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A

PRACTICAL TREATISE

ON

THE LAW OF TRUSTS.

BY

(THE LATE)

THOMAS LEWIN, ESQ.

Ninth Edition

BY

CECIL C. M. DALE

OF LINCOLN'S INN, ESQUIRE, BARRISTER-AT-LAW.

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TO

THE RIGHT HONOURABLE

THE LORD JUSTICE

SIR EDWARD E. KAY

THE NINTH EDITION OF THIS WORK

IS

BY PERMISSION

MOST RESPECTFULLY DEDICATED.

PREFACE.

In the preparation of the present Edition of this work for the press, which has been entrusted to him by the executrix of the late Mr. F. A. Lewin, the Editor has sought to observe the lines laid down in the preparation of previous Editions. Mr. F. A. Lewin had annotated the book down to the time of his death, in the year 1887, and the work so done by him has been carefully preserved, and, wherever practicable, embodied in the present Edition.

The passing of the Trust Investment Act, 1889, and the course of judicial decision under the provisions of the Married Women's Property Act, 1882, have necessitated the rearrangement of the two chapters dealing with the subjects of investments and the rights of married women; but with these exceptions, the existing arrangement of the work has been retained intact.

The Appendix has been enlarged by the introduction of those provisions of the Lunacy Acts, 1890 and 1891, which are substituted for the repealed sections of the Trustee Acts of 1850 and 1852; but, as the important provisions of the Trustee Act, 1888, have been fully noticed in the body of the work, and can readily be found by a reference to the Index, it has been deemed unnecessary to reproduce them in the Appendix.

Every effort has been made to keep the book within reasonable dimensions, and in a few places it has been found practicable to omit matter which, by reason of alterations in the law, has been rendered practically obsolete; but the cases decided since the publication of the last Edition have been so numerous and important, that it has been impossible to prevent a considerable increase in the size of the present Edition.

In conformity with the course adopted in the two previous

Editions, the matter introduced by the Editors, past and present, has been distinguished from the work of the Author by being inserted in square brackets [ ].

With a view to the convenience of members of the profession in using the book, the decisions of the Court of Appeal, reported in that series of the *Law Reports* which was concluded in December, 1890, have been referred to by the abbreviations "Ch. Div.," "Q. B. Div.," and "P. Div.," in lieu of the more compendious "Ch. D.," "Q. B. D.," and "P. D.," which have been reserved for the decisions of the Courts of First Instance.

The Charitable Uses and Mortmain Act, 1891, became law at too late a period of the session to admit of its provisions being noticed in the earlier pages of the work, where the provisions of the principal Act of 1888 are dealt with; but they have been fully referred to on later pages.

The asterisk prefixed to references to pages in the Table of Cases and in the Index of Statutes indicates those places in the book where the case, the statute, and the section in question have been more particularly referred to.

The grateful acknowledgments of the Editor are due to Mr. W. B. Megone, of the Chancery Bar, for his careful selection of the Irish cases referred to in the present Edition, and for valuable assistance rendered in the preparation of the Table of Cases, and during the whole time that the work was going through the press.

CECIL C. M. DALE.

8, Stone Buildings, Lincoln's Inn,
November, 1891.

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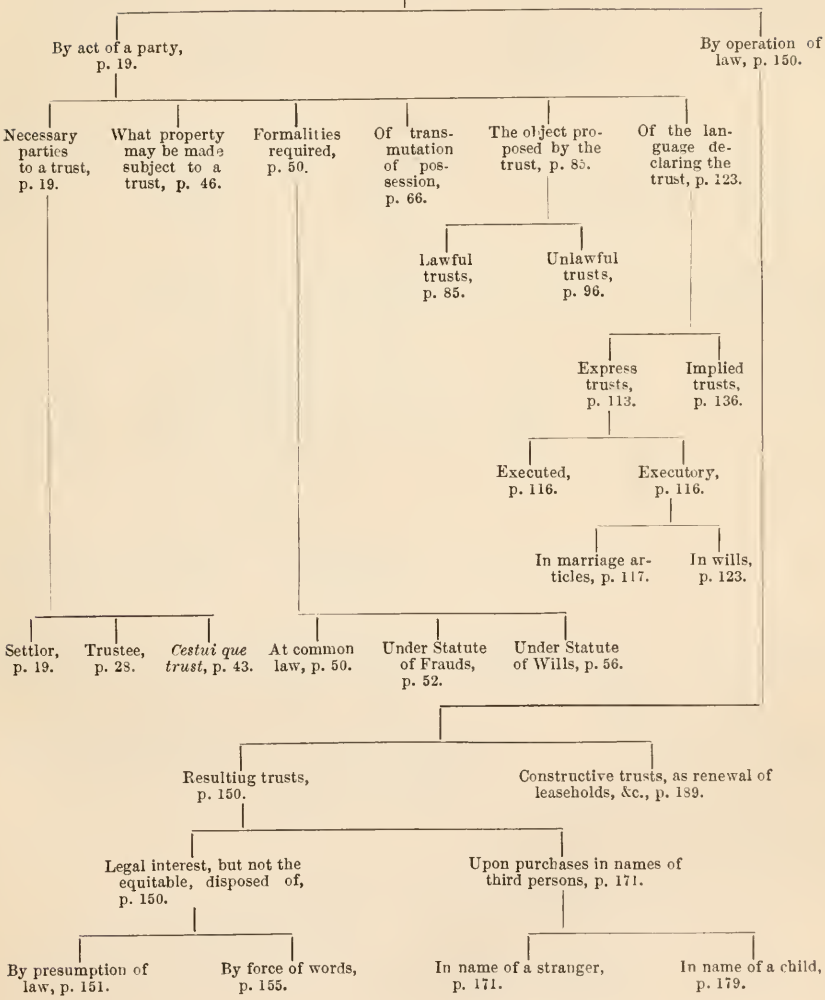

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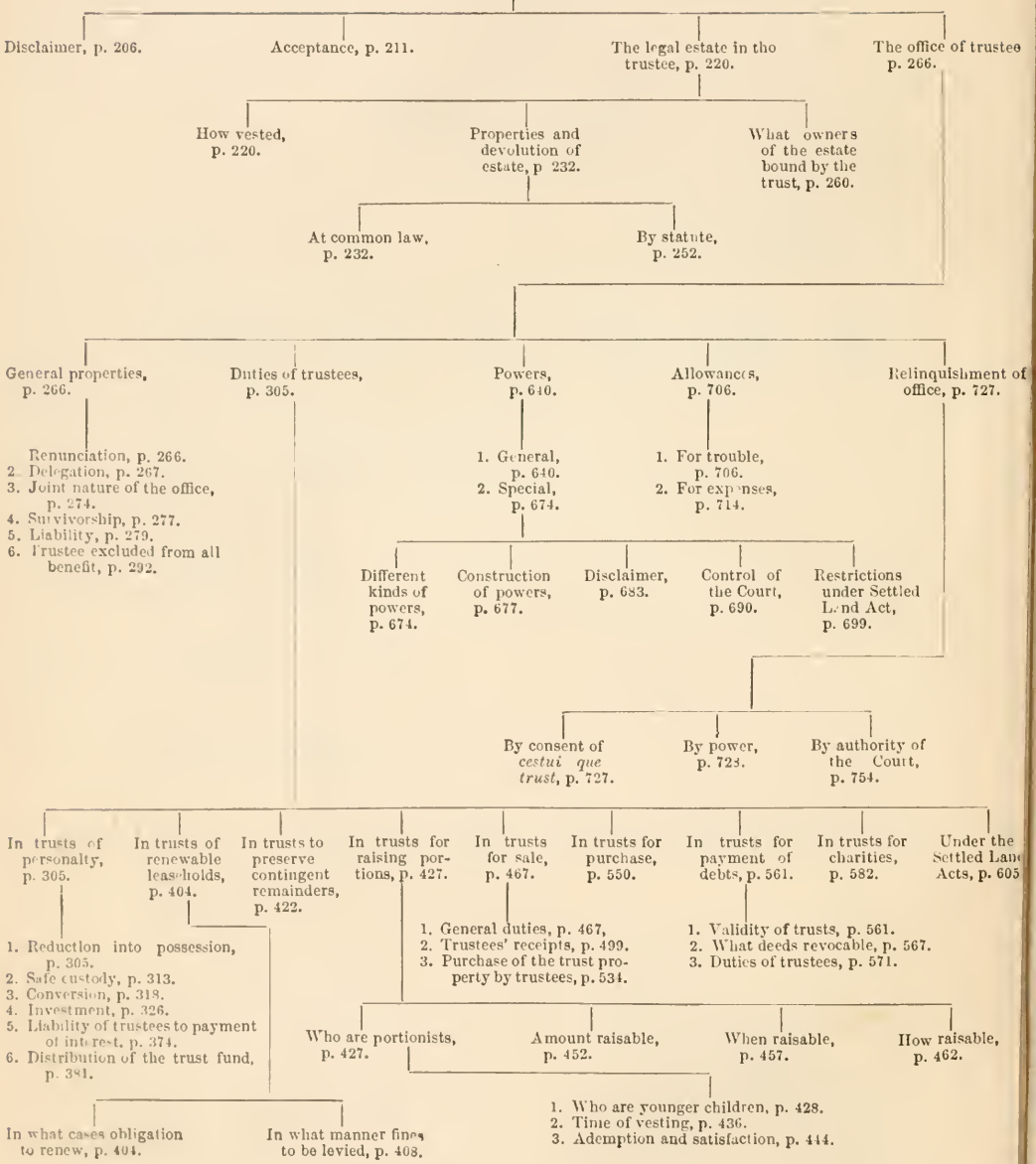

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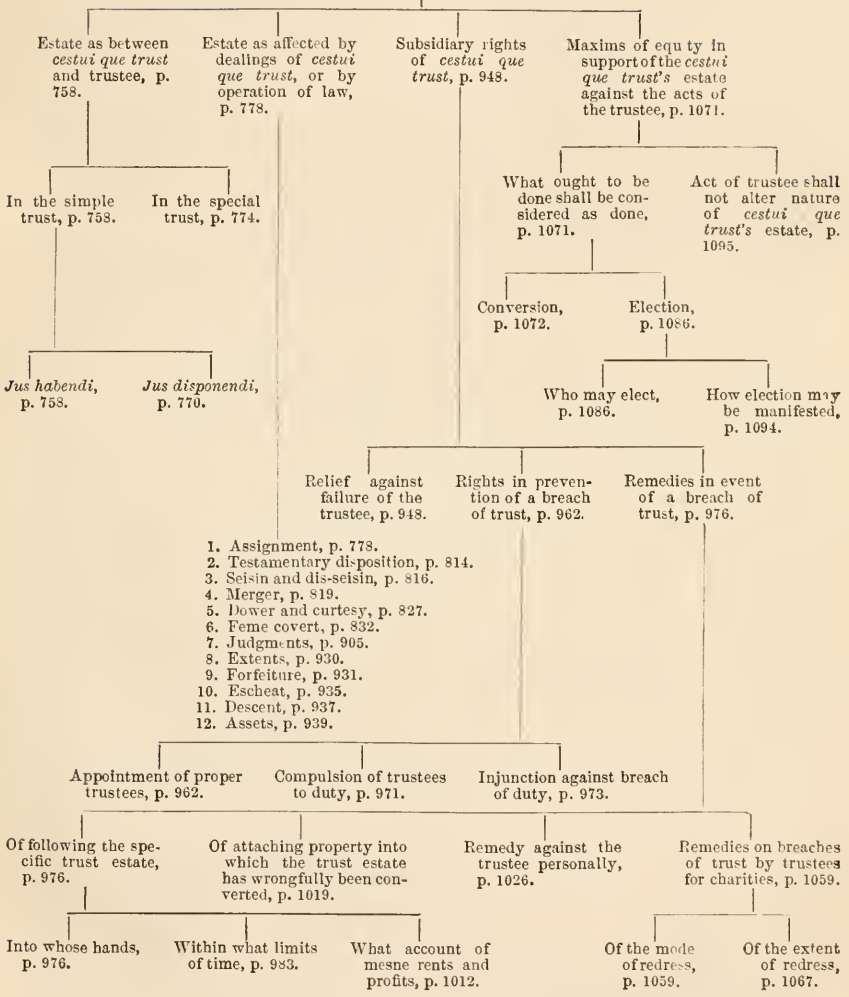

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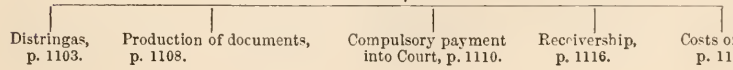

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ADDENDA ET CORRIGENDA.

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18. At end of note (*c*) add "*Re Tyler*, 60 L. J. N.S. Ch. 686; 40 W. R. 7, where a gift to a charitable institution, subject to a condition that they should keep the testator's tomb in repair, with a gift over to another charity on default of compliance with the condition, was held valid."

21, note (*b*). After "*Witherby* v. *Rackham*, 39 W. R. 363" add "60 L. J. Ch. 511."

60, note (*e*). After "*Harrison* v. *Harrison*, 2 H. & M. 237" add "*Fuge* v. *Fuge*, 27 L. R. Ir. 59."

65, lines 25 to 27. Dele from "Now" to "unchanged," and in place of the words deleted read as follows: By the Mortmain and Charitable Uses Act, 1888, the statute 9 Geo. 2. c. 36 was repealed, and in lieu thereof it was enacted that every "assurance" of land (which expression includes testamentary gift) "to or for the benefit of any charitable uses" should be void unless made in accordance with the requirements of the Act of 1888. Now, however, by the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), as respects the will of a testator dying after the passing of that Act (August 5th, 1891), land may, subject to the provisions of that Act (as to which see *post*, pp. 604, 971, 1083), be assured by will to or for the benefit of any charitable use.

95, note (*g*). After "*Vine* v. *Raleigh*" add "(1891) 2 Ch. (C. A.) 13."

100, line 11. Insert the following paragraph:—

As regards assurances by the wills of testators dying subsequently to the 5th of August, 1891, the law has now been completely changed by the Mortmain and Charitable Uses Act, 1891 (referred to *post*, pp. 604, 971, 1083), which enacts, by sect. 5, that "land may be assured by will to or for the benefit of any charitable use," subject, however, to the requirement that land so assured shall be sold within one year from the death of the testator, or such extended period as in the Act mentioned. By sect. 7 it is provided that "any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses" shall "be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land," but (by sect. 8) the Court or Charity Commissioners may authorize the retention or acquisition by the charity of land so assured or directed to be purchased, if satisfied that such land is required for actual occupation for the purposes of the charity, and not as an investment.

The Act of 1891 (by sect. 3) repeals the definition of "land" contained in sect. 10 of the Act of 1888, and provides that "land" in both those Acts shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land; but (sect. 10) nothing in the Act of 1891 contained is to limit or affect the exemptions contained in the Act of 1888, or to apply to any land or personal estate to be laid out in the purchase of land acquired under any assurance to which such exemptions, or any of them, apply, or to exclude or impair any jurisdiction or authority which might otherwise be exercised by a Court or judge of competent jurisdiction or by the Charity Commissioners.

106, note (*h*). After "*Metcalfe* v. *Metcalfe*, 43 Ch. D. 633" add "affirmed on appeal, (1891) 3 Ch. 1; and that a forfeiture clause in a will may extend to a bank-

ruptcy existing at the testator's death, see *s. c.*; where, however, doubt was expressed whether the doctrine of *Trappes* v. *Meredith*, extending such a clause to a bankruptcy existing at the date of the will, could be supported."

148, note (*i*). After "*Wilson* v. *Clapham*, 1 J. & W. 39" add "*Clarke* v. *Ramuz*, (1891) 2 Q. B. 456."

153, note (*g*). After "*Cooke* v. *Smith*, 45 Ch. Div. 38" add "*s. c.* in D. P. *nom. Smith* v. *Cooke*, (1891) A. C. 297."

159, note (*c*). After "and see *Crowther* v. *Bradney*, 28 L. T. N.S. 464" add "; *In re Beamish's Estate*, 27 L. R. Ir. 326."

169, note (*g*). After "*Re Slevin*," and before "64 L. T. N.S. 311" add "(1891) 2 Ch. (C. A.) 236."

176, note (*g*). After "*James* v. *Smith*" add "(1891) 1 Ch. 384."

215, note (*c*). After "*Re Rowe*," etc. add "And see *Re Jane Davis*, (1891) 3 Ch. (C. A.) 119."

252, note (*f*). After "*Dowse* v. *Gorton*" add "(1891) A. C. 190."

259, note (*g*). Add "and see *Ex parte Ward*, 60 L. J. Q. B. 574."

343, line 10. For "Kay, J." read "Kay, L.J."

355, note (*a*), 4 lines from end of note. For "Lord Walton" read "Lord Watson."

376, 377, note (*g*). After "see *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*" add "64 L. T. N.S. 501."

389, line 1. After "trustee" add "nor to order a defendant trustee to pay into Court profit costs paid over to him by the solicitors in an administration action; *Re Thorpe*, (1891) 2 Ch. 360."

426, note (*b*). After "*Re Freme*" add "(1891) 3 Ch. 167."

431, note (*c*). Add "and see *Re Fitzgerald's Estate*, 60 L. J. Ch. 624."

448, note (*a*). After "*Re Lacon*" add "(1891) 3 Ch. 82."

566, note (*c*). After "*Cooke* v. *Smith*, 45 Ch. Div. 38" add "*s. c.* in D. P. *nom. Smith* v. *Cooke*, (1891) A. C. 297."

590. At end of note (*a*) add "where an application for a scheme under the Act of 1860 (23 & 24 Vict. c. 136) has been made, the withdrawal of the application before an order has been made will not deprive the Commissioners of jurisdiction. *Re Bethnal Green* (*Poor Lands*) *Charity*, 60 L. J. N.S. Ch. 742."

605, note (*c*). Add "and see *Re Bective Estate*, 27 L. R. Ir. 364."

629, note (*d*). After "*Re Smith's Settled Estates*," add "(1891) 3 Ch. 65."

653, note (*d*). After "*Re Owthwaite*," add "40 W. R. 38."

687, note (*c*). After "*Re Radcliffe*" add "(1891) 2 Ch. 662."

702, note (*a*). Add "It was held in *In re M'Curdy's Estate*, 27 L. R. Ir. 395, that a devise on trust to pay debts is sufficient, and that there need not be an express direction for sale."

718, note (*b*). After "*Re Thorley*," etc., add "reported on appeal, (1891) 2 Ch. 613."

787, note (*f*). After "*Re Akerman*" add "(1891) 3 Ch. 212."

789, note (*e*). Add "and see *Baker* v. *Nottingham and Nottinghamshire Banking Company*, 60 L. J. Q. B. 574; *Hone* v. *Boyle & Co.*, 27 L. R. Ir. 137."

795, note (*b*). After "*Low* v. *Bouverie*" add "(1891) 3 Ch. (C. A.) 82."

903. Add note to sect. 11 of the Married Women's Property Act, 1882, as follows: "When an insurance is effected by a husband under the section for the benefit of his wife, a trust is created in her favour, and the insurance moneys form no part of his estate. And if the wife murders him, his executors cannot maintain an action on the policy, as it is against public policy that she should profit by her crime; *Cleaver* v. *Mutual Reserve Fund Life Association*, 39 W. R. 638."

1007, note (*c*). After "*Re Davis*, 39 W. R. 627" add "(1891) 3 Ch. (C. A.) 119."

1007, note (*f*). After "*Re Rowe*," etc. add "and see *Re Davis*, (1891) 3 Ch. C. A. 119; *Re Swain*, (1891) 3 Ch. 233."

1010, 7 lines from end of page. After "ought to have received" add footnote (*d*), "See *Re Swain*, (1891) 3 Ch. 233."

1121, note (*b*). After "*Tanner* v. *Dancy*, 9 Beav. 339" add "*Leonard* v. *Kellett*, 27 L. R. Ir. 418."

1170, note. After reference to "*Re Hume*" add "By the Lunacy Rules, 1890, r. 92, 'the consent of a new trustee to act shall be sufficiently evidenced by a written consent signed by him and verified by his solicitor in the Form No. 9 in the schedule to the rules.'"

INTRODUCTORY VIEW

OF THE

RISE AND PROGRESS OF TRUSTS.

THE origin of trusts, or rather the adaptation of them to the English law, may be traced in part at least to the ingenuity of fraud. By the interposition of a trustee the debtor thought to withdraw his property out of the reach of his creditor, the freeholder to intercept the fruits of tenure from the lord of whom the lands were held, and the body ecclesiastic to evade the restrictions directed against the growing wealth of the church by the statutes of mortmain. Another inducement to the adoption of the new device was the natural anxiety of mankind to acquire that free power of alienation and settlement of their estates, which, by the narrow policy of the common law, they had hitherto been prevented from exercising. Origin of trusts.

Originally the only pledge for the due execution of the trust was the faith and integrity of the trustee; but the mere feeling of honour proving, as was likely, when opposed to self-interest, an extremely precarious security, John Waltham, Bishop of Salisbury, who was Lord Keeper in the reign of Richard the Second, originated the writ of *subpœna*, by which the trustee was liable to be summoned into Chancery, and compellable to answer upon oath the allegations of his *cestui que trust*. No sooner was this protection extended, than half the lands in the kingdom became vested in feoffees to *uses*, as trusts were then called. Thus, in the words of an old counsellor, the parents of the trust were Fraud and Fear, and a Court of Conscience was the Nurse (*a*). The subpœna.

Of trusts there were two kinds: the *simple* trust, and the *special* trust. The *simple* trust was defined in legal phraseology Trusts simple or special. Simple trust defined.

(*a*) *Attorney-General* v. *Sands*, Hard. 491.

to be, "a confidence, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cestui que use* should take the profit, and that the terre-tenant should execute an estate as he should direct" (*a*). In order rightly to understand what was meant by this rather technical description, we shall briefly consider the principles that were recognised by Courts of Equity (for these had the exclusive jurisdiction of trusts). First, with reference to the terre-tenant or feoffee to uses, and Secondly, with reference to the beneficial proprietor, or *cestui que use*.

Confidence in the person.

With respect to the feoffee to uses, it was at first held to be absolutely indispensable that there should be *confidence in the person*, and *privity of estate*. For want of the requisite of *personal confidence* it was ruled that a *corporation* could not stand seised to a use; for how, it was said, could a corporation be capable of confidence when it had not a *soul*? Nor was it competent for the *king* to sustain the character of trustee; for it was thought inconsistent with his high prerogative that he should be made responsible to his own subject for the due administration of the estate. And originally the *subpœna* lay against the trustee himself only, and could not have been sued against either his *heir* or *assign*; for the confidence was declared to be personal, and not to accompany the devolution of the property (*b*). But the doctrine of the Court in this respect was subsequently put on a more liberal footing, and it came to be held that both heir and assign should be liable to the execution of the use (*c*). An exception however was still made in favour of a purchaser for valuable consideration not affected by notice (*d*).

Privity of estate.

The meaning of *privity of estate* may be best illustrated by an example. Had a feoffment been made to A. for life to his own use, with remainder to B. in fee to the use of C., and then A. had enfeoffed D. in fee, in this case, though D. had the land by the feoffment, which then operated as a tortious conveyance, yet, as he did not take the identical estate in the land to which the use in favour of C. was attached, he was not bound by C.'s equitable claim. And, by the same rule, neither tenant by the *curtesy*, nor tenant in *dower*, nor tenant by *elegit*, was liable to the execution of the use, for their interests were new and original estates,

(*a*) Co. Lit. 272, b.
(*b*) 8 E. 4. 6; 22 E. 4. 6.
(*c*) The law as to the heir was altered by Fortescue, Ch. J. Bac. Ab. Uses and Trusts B.
(*d*) Bac. Ab. Uses and Trusts B.; and see 14 H. 8. 4, 7, 8.

and could not be said to have been impressed with the use. So the lord who was *in* by *escheat*, a *disseisor*, *abator*, and *intruder*, were not amenable to the *subpœna;* for the first claimed by title paramount to the creation of the use; and the three last were seised of a tortious estate, and held adversely to the feoffee to uses.

Privity as regards the cestui que use.

With respect to the *cestui que use*, the principle upon which his whole estate depended was also what in legal language was denominated *privity*. Thus, on the death of the original *cestui que use*, the right to sue the *subpœna* was held to descend indeed to the *heir* on the ground of *hæres eadem persona cum antecessore;* but the wife of the *cestui que use*, or the husband of a feme *cestui que use*, and a judgment creditor were not admitted to the same privilege; for their respective claims were founded not on privity with the person of the *cestui que use*, but on the course of law. And for the like reason a use was not assets, was not subject to forfeiture, and on failure of heirs in the inheritable line did not escheat to the lord.

Special trust defined.

The *special* trust (for hitherto we have spoken of the simple trust only) was where the conveyance to the trustee was to answer some particular and specific purpose, as upon trust to reconvey in order to change the line of descent, upon trust to sell for payment of debts, &c. In the special trust the duty of the trustee was not, as in the simple trust, of a mere passive description, but imposed upon him the obligation of exerting himself in some active character for the accomplishment of the object for which the trust was created. In case the trustee neglected his duty, the *cestui que trust* was entitled to file a bill in Chancery, and compel him to proceed in the execution of his office (*a*).

Trusts applicable to chattels.

Both the *simple trust* and the *special trust* were applicable to *chattels* real and personal, as well as to freeholds; but trusts of chattels were for obvious reasons much less frequently employed. The amount of the property was small; the owner, even without the interposition of a trustee, had the fullest control and dominion over it; and a chattel interest, as it followed the person, was equally subject to forfeiture whether in the custody of a trustee, or in the hands of the beneficial proprietor (*b*). But to the extent, whatever it was, to which trusts of chattels were adopted, they were administered upon the same principles, *mutatis*

(*a*) See the case in the reign of Hen. 7. Append. to Sugden on Powers, No. 1.

(*b*) 5 H. 5. 3, 6.

mutandis, as were trusts of freeholds; the right to sue a *subpœna* turned equally on privity (*a*), and the interest of the *cestui que trust* was held not to be assignable (*b*).

Statutes affecting trusts.

Such was the nature of trusts as they stood at *common law;* but the manifold frauds and mischiefs to which the new system gave occasion, particularly "the great unsurety and trouble arising thereby to purchasers," called loudly from time to time for the enactment of remedial statutes. One of the most important of these was 1 Ric. 3, c. 1, the substance of which may be well expressed in the terms of the preamble, viz., that "all acts made by or against a *cestui que use* should be good as against him, his heirs, and feoffees in trust," in other words, that all dealings of the *cestui que use* with the trust property should have precisely the same legal operation, as if the *cestui que use* had himself possessed the legal ownership. To what interests the legislature intended this statute to apply has not on all hands been agreed. A feoffment in *fee* to uses was clearly the case primarily intended. Upon a feoffment in *tail*, it seems no use could have been declared, for a tenant in tail was incapacitated by the statute *de donis* from executing estates (*c*). With respect to a feoffment for *life* to uses, there appears to be no reason upon principle (except so far as the language of the Act may be thought to furnish any inference), and certainly there is no objection on the score of authority, why the *cestui que use* might not have passed the legal estate by virtue of the statutory power. It has been contended by Mr. Sanders, that on a feoffment for life no use grafted on the life-estate could have been declared, on the ground that as the tenant for life held of the reversioner, the consideration of tenure would have conferred a title to the beneficial interest on the tenant for life himself (*d*). But this reasoning can have no application where the estate for life was not *created*, but was merely *transferred*, for then the assignment of the life-estate was not distinguishable in this respect from a conveyance of the fee; in each case there was no consideration of tenure as between the grantor and grantee, but in each case the services incident to tenure were due from the grantee to a third person (1). It is clear that the statute

(*a*) *Witham's case*, 4 Inst. 87.
(*b*) Jenk. 244, c. 30.
(*c*) Co. Lit. 19, b.
(*d*) Sand. on Uses, c. 1, s. 6, div. 2.

In what case a use might have been declared

(1) The state of the law upon this subject appears to have been as follows:—(1). On the *creation* of an estate for life, had no use been mentioned on the face of the instrument, the tenant for life had held for his own benefit in compen-

embraced *uses of lands* only, and did not extend either to *special trusts*, or to *trusts of chattels:* not to special trusts, because the trustee combined in himself both the legal estate and the use, though compellable in Chancery to direct them to a particular purpose; and not to trusts of chattels, because the preamble and the statute were addressed to *cestui que use* and *his heirs*, and to *feoffees in trust.*

The mischiefs of the system increasing more and more (the statute of Richard occasioning still greater evils than it remedied, from the facility it gave to the *cestui que use* and his feoffee, who had now each the power of passing the legal estate, of defrauding by collusion the *bonâ fide* purchaser), the legislature again interposed its authority by 27 Hen. 8. c. 10, and thereby annihilated uses as regarded their fiduciary character, by enacting, that "where any person stood *seised* of any hereditaments to the use, confidence, or trust of any other person, or of any body politic, such person or body politic as had any such use, confidence, or trust, should be deemed in lawful *seisin* of the hereditaments in such like estates as they had in use, trust, or confidence." (1) 27 H. 8. c. 10.

Uses by the operation of this statute became merged in the legal estate; but *special trusts* and *trusts of chattels* were not within the purview of the Act: the former, because the use, as Special trusts and trusts of chattels excepted from the statute.

sation for his services: Perk. s. 535; B. N. C. 60; Br. Feff. al. Uses, 10; and no use could have been *averred* in contradiction to the use implied. See Gilb. on Uses, 57. (2). Had a use been *expressly* declared by the deed, the tenant had been bound by the terms on which he accepted the estate: Perk. s. 537; Br. Feff. al. Uses, 10, 40; (3), unless a rent had been reserved, or consideration paid, in which case a court of equity would not have enforced the use against the purchaser for valuable consideration: B. N. C. 60; Br. Feff. al. Uses, 40. (4). On the *assignment* of a life estate a use might have been declared, as on a conveyance in fee. upon an estate for life.

(1) As this statute *does* operate on the use of a life estate, but does *not* apply to a *seisin* in tail, the doctrine of Mr. Sanders, that prior to 27 Hen. 8. there was no use of a *seisin* either in tail or for life, seems open to the following objections:—1. That the statute in executing the use of a life estate operates on an interest which at the time of the enactment had no existence; and, 2ndly, that in *not* executing a use declared on a seisin in tail, it operates differently on two estates falling, according to his view, within the same principle. To meet the former objection, Mr. Sanders holds the statute of Hen. 8. to be prospective, and distinguishes it from the statute of Richard, which he considers not to be prospective, by observing that the latter employs the word "use" only, while the former has the additional term of "trust"; but to this it may be answered, that, although the *statute* of Richard does not contain the word trust, the *preamble* does, and that the distinction contended for between *use* and *trust* had no existence until a comparatively late period. See *Altham* v. *Anglesey*, Gilb. Eq. Rep. 17. To obviate the latter objection, it is maintained by Mr. Sanders that tenant in tail *is* within the statute of Hen. 8.; an opinion which, it is submitted, is directly opposed to the general stream of authority: Co. Lit. 19, b.; Shep. Touch. 509; Gilb. on Uses, 11, and Lord St. Leonards' note, *ibid.* Objections to the doctrine that no use could have been declared upon an estate in tail or for life.

well as the legal interest, was in the trustee; the latter, because a termor is said to be *possessed*, and not to be *seised* of the property.

Introduction of the modern trust.

In the room of uses which were thus destroyed as they arose, the judges by their construction of the statute created a novel kind of interest, since distinguished and now known by the name of *Trust*. Before the statute of Hen. 8. a person, to have had the complete ownership, must have united the *possession* of the land and the *use* of the profits. The possession and the use were even at common law recognised as distinct interests, though the *cestui que use* was left to Chancery for his remedy (*a*). On a feoffment to A. to the use of B. to the use of C., the possession was in A., the use in B., and the limitation over to C. was disregarded as surplusage. When the statute of Hen. 8. was passed, it executed the estate in B. by annexing the possession to the use; but having thus become *functus officio* it did not, as the Act was construed, affect the use over to C. However, Chancery, now that uses were converted into estates, decreed C. to have a title in equity, and enforced the execution of it under the name of a *trust* (*b*).

Land, use, and trust, distinguished by Lord Hardwicke.

"Interests in land," said Lord Hardwicke, "thus became of three kinds: first, the *estate in the land itself*, the ancient common-law fee; secondly, the *use*, which was originally a creature of equity, but since the statute of uses it drew the estate in the land to it, so that they were joined and made one legal estate; and thirdly, the *trust*, of which the common-law takes no notice, but which carries the beneficial interest and profits in a court of equity, and is still a creature of that court, as the use was before the statute" (*c*).

Trusts not within statutes relating to uses.

This newly-created interest was held to be so perfectly distinct from the ancient use, that the statutory provisions by which many of the mischiefs of uses had been remedied, as the 19th Hen. 7. c. 15, by which uses had been made liable to writs of execution, and the 26 Hen. 8. c. 13, by which they had become forfeitable to the Crown for treason, were decided to have no application. However, the *trust* took the likeness of the *use*, conforming itself to the nature of special trusts and trusts of chattels, which had never been disturbed by any legislative enactment.

(*a*) Lit. s. 462, 463; Co. Lit. 272, b.; and see Carter, 197; *Porey* v. *Juxon*, Nels. 135; *Megod's case*, Godb. 64.

(*b*) See *Hopkins* v. *Hopkins*, 1 Atk. 591.

(*c*) *Willet* v. *Sanford*, 1 Ves. 186; *Coryton* v. *Helyar*, 2 Cox, 342.

Trusts at first modelled after the pattern of uses.

To show how the principles of uses prevailed after the statute of Hen. 8., it was held in the reign of Elizabeth (*a*), that the equitable term of a *feme covert* did not vest in the husband by survivorship, for a trust, it was said, was a thing in privity, and in the nature of an action, and there was no remedy for it but by writ of *subpœna*. And a few years after in the same reign it was resolved by all the Judges that a trust was a matter of privity, and in the nature of a *chose in action*, and therefore was not *assignable* (*b*). And in the sixth year of King Charles the First it was decided by the Judges, that as a feme was dowable by act or rule of law, and a court of equity had no jurisdiction where there was not fraud or covin, the widow of a trustee was not bound by the trust, but was entitled beneficially to her dower out of the trust estate (*c*).

Improvements introduced by Lord Nottingham.

But during the reigns of Charles the First and Charles the Second, and particularly during the Chancellorship of Lord Nottingham, who, from the sound and comprehensive principles upon which he administered trusts, has been styled the father of equity (*d*), the Courts gradually threw off the fetters of uses and, disregarding the operation of mere technical rules, proceeded to establish trusts upon the broad foundation of conformity to the course of common law. "In my opinion," said Lord Mansfield, "trusts were not on a true foundation till Lord Nottingham held the great seal; but by steadily pursuing from plain principles trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has since been raised; so that trusts are now made to answer the exigences of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Hen. 8. meant to avoid" (*e*).

Alterations made in trusts as regards the trustee.

As to the changes that were successively introduced, it was held *with reference to the trustee*, that *actual confidence in the person* was no longer to be looked upon as essential. A body *corporate* therefore was not exempted from the writ of *subpœna* on the ground of incapacity (*f*): and even the *king*, notwithstanding his high prerogative, was invested with the character of a Royal Trustee (*g*), though the precise mode of enforcing the

(*a*) *Witham's case*, 4 Inst. 87; *S. C.* Popham, 106, *sub nomine Johnson's case.*
(*b*) *Sir Moyle Finch's case*, 4 Inst. 86.
(*c*) *Nash* v. *Preston*, Cro. Car. 190.
(*d*) *Philips* v. *Brydges*, 3 Ves. 127; *Kemp* v. *Kemp*, 5 Ves. 858.
(*e*) *Burgess* v. *Wheate*, 1 Eden, 223.
(*f*) See *Green* v. *Rutherforth*, 1 Ves. 468; *Attorney-General* v. *Whorwood*, 1 Ves. 536.
(*g*) See *Penn* v. *Lord Baltimore*, 1

trust against him was not exactly ascertained: to use the language of Lord Northington, "the arms of equity were very short against the Prerogative" (*a*). The subtle distinctions which had formerly attended the notion of *privity of estate* were also gradually discarded. Thus it was laid down by Lord Hale, that tenant in *dower* should be bound by a trust as claiming in the *per* by the assignment of the heir (*b*); and so it was afterwards determined by Lord Nottingham (*c*): and when an old case to the contrary was cited before Lord Jeffries, it was unanimously declared both by the bench and the bar to be against equity and the constant practice of the Court (*d*). A tenant by *statute merchant* was held to be bound upon the same principle, for he took, it was said, by the act of the party, and the remedy which the law gave thereupon (*e*). But as to tenant by the *curtesy*, Lord Hale gave his opinion, that one in the *post* should not be liable to a trust *without express mention made by the party who created it;* and therefore tenant by the curtesy should not be bound (*f*): but his Lordship's authority on this point was subsequently over-ruled, and curtesy as well as dower was made to follow the general principle.

As regards the cestui que trust.

With respect to the *cestui que trust*, or the person entitled to the *subpœna*, the narrow doctrine contained under the technical expression of privity began equally to be waived, or rather to be applied with considerable latitude of construction. "The equitable interest," said Justice Rolle, "is not a *thing in action*, but an *inheritance* or *chattel*, as the case may fall out" (*g*); and when once the trust, instead of passing as a *chose in action*, came to be treated on the footing of an actual *estate*, it soon drew to it all the rights and incidents that accompanied property at law: thus, the equity of the *cestui que trust*, though a bare contingency or possibility (*h*), was admitted to be *assignable* (*i*); and *Witham's case*, that a husband who survived his wife could not, for want of privity, claim her equitable chattel, was declared by the Court to be no longer an authority (*j*). So a *judgment creditor*, it was

Ves. 453; *Earl of Kildare* v. *Eustace*, 1 Vern. 439.

(*a*) *Burgess* v. *Wheate*, 1 Eden, 256.

(*b*) *Pawlett* v. *Attorney-General*, Hard. 469.

(*c*) *Noel* v. *Jevon*, 2 Freem. 43.

(*d*) MS. note by an old hand in the copy of Croke's Reports in Lincoln's Inn Library, Cro. Car. 191.

(*e*) *Pawlett* v. *Attorney-General*, Hard. 467, *per* Lord Hale.

(*f*) *Pawlett* v. *Attorney-General*, Hard. 469.

(*g*) *Rex* v. *Holland*, Styl. 21; see *Casburne* v. *Inglis*, 2 J. & W. 196.

(*h*) *Warmstrey* v. *Tanfield*, 1 Ch. Rep. 29; *Lord Cornbury* v. *Middleton*, 1 Ch. Ca. 208; *Goring* v. *Bickerstaff*, 1 Ch. Ca. 8.

(*i*) *Courthope* v. *Heyman*, Cart. 25, *per* Lord Bridgman.

(*j*) *Rex* v. *Holland*, Al. 15.

held by Lord Nottingham, might prosecute an equitable *fieri facias* (*a*); and though Lord Keeper Bridgman refused to allow an equitable *elegit* (*b*), it is probable, had the question arisen before Lord Nottingham, his Lordship would in this, as in other cases, have acted on a more liberal principle: at all events, the creditor's right to relief in this respect has since been established by the current of modern authority (*c*). Again, a trust was decided by Lord Nottingham to be *assets* in the hands of the heir (*d*); and though Lord Guildford afterwards held the other way (*e*), yet Lord Nottingham's view of the subject appears to have been eventually established (*f*). *Curtesy* was also permitted of a trust estate, though the widow of a *cestui que trust* could never make good her title to *dower* (*g*); "not," said Lord Mansfield, "on reason or principle, but because wrong determinations had misled in too many instances to be then set right" (*h*); or rather, as Lord Redesdale thought, because the admission of dower would have occasioned great inconvenience to purchasers —a mischief that in the case of curtesy was not to be equally apprehended (*i*).

Lord Mansfield's doctrines.

Lord Mansfield was for carrying the analogy of trusts to legal estates beyond the legitimate boundary. "A use or trust," he said, "was heretofore understood to be merely as an agreement, by which the trustee and all claiming from him in privity were personally liable to the *cestui que use*, and all claiming under him in like privity; nobody in the *post* was entitled under or bound by the agreement: but now the trust in this Court is the same as the *land*, and the trustee is considered merely as an instrument of conveyance" (*j*). And in the application of this principle his Lordship argued, that the estate of the *cestui que trust* was subject to *escheat*, and that on failure of heirs of the trustee, the lord who took by escheat was bound by the trust. But to these propositions the Courts of Equity have never yet assented (*k*). The limit to which the analogy of trusts to legal estates ought properly to be allowed was well enunciated by Lord Northington in the case of *Burgess* v. *Wheate*. "It is true," he said, "this Court has considered trusts *as between the trustee*,

Principles governing trusts at the present day.

(*a*) *Anon. case*, cited *Balch* v. *Wastall*, 1 P. W. 445; *Pit* v. *Hunt*, 2 Ch. Ca. 73.
(*b*) *Pratt* v. *Colt*, 2 Freem. 139.
(*c*) See *infra*.
(*d*) *Grey* v. *Colvile*, 2 Ch. Rep. 143.
(*e*) *Creed* v. *Colville*, 1 Vern. 172.
(*f*) See *infra*.
(*g*) *Colt* v. *Colt*, 1 Ch. Rep. 254.
(*h*) *Burgess* v. *Wheate*, 1 Eden, 224.
(*i*) See *infra*.
(*j*) *Burgess* v. *Wheate*, 1 Eden, 226.
[(*k*) But see now 47 & 48 Vict. c. 71, s. 4].

cestui que trust, *and those claiming under them,* as imitating the possession; but it would be a bold stride, and, in my opinion, a dangerous conclusion, to say therefore this Court has considered the creation and instrument of trust as a mere nullity, and the estate in all respects the same as if it still continued in the seisin of the creator of the trust, or the person entitled to it: for my own part *I know no instance where this Court has permitted the creation of a trust to affect the right of a third person*" (*a*) that is, to illustrate the principle by instances, a tenant by the curtesy, or in dower, or by *elegit,* as claiming through the *cestui que trust* or trustee, though in the *post,* is bound by and may take advantage of the trust; but according to the doctrine laid down by Lord Northington, the lord who comes in by escheat is not in any sense a privy to the trust, and therefore can neither reap a benefit from it on failure of heirs of the *cestui que trust,* nor is bound by the equity on failure of heirs of the trustee (*b*).

(*a*) *Burgess* v. *Wheate,* 1 Eden, 250, 251.

(*b*) It is clear that [prior to 47 & 48 Vict. c. 71], the lord [could] not acquire an equitable interest by escheat: *Burgess* v. *Wheate,* 1 Eden, 177; *Cox* v. *Parker,* 22 Beav. 168; but whether a lord taking the legal estate by escheat shall or not be bound by the trust, has never been decided. See *post,* c. xii. s. 3. The Trustee Act, 1850, s. 15, enables the Court to make an order on failure of heirs of the trustee, but is the *Crown* bound by the Trustee Act? See note on second section of the Trustee Act, *post.* [See also 44 & 45 Vict. c. 41, s. 30.]

PART I.

DEFINITION, CLASSIFICATION, AND CREATION OF TRUSTS.

CHAPTER I.

DEFINITION OF A TRUST.

Definition of a trust.

As the doctrines of trusts are equally applicable to *real* and *personal* estate, and the principles that govern the one will be found *mutatis mutandis*, to govern the other, we cannot better describe the nature of a trust generally, than by adopting Lord Coke's definition of a *use*, the term by which, before the Statute of Uses, a trust (1) of lands was designated (*a*). A trust, in the words applied to the use, may be said to be "*A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which* cestui que trust *has no remedy but by* subpœna *in Chancery*" (*b*).

(*a*) *Burgess* v. *Wheate*, 1 Eden, 248, *per* Lord Keeper Henley; *Lloyd* v. *Spillet*, 2 Atk. 150, *per* Lord Hardwicke.

(*b*) Co. Lit. 272, b. Law and equity are now administered in all the courts alike. [For another definition, see *Wilson* v. *Lord Bury*, 5 Q. B. Div. 518, at p. 530.]

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(1) That a trust was anciently known as a *use*, appears from the *Merchant of Venice*. Thus, when Shylock had forfeited one half of his goods to the State to be commuted for a fine, and the other half of his goods to Antonio, the latter offered that, if the Court, as representing the State, would forego the forfeiture of the one half, he (Antonio) would be content himself to hold the other half in *use*, that is, in *trust* for Shylock for life, with remainder, after Shylock's death, for Jessica's husband:—

> "So please my lord the duke, and all the court,
> To quit the fine for one half of his goods;
> I am content so he will let me have
> The other half *in use*,—to render it,
> Upon his death, unto the gentleman
> That lately stole his daughter."
>
> *Merchant of Venice*, Act IV., Scene I.

This interpretation clears Antonio's character from the charge of selfishness to which it would be exposed if he were to keep the half for his own use during his life.

A confidence.

1. It is "a *confidence;*" not necessarily a confidence *expressly* reposed by one party in another, for it may be raised by implication of law: and the trustee of the estate need not be *actually* capable of confidence, for the capacity itself may be supplied by legal fiction, as where the administration of the trust is committed to a body corporate; but a trust is a confidence, as distinguished from *jus in re* and *jus ad rem*, for it is neither a *legal* property nor a *legal* right to property (*a*).

Reposed in some other.

2. It is a confidence "*reposed in some other;*" not in some other than the author of the trust, for a person may convert himself into a trustee, but in some other than the *cestui que trust;* for as a man cannot sue a *subpœna* against himself, he cannot be said to hold upon trust for himself (*b*). If the legal and equitable interests happen to meet in the same person, the equitable is for ever absorbed in the legal. Thus, if A. be seised of the legal inheritance *ex parte paternâ*, and of the equitable *ex parte maternâ*, upon the death of A. the heir of the maternal line has no equity against the heir of the paternal (*c*). And the same rule prevails as to leaseholds for lives (*d*): as if the legal estate in a freehold lease be vested in a husband and his heirs, in trust for the wife and her heirs, the child who is the heir of both, and takes the legal estate *ex parte paternâ*, and the equitable estate *ex parte maternâ*, will, by the merger of the equitable in the legal, become seised both at law and at equity, *ex parte paternâ*, and the subsequent devolution will be regulated accordingly.

How far the equitable merges in the legal estate.

But this rule holds only where the legal and equitable estates are co-extensive and commensurate; for if a person be seised of the legal estate in *fee*, and have only a *partial equitable* interest, to merge the one in the other might occasion an injurious disturbance of rights. Thus before the Fines and Recoveries Act (*e*), if lands had been conveyed unto and to the use of A. and his heirs, in trust for B. in tail, with remainder in trust for A. in fee, had the equitable remainder limited to A. been converted into

(*a*) Bacon on Uses, 5. See *Wainewright* v. *Elwell*, 1 Mad. 634.

(*b*) *Goodright* v. *Wells*, Dougl. 747, *per* Lord Mansfield; *Conolly* v. *Conolly*, 1 Ir. Rep. Eq. 383, *per* Christian, L.J.

(*c*) *Selby* v. *Alston*, 3 Ves. 339; *Goodright* v. *Wells*, Dougl. 747, *per* Lord Mansfield; *Wade* v. *Paget*, 1 B. C. C. 363; *S. C.* 1 Cox, 76; *Philips* v. *Brydges*, 3 Ves. 126, *per* Lord Alvanley; *Finch's case*, 4 Inst. 85, 3rd resolution; *Harmood* v. *Oglander*, 8 Ves. 127, *per* Lord Eldon; *Conolly* v. *Conolly*, 1 Ir. Rep. Eq. 376. These cases, except the last, were all before the Inheritance Act, 3 & 4 W. 4. c. 106; [which however has been held not to vary the law. *Re Douglas*, 28 Ch. D. 327.]

(*d*) *Creagh* v. *Blood*, 3 Jon. & Lat. 133].

(*e*) 3 & 4 W. 4. c. 74.

a legal estate, it would not have been barrable by B.'s equitable recovery (*a*)

In what sense mortgagee in fee is trustee for himself and his executors.

In the case of a mortgage in fee it [has been] said [that] a man and his *heirs* are trustees for himself and his *executors* (*b*). But the meaning was, that, until a release or foreclosure of the equity of redemption, the interest of the mortgagee was of the nature of personality, and passed on his death to his personal representative; the *heir*, therefore, took the estate upon trust for the *executor* (*c*). A release or foreclosure, unless it happen in the lifetime of the mortgagee, comes too late after his decease to alter the character of the property, for, *as the tree falls, so it must lie* (*d*).

Trust not issuing out of the land, but collateral to it.

3. A trust is "*not issuing out of the land, but as a thing collateral to it.*" A legal charge, as a rent, issues directly out of the land itself, and therefore binds every person, whether in the *per* or *post*, whether a purchaser for valuable consideration or volunteer, whether with notice or without; but a trust is not part of the land, but an incident made to accompany it, and that not inseparably, but during the continuance only of certain indispensable adjuncts; for—

Annexed in privity to the estate.

4. A trust is "*annexed in privity to the estate*," that is, must stand or fall with the interest of the person by whom the trust is created; as, if the trustee be disseised, the tortious fee is adverse to that impressed with the trust, and therefore the equitable owner, until the fusion of law and equity, could not have himself sued the disseisor, but must have brought an action against him at law in the name of the trustee (*e*).

Extent of the term privity to the estate.

During the system of *uses*, and also while *trusts* were in their infancy, the notion of privity of estate was not extended to tenant

(*a*) *Philips* v. *Brydges*, 3 Ves. 120; see the judgment, pp. 125–127; *Robinson* v. *Cuming*, Rep. *t.* Talb. 164; *S. C.* 1 Atk. 473; and see *Boteler* v. *Allington*, 1 B. C. C. 72; *Merest* v. *James*, 6 Mad. 118; *Habergham* v. *Vincent*, 2 Ves. jun. 204; *Buchanan* v. *Harrison*, 1 J. & H. 662.

(*b*) *Kendal* v. *Micfield*, Barn. 50, *per* Lord Hardwicke.

[(*c*) Now, by the Conveyancing and Law of Property Act, 1881, s. 30, the estate of the mortgagee devolves upon the legal personal representative to the exclusion of the heir or devisee, except in the case of copyholds vested in the tenant on the court rolls by way of mortgage. See Copyhold Act, 1887 (50 & 51 Vict. c. 73) s. 45.]

(*d*) *Canning* v. *Hicks*, 2 Ch. Ca. 187; *S. C.* 1 Vern. 412; *Tabor* v. *Grover*, 2 Vern. 367; *S. C.* 1 Eq. Ca. Ab. 328; *Clerkson* v. *Bowyer*, 2 Vern. 66; *Gobe* v. *Earl of Carlisle*, cited *ib.*; *Wood* v. *Nosworthy*, cited *Awdley* v. *Awdley*, 2 Vern. 193. But if the heir foreclosed or obtained a release of the equity of redemption, it was said he might keep the estate, and pay the executor the debt only. *Clerkson* v. *Bowyer*, 2 Vern. 67, *per Cur. Sed quære.*

(*e*) *Finch's case*, 4 Inst. 85, 1st resolution; and see Gilbert on Uses, edited by Lord St. Leonards, p. 429, note 6. See now 36 & 37 Vict. c. 66, s. 24.

by the curtesy, or in dower, or by *elegit*, or in fact to any person claiming by operation of law, though through the trustee; but in this respect the landmarks have been carried forward, and at the present day a trust follows the estate into the hands of every one *claiming under the trustee*, whether in the *per* or *post*. It was the opinion of Sir T. Clarke and Lord Northington, that a lord taking by escheat, as claiming by title paramount, and not either in the *per* or *post*, was not affected by any privity, and therefore could not be compelled to execute the trust (*a*). But this question was never actually decided, and has in great measure become immaterial (*b*).

Trust annexed in privity to the person.

5. A trust is "*annexed in privity to the person.*" To entitle the *cestui que trust* to relief in equity it is not only necessary that he should prove the creation of the trust, and the continuance of the estate supporting it, but should also establish that the assign is personally privy to the equity, and therefore amenable to the *subpœna*. If it can be shown that the assign had *actual* notice, then, whether he paid a valuable consideration or not, he is plainly privy to the trust, and bound to give it effect; but if actual notice cannot be proved, then, if he be a volunteer, the Court will still affect him with notice by presumption of law; but if he be a purchaser for value, the Court must believe, until proved to the contrary, that, having paid for the estate, he was ignorant, at the time he purchased, of another's equitable title. A purchaser for valuable consideration without notice therefore is the only assign against whom privity annexed to the person cannot at the present day be charged (*c*).

No remedy of the cestui que trust but in Chancery.

6. The cestui que trust "*has no remedy but by a subpœna in Chancery.*" And by chancery must be understood, not exclusively the court of the Lord Chancellor, but any court invested with an equitable jurisdiction, as opposed to common-law courts (*d*), and

(*a*) *Burgess* v. *Wheate*, 1 Eden, 203, 246.

(*b*) See *post*, c. xii. s. 3.

(*c*) See 37 & 38 Vict. c. 78, s. 7, repealed by 38 & 39 Vict. c. 87, s. 129.

(*d*) *Sturt* v. *Mellish*, 2 Atk. 612, *per* Lord Hardwicke: *Allen* v. *Imlett*, F. L. Holt's Rep. 641; *Rex* v. *Holland*, Styl. 41, *per* Rolle, J.; *Queen* v. *Trustees of Orton Vicarage*, 14 Q. B. 139; *Vanderstegen* v. *Witham*, 6 M. & W. 457; *Bond* v. *Nurse*, 10 Q. B. 244; *Edwards* v. *Lowndes*, 1 Ell. & Bl. 81; *Drake* v. *Pywall*, 4 H. & C. 78. In *The Queen* v. *Abrahams*, 4 Q. B. 157, the Court professed to proceed upon the *legal* right, so that the principle was not disturbed, though there may be a question how far the facts justified the assumption upon which the Court acted. In *Roper* v. *Holland*, 3 Ad. & E. 99, a *cestui que trust* recovered upon an action of debt for money had and received on proof of the admission by the trustee that he had a balance in hand for the plaintiff; and see *Sloper*

spiritual courts (*a*), neither of which until the fusion of law and equity had any cognisance in matters of trust. A common-law court could never, from the defective nature of its proceedings, have specifically enforced a trust; but at one time it affected to punish a trustee in damages for breach of the implied contract (*b*): an exercise of authority, however, clearly extra-provincial, and afterwards abandoned (*c*). Had a Spiritual court attempted to meddle with a trust, the Court of Queen's Bench might have been moved to issue a prohibition (*d*).

By 36 & 37 Vict., c. 66, and 37 & 38 Vict., c. 83, it was enacted that as from 1st November, 1875 (inclusive), there should be "One Supreme Court of Judicature" consisting of "Her Majesty's High Court of Justice" and "Her Majesty's Court of Appeal," and the High Court of Justice was made to comprise five divisions, viz.: the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division [but by Order in Council dated 16th December, 1880, under section 32 of the first-mentioned act, the Common Pleas Division and the Exchequer Division have been abolished.] 36 & 37 V. c. 66.

Equitable estates and rights are now to be noticed and acted upon in all the courts, and where there is any conflict between the rules of equity and the rules of common law, the rules of equity are to prevail. See sections 24 & 25 of the first-mentioned Act.

Subject to any rules to be made in pursuance of the new enactments, all causes and matters pending in the Court of Chancery at the commencement of the Act of 36 & 37 Vict., are transferred to the *Chancery division of the High Court of Justice*, and subject as aforesaid, all causes and matters for the execution of *trusts*, charitable or private, are to be assigned to the same division, and for that purpose every document by which the cause or matter is commenced is to be marked for that division, or with the name of the Judge to whom the cause or matter is to be assigned. See sections 33 & 34.

v. *Cottrell*, 6 Ell. & Bl. 497; 2 Jur. N. S. 1046; *Topham* v. *Morecraft*, 8 Ell. & Bl. 972; 4 Jur. N. S. 611.

(*a*) *Miller's case*, 1 Freem. 283; *King* v. *Jenkins*, 3 Dow. & Ry. 41; *Farrington* v. *Knightly* 1 P. W. 549, *per* Lord Parker; *Edwards* v. *Graves*, Hob. 265; *Witter* v. *Witter*, 3 P. W. 102, *per* Lord King.

(*b*) *Megod's case*, Godb. 64; *Jevon* v. *Bush*, 1 Vern. 344, *per* Lord Jeffries; *Smith* v. *Jameson*, 5 T. R. 603, *per* Buller, J.; and see 1 Eq. Ca. Ab. 384, D. (*a*).

(*c*) *Barnardiston* v. *Soame*, 7 State Trials, 443, Harg. ed. *per* Chief Justice North; *Sturt* v. *Mellish*, 2 Atk. 612, *per* Lord Hardwicke; *Rex* v. *Holland*, Styl. 41, *per* Rolle, J.; *Allen* v. *Imlett*, F. L. Holt's Rep. 14.

(*d*) *Petit* v. *Smith*, 1 P. W. 7; *Edwards* v. *Freeman*, 2 P. W. 441, *per* Sir J. Jekyll; *Barker* v. *May*, 4, Man. & R. 386; *Ex parte Jenkins*, 1 B. & C. 655.

CHAPTER II.

CLASSIFICATION OF TRUSTS.

Trusts simple or special.

1. THE first and natural division of trusts is into *simple* and *special.*

Simple trust.

The *simple* trust is where property is vested in one person *upon trust* for another, and the nature of the trust, not being prescribed by the settlor, is left to the construction of law. In this case the *cestui que trust* has *jus habendi,* or the right to be put into actual possession of the property, and *jus disponendi,* or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs.

Special trust.

The *special* trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depositary of the estate, but is called upon to exert himself actively in the execution of the settlor's intention; as where a conveyance is to trustees upon trust to sell for payment of debts.

Special trusts either instrumental or discretionary.

2. Special trusts have again been subdivided into *ministerial* (or *instrumental*) and *discretionary.* The former, such as demand no further exercise of reason or understanding than every intelligent agent must necessarily employ; the latter such as cannot be duly administered without the application of a certain degree of prudence and judgment.

A trust to convey an estate must be regarded as ministerial; for, provided the estate be vested in the *cestui que trust,* it is perfectly immaterial to him by what manner of person the conveyance is executed.

Trust to sell held by Mr. Fearne to be instrumental.

A trust for sale was considered by Mr. Fearne as also ministerial; "for the price," he said, "is not arbitrary, or at the trustee's discretion, but to be the best that can be gotten for the estate, which is a fact to be ascertained independently of any discretion in the trustee" (*a*). But there is much room for judgment in the time

(*a*) Fearne's P. W. 313.

and mode of proceeding to a sale, and the precautions that are taken will have a material influence upon the price; and Mr. Fearne's opinion cannot at the present day be maintained (*a*).

Examples of discretionary trusts.

A fund vested in trustees upon trust to distribute among such charitable objects as the trustees shall think fit (*b*), or an advowson conveyed to them upon trust to elect and present a proper preacher (*c*), is clearly a discretionary trust; for the selection of the most deserving objects in the first instance, and the choice of the best candidate in the second, is a matter calling for serious deliberation, and not to be determined upon without due regard to the merits of the candidates, and all the particular circumstances of the case.

Mixture of trust and power.

3. There is frequent mention made in the books of *a mixture* of *trust and power* (*d*), by which is meant, a trust of which the outline only is sketched by the settlor, while the details are to be filled up by the good sense of the trustees. The *exercise* of such a power is *imperative*, while the *mode* of its execution is matter of judgment and *discretionary*.

Distinguished from trust with power annexed.

A *mixture of trust and power* is not to be confounded with a *common trust to which a power is annexed;* for, in the former case, as in a trust "to distribute at the discretion of the trustees," they are bound at all events to distribute, and the manner only is left open; but in the latter case, the trust itself is complete, and the power, being but an accessory, may be exercised or not, as the trustee may deem it expedient; as where lands are limited to trustees with an authority to grant leases, or stock is transferred to trustees with a power of varying the securities; for in such cases the power forms no integral part of the trust, but is merely collateral and subsidiary, and the execution of it, in the absence of fraud, cannot be compelled by application to the Court.

Trusts lawful and unlawful.

4. Again, trusts may be divided, with reference to the object in view, into *lawful* and *unlawful*. The former, such as are directed to some honest purpose (as a trust to pay debts, &c.), which are called by Lord Bacon *Intents* or *Confidences*, and will be administered by the Court. The latter are trusts created for the attainment of some end contravening the policy of the law,

(*a*) See *King* v. *Bellord*, 1 H. & M. 343; *Robson* v. *Flight*, 5 N. R. 344; *S. C.*, 4 De G. J. & S. 608; *Clarke* v. *Royal Panopticon*, 4 Drew. 29.

(*b*) *Attorney-General* v. *Gleg*, 1 Atk. 356; *Hibbard* v. *Lamb*, Amb. 309; *Cole* v. *Wade*, 16 Ves. 27; *Gower* v. *Mainwaring*, 2 Ves. 87.

(*c*) *Attorney-General* v. *Scott*, 1 Ves. 413; *Potter* v. *Chapman*, Amb. 98.

(*d*) *Cole* v. *Wade*, 16 Ves. 27, 43; *Gower* v. *Mainwaring*, 2 Ves. 89.

and therefore not to be sanctioned in a forum professing not only justice but equity, as a trust to defraud creditors or to defeat a statute. Such are designated by Lord Bacon as *Frauds, Covins,* or *Collusions* (*a*).

Trusts public and private.

5. Another division of trusts is into *public* and *private.* By public must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for *charitable* purposes, and indeed *public* trusts and *charitable* trusts may be considered in general as synonymous expressions (*b*). In *private* trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained, and to whom, therefore, collectively, unless under some legal disability, it is, or within the allowed limit will be, competent to control, modify, or determine the trust. The duration of trusts of this kind cannot be extended by the will of the settlor beyond the bounds of legal limitations, viz., a life or lives in being with an engraftment of twenty-one years. A *public* or *charitable* trust, on the other hand, has for its objects the members of an uncertain and fluctuating body, and the trust itself is of a permanent and indefinite character, and is not confined within the limits prescribed to a settlement upon a private trust (*c*).

(*a*) Bac. on Uses, 9.

(*b*) See *Attorney-General* v. *Aspinall*, 2 M. & Cr. 622; *Attorney-General* v. *Heelis*, 2 S. & S. 76; *Attorney-General* v. *Corporation of Shrewsbury*, 6 Beav. 220; *Walker* v. *Richardson*, 2 M. & W. 892; *Attorney-General* v. *Webster*, 20 L. R. Eq. 483. But see *Attorney-General* v. *Forster*, 10 Ves. 344; *Attorney-General* v. *Newcombe*, 14 Ves. 1; *Fearon* v. *Webb*, ib. 19; *Dolan* v. *Macdermot*, 5 L. R. Eq. 60 (in which M. R. observed, "*Public purposes* are such as mending or repairing roads, supplying water, making or repairing bridges, and are distinguished from *charities* in the shape of almsgiving, building almshouses, founding hospitals, and the like;" but *public* purposes, he added, "are *all* in a legal sense *charities*"); affirmed on appeal, 3, L. R. Ch. App. 677. [And see *Re Douglas*, 35 Ch. Div. 472; *Wilson* v. *Barnes*, 38 Ch. Div. 507; *In re Christchurch Inclosure Act*, 38 Ch. Div. 520; *Bradshaw* v. *Jackman*, 21 L. R. Ir. 12; *Re St. Stephen's Coleman Street*, 39 Ch. D. 492.]

(*c*) *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; *Stewart* v. *Green*, 5 I. R. Eq. 470.

CHAPTER III.

OF THE PARTIES TO THE CREATION OF A TRUST.

Now that we have defined and distributed trusts, we shall next enter upon the creation of them: *First*, By the act of a party, and *Secondly*, By operation of Law. Upon the subject of the former class we propose to treat, *First*, Of the necessary parties to the creation of a trust; *Secondly*, What property may be made the subject of a trust; *Thirdly*, With what formalities a trust may be created; *Fourthly*, Of Transmutation of Possession; *Fifthly* What may be the object or scope of the trust; and *Sixthly*, In what language a trust may be declared.

In this chapter, we shall consider the necessary parties to a trust, under the three heads of the *Settlor*, the *Trustee* and the *Cestui que trust*.

SECTION I.

OF THE SETTLOR.

General power creating a trust.

1. As the creation of a trust is a modification of property in a particular form, it may be laid down as a general rule that whoever is competent to deal with the legal estate, may, if he be so disposed, vest it in a trustee for the purpose of executing the settlor's intention.

The Crown.

2. The *sovereign*, as to his private property, may, by letters patent, grant it to one person upon trust for another (*a*). But the trust must appear upon the face of the letters patent; for if the grant be expressed to be made to one person, a trust cannot be proved by *parol* in favour of another, for this would contradict the nature of the instrument which purports to be an act of

(*a*) Bac. on Uses, 66.

bounty to the grantee (*a*). However, if the grant be to A. and his *heirs* with the limitation of a beneficial interest to A. for life only, a trust of the remainder will not pass to the grantee, but will result to the Crown, for the presumption of bounty as to the whole is rebutted by the declared intention as to the part (*b*).

Prizes.

All prizes taken in war vest in the sovereign, and are commonly by the royal warrant granted to trustees upon trust to distribute in a prescribed mode amongst the captors; but an instrument of this kind is held not to vest an interest in the *cestuis que trust* which they can enforce in equity, but it may at any time be revoked or varied at the pleasure of the sovereign before the general distribution (*c*). [The effect of such an instrument, though the words "in trust" be used, is merely to appoint the persons named to be the agents of the sovereign to effect the distribution (*d*).]

Will of the sovereign.

The Crown may also by *will* bequeath its private personal property to one person in trust for another, but the will must be in writing and under the sign manual (*e*), though the Probate Court has no jurisdiction to admit it to probate (*f*).

Corporations.

3. As to the power of *Corporate Bodies* to create a trust, it was competent to municipal corporations, before the Municipal Corporations Act (*g*), to alienate their property, and as a consequence to vest it in a trustee (*h*). But now municipal corporations are themselves trustees of their property, for the public purposes prescribed by the Municipal Corporations Act, and are debarred from alienating their real (*i*) or personal estate (*j*) without the consent of the Lords of the Treasury. A corporation, however, not included in the schedules to the Act still retains its power of alienation (*k*).

Feme covert.

4. A *Feme Covert* may create a trust of *real* estate, but, unless it be property settled to her separate use, it must be done with the consent of her husband, and there must be all the attendant formalities required by the Fines and Recoveries Act, 3 & 4 W. 4, c. 74, [as modified by the Conveyancing Act, 1882, 45 & 46

(*a*) *Fordyce* v. *Willis*, 3 B. C. C. 577.

(*b*) Bac. on Uses, 66.

(*c*) *Alexander* v. *Duke of Wellington*, 2 R. & M. 35. As to the execution of the trust by the agency of persons deputed by the principals, see *Tarragona*, 2 Dods. Adm. Rep. 487.

[(*d*) *Kinloch* v. *Secretary of State for India in Council*, 15 Ch. Div. 1; 7 App. Cas. 619.]

(*e*) 39 & 40 G. 3. c. 88, s. 10.

(*f*) Williams on Executors, 14, 8th ed. *In the goods of his late Majesty George III.*, 3 Sw. & Tr. 199.

(*g*) 5 & 6 W. 4. c. 76, [repealed and superseded by 45 & 46 Vict. c. 50].

(*h*) *Mayor of Colchester* v. *Lowten*, 1 V. & B. 226.

(*i*) 5 & 6 W. 4. c. 76, s. 94. [See now 45 & 46 Vict. c. 50, s. 108.]

(*j*) *Attorney-General* v. *Aspinall*, 2 M. & Cr. 613; *Attorney-General* v. *Wilson*, Cr. & Ph. 1.

(*k*) *Evan* v. *The Corporation of Avon*, 29 Beav. 144.

Vict. c. 39, s. 7. But under the Married Women's Property Act, 1882 (*a*), a woman married since the 31st Dec. 1882, and also a woman married before that date as to property acquired by her after that date, can create a trust of real estate without the concurrence of her husband and without the formalities of the Fines and Recoveries Act.]

5. As to her *choses en action*, by a recent statute (*b*) (commonly called Malins's Act), a feme covert is enabled with the concurrence of her husband, and on being separately examined in the manner prescribed by the Fines and Recoveries Act, to dispose by deed (*c*) of any *future* or *reversionary interest* created by an *instrument made after the* 31*st December*, 1857, and as to which interest her power of anticipation is not specially restricted; and is also authorized to release or extinguish her right or equity to a settlement out of personal estate to which she is entitled *in possession*, under such *instrument* as aforesaid. But any personal estate settled for her benefit upon the occasion of her *marriage* is excepted from the foregoing powers (*d*); and an appointment after the date of the Act, but in execution of a power of appointment amongst children created by a settlement of a previous date, is not within the Act (*e*). And as the interest must be created by an *instrument* a share of a feme covert as next of kin under an intestacy is not within the Act. 20 & 21 Vict. c. 57.

[By an assignment under this statute the wife can transfer her future property "discharged from her husband's right, as fully and effectually as if she were a feme sole;" and "the assignment ought not to be regarded as that of the husband and wife according to their respective interests" (*f*). The concurrence of the husband will therefore be good, although there may be a right of retainer which would have been available as against him if he had been entitled to reduce the property into possession (*g*), or although he may have previously executed a creditors' deed or been adjudicated a bankrupt (*h*).]

Whether the Act applies to *choses en action* in possession.

It will be observed that the statutory power of disposition

[(*a*) 45 & 46 Vict. c. 75, ss. 2, 5.]

(*b*) 20 & 21 Vict. c. 57.

[(*c*) It may be open to doubt whether the modifications introduced by the Conveyancing Act, 1882, 45 & 46 Vict. c. 39, s. 7, apply to such a deed.]

(*d*) See a case with reference to this section, *Clarke* v. *Green*, 2 H. & M. 474.

(*e*) *Re Butler's Trusts*, 3 Ir. Rep. Eq. 138.

[(*f*) *Re Batchelor*, 16 L. R. Eq. 481, *per* Lord Selborne, L. C.]

[(*g*) *Re Batchelor*, *ubi supra*.]

[(*h*) *Re Jakeman's Trusts*, 23 Ch. D. 344; *Cooper* v. *Macdonald*, 7 Ch. D. 288; and see *Re Briant*, 39 Ch. D. 471, 478; and that the Act applies to a reversionary legal chose in action, such as a policy of assurance on the life of the feme, see *Witherby* v. *Rackham*, 39 W. R. 363.]

given by Malins's Act to a feme covert extends in terms no further than to her *future* or *reversionary* interests not limited to her by her marriage settlement; and as to *choses en action* in *possession*, the feme covert, though enabled to waive her equity to a settlement, has no express power of absolute disposition given her. If therefore a feme covert be entitled to a *chose en action* in possession, and join with her husband in assigning it to a trustee, then if it be not reduced into possession during the coverture, and the wife survives, the question arises whether, though the formalities prescribed in the Act were complied with, she may not claim the fund by survivorship. The meaning of the framer of the Act probably was, that, as to *choses en action* to which a feme covert is entitled *in possession*, the husband can compel a transfer of them to himself, subject only to the wife's equity to a settlement, and as the Act enables a feme covert to waive her equity to a settlement, the husband and wife together can deal with such *choses en action* by making it imperative on the trustees to transfer the fund to the husband or his nominee.

Choses en action, &c., irrespectively of the Act.

6. The husband alone may create a trust of the wife's *choses en action sub modo;* that is, if they be reduced into possession during the coverture, the settlement will be unimpeachable, but if they remain *choses en action* at the death of the husband, the wife will be entitled to them by survivorship.

Chattels real.

As to the wife's equitable chattels real, the husband may, subject to the wife's equity to a settlement (*a*), create a trust of them *jure mariti* (*b*), unless the chattel be of such a nature that it cannot possibly fall into possession during the coverture (*c*).

[Recent alterations.]

[7. The above observations apply only to property which was acquired before the 1st of January, 1883, by women married before that date; as in all other cases the property vests in the wife, independently of her husband, and she has power to dispose or create a trust of it without his concurrence (*d*).]

Separate use.

8. As regards property settled to the *separate use* of a feme covert, she is to all intents and purposes considered a *feme sole*, as, if real estate be conveyed to a trustee and his heirs, or if personal estate be assigned to a trustee and his executors upon trust for the feme covert for her sole and separate use, and to be at her sole disposal as to the fee-simple in the one case and the absolute interest in the other, she has the entire control, and may

(*a*) *Hanson* v. *Keating*, 4 Hare, 1.
(*b*) *Donne* v. *Hart*, 2 R. & My. 360.
(*c*) *Duberley* v. *Day*, 16 Beav. 33.
[(*d*) 45 & 46 Vict. c. 75.]

exercise her ownership or implied power of appointment by creating a trust, extending even beyond the coverture. So if the feme covert be tenant for life to her separate use, she has full power to make a settlement of her whole life estate, and not during the coverture only. But in all cases where the power of anticipation is restrained, the feme covert can make no disposition of the property, except as to the annual produce which has actually become due (*a*). If a settlement be *fraudulently* procured from the wife by a husband by virtue of her separate use, it may be set aside (*b*).

9. The Married Women's Property Act, 1870 (*c*), enacted by sect. 1, that *wages and earnings* made by a married woman separately from her husband after the date of the Act (9th of Aug. 1870), were to be deemed settled to her separate use; and, by sect. 7, that where a woman married after the date of the Act was entitled to any personal property as *next of kin*, or to any sum not exceeding 200*l.*, under any *deed* or *will*, it should belong to her for her separate use; and, by the next section, that "rents and profits" of any real estate descending upon such married woman as *heiress*, should also belong to her for her separate use. [This Act has been repealed and its place supplied by the Married Women's Property Act, 1882 (*d*), which makes all property acquired after the commencement of the Act (1st of January, 1883), by women married before that date, and also all the property of women married after that date, their separate property.] 33 & 34 Vict. c. 93. [45 & 46 Vict. c. 75.]

10. If an *Infant* before the Fines and Recoveries Act had levied a fine or suffered a recovery, he might also have declared the uses (*e*), and unless the fine or recovery had been reversed by him during his nonage he had been bound by the declaration (*f*), but deeds have now been substituted for fines and recoveries, and every deed of an infant, whether under the Act or independent of it, either is void or may be avoided. Infants.

An infant until recently might have made a *Feoffment*, and at the same time have declared a use upon it, and both feoffment Feoffment.

[(*a*) See now 44 & 45 Vict. c. 41. s. 39, under which a married woman with the consent of the Court may bind her interest notwithstanding a restraint on alienation. As to the form of order for payment of dividends to a married woman restrained from anticipation, see *Stewart* v. *Fletcher*, 38 Ch. D. 627; and as to the power of the Court to impound her interest by way of indemnity to a trustee who has committed a breach of trust at her instigation, see *Trustee Act*, 1888 (51 & 52 Vict. c. 59) s. 6, and *post*, Chap. XXX. sect. 3.]

(*b*) *Knight* v. *Knight*, 11 Jur. N. S. 617; 5 Giff. 26.

(*c*) 33 & 34 Vict. c. 93.

[(*d*) 45 & 46 Vict. c. 75; see as to these Acts *post*, Chap. XXVII. sect. 6.]

(*e*) Gilb. on Uses, 41, 245, 250.

(*f*) Gilb. on Uses, 246.

and use were voidable only and not void (*a*); and by analogy the infant might also have engrafted a trust upon the legal estate; but a Court of equity would never have allowed any equitable interest to be enforced against the infant himself to his prejudice, but gave him the same power of avoidance over the equitable as he had over the legal estate, and if the infant had died without having avoided the trust, the Court would still have investigated the transaction, and seen that no unfair advantage was taken (*b*).

Custom of Kent.

An infant may by the custom of Kent for valuable consideration certainly, and, according to the better opinion, even without value (*c*), make a feoffment at the age of fifteen, and upon such feoffment he may declare uses (*d*). But a Court of equity would no doubt confine such a custom within its narrowest bounds, and as trusts have sprung into being since the statute of Hen. 8, might hold the custom to be void as of recent growth in respect of the equitable interest, and at all events would not allow the custom to be made an instrument of fraud.

Wills Act.

Before the Wills Act (*e*) an infant of the age of fourteen years might have bequeathed his personal estate, and therefore might have created a trust of it by will; but now, as regards personal as well as real estate, every testator must be of the age of twenty-one years.

Lunatics.

11. *Lunatics or Idiots* might, before the Fines and Recoveries Act, have levied a *fine* or suffered a *recovery*, and the uses declared would have been valid until the fine or recovery was reversed. The *deed* of a lunatic or idiot may be void or not according to circumstances (*f*). The *feoffment* of a lunatic or idiot, while the feoffment operated tortiously, was voidable by the heir only (*g*). However, should a lunatic or idiot have engrafted a declaration of trust upon any legal estate passed by him, a Court of equity would have had jurisdiction to set it aside (*h*); though generally it declined to interfere even in this case as against a purchaser for valuable consideration without notice of the lunacy or idiocy (*i*).

Bankruptcy.

12. If a man be declared a *bankrupt*, all the real and personal estate to which he is or may become entitled at the commencement of his bankrutcy, [or before his discharge,] vests in his

(*a*) Bac. on Uses, 67; Bac. Ab. Uses, E. See now 8 & 9 Vict. c. 106, s. 3.
(*b*) See Cr. Dig. vol. iv. p. 130.
(*c*) Robinson on Gavelkind.
(*d*) Gilb. on Uses, 250.
(*e*) 7 W. 4 & 1 Vict. c. 26.
(*f*) See *Molton* v. *Camroux*, 2 Exch. 487, 4 Exch. 17; *Elliott* v. *Ince*, 7 De G. M. & G. 488; *Campbell* v. *Hooper*, 3 Sm. & G. 153.
(*g*) Co. Lit. 247, b.
(*h*) See Cruise, vol. iv. p. 130, vol. v. p. 253; *Niell* v. *Morley*, 9 Ves. 478.
(*i*) See *Price* v. *Berrington*, 3 Mac. & G. 486; *Greenslade* v. *Dare*, 20 Beav. 285.

trustee (*a*); but the surplus after payment of his debts still belongs to him (*b*), and of this interest he may create a trust.

Alien as to real estate.

13. An *Alien* might always have acquired real estate, whether freeholds or chattels real, by *purchase*, though he could not take it by operation of law, as by descent or *jure mariti*; and if he purchased it he might have held it until office found, but could not give an alienee a better title than he had himself (*c*). An alien, therefore, could only create a trust of real estate until the Crown stepped in.

As to personal estate.

As to personal estate an alien *friend* might, although an alien *enemy* could not, be the lawful owner of chattels personal, and might exercise the ordinary rights of proprietorship over them, and consequently might create a trust.

"Naturalization Act, 1870."

Now by the "Naturalization Act, 1870" (*d*), which came into operation on 12th May, 1870, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural born British subject (*e*), and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural born subject, but this is not to "qualify an alien for any office or any municipal, parliamentary, or other franchise," and the enactment is not to affect any disposition or devolution before the date of the Act (*f*).

Traitors, felons and outlaws.

14. With regard to *Traitors, Felons, and Outlaws*, a distinction by the old law was taken between *real* and *personal* estate. In *high treason, lands*, whether held in fee simple, fee tail (*g*), or for life, were *upon attainder* forfeited absolutely to the Crown—and in all *other felonies* the profits of the land were *upon attainder* forfeited to the Crown during the *life* of the offender. Subject to these superior rights of the Crown by forfeiture, and to the year, day, and waste of the Crown (*h*), *land*, in cases of *petit treason* and

[(*a*) 46 & 47 Vict. c. 52, ss. 44, 54.]

[(*b*) Sect. 65.]

(*c*) An alien friend residing in the United Kingdom might by 7 & 8 Vict. c. 66, s. 5, take and hold lands or houses for residence or occupation by him or his servants, or for the purpose of any business, trade, or manufacture for any term not exceeding 21 years.

(*d*) 33 Vict. c. 14.

[(*e*) This section enables a foreigner to dispose of property in England by will, but in the case of personalty the form of the will must, if the testator be domiciled abroad, be subject to the laws of his domicile. *In the goods of Von Buseck*, 6 P. D. 211; *Bloxam* v. *Favre*, 8 P. D. 101; 9 P. Div. 130.]

(*f*) See as to this *Sharp* v. *St. Sauveur*, 7 L. R. Ch. App. 351; [*De Geer* v. *Stone*, 22 Ch. D. 243, 254.]

(*g*) 26 Hen. 8. c. 13. See 2 Bac. Ab. 576, 580.

(*h*) Attainder was also necessary to entitle the Crown to the year, day and waste. *Rex* v. *Bridger*, 1 M. & W. 145.

murder, (and until the statute of 54 G. 3, c. 145, in all cases of felony), escheated upon the death of the offender, by reason of the corruption of blood caused by *attainder, pro defectu tenentis*, to the lord of the fee, if it was held in fee; but if he held in tail, the land upon the death of the offender devolved upon the issue in tail. *Attainder* related back to the *time of the offence*, and consequently from that time no valid trust could be created by the offender as against the Crown or the lord in cases of *treason, petit treason*, or *murder*, nor in cases of other felonies, except subject to the right of the Crown during the offender's life. As respects the large number of *felonies* in which *no attainder* took place, the offender, though convicted, might convey (*a*), and therefore might create a valid trust of his real estate. Outlawry upon felony was equivalent to attainder, and drew with it the same consequences (*b*).

As to the *goods and chattels* of traitors, felons, and outlaws, they were forfeited absolutely, but only from the time of conviction, or the declaration of outlawry, and therefore up to that period the traitor, felon, or outlaw, might vest his goods and chattels in a trustee upon trusts; but the law would not allow this power of disposition to be exercised collusively for the purpose of defeating the just rights of the Crown (*c*). The traitor, felon, or outlaw might sell the goods for valuable consideration (*d*); and so he might assign the property upon trust to secure the *bonâ fide* debt of a creditor (*e*); but the existence of the debt must have been actually proved, and the mere recital of it in the security was not sufficient (*f*). An assignment upon a meritorious consideration, as a bargain and sale to a trustee for the purpose of making provision for a son, would not support the deed (*g*). *Outlawry* in *misdemeanours* and *civil actions* (*h*) was a contempt of Court, and worked a forfeiture of the profits of the offender's lands for his life, and of his goods and chattels, absolutely. The person so outlawed, therefore, could not from that time affect the pernancy of the profits of his real estate, or make any settlement of his personal estate.

33 & 34 Vict. c. 23.

15. Now, by 33 & 34 Vict. c. 23, it is enacted by sect. 1 that

(*a*) *Rex* v. *Bridger*, 1 M. & W. 145.

(*b*) See Co. Lit. 390, b.; *Holloway's case*, 3 Mod. 42; *King* v. *Ayloff*, 3 Mod. 72.

(*c*) See *Re Saunders's estate*, 4 Giff. 179: and 1 N. R. 256; *Barnett* v. *Blake*, 2 Dr. & Sm. 117; and see *Anon.* 2 Sim. N.S. 71.

(*d*) Hawk. Pl. of Cr., book 2, c. 49.

(*e*) *Perkins* v. *Bradley*, 1 Hare, 219; *Whitaker* v. *Wisbey*, 12 C. B. 44; *Chowne* v. *Baylis*, 31 Beav. 351.

(*f*) *Shaw* v. *Bran*, 1 Stark. 320.

(*g*) *Jones* v. *Ashurst*, Skinn. 357.

[(*h*) Now by 42 & 43 Vict. c. 59, outlawry in civil proceedings has been abolished.]

"from and after the passing of the Act (4th July, 1870), no confession, verdict, inquest, conviction or judgment of or for any treason or felony, or felo de se, shall cause any *attainder* or corruption of blood, or any *forfeiture* or *escheat*, provided that nothing in the Act shall affect the law of forfeiture consequent upon *outlawry*."

After defining by sect. 6, a "convict" to be "any person against whom, after the passing of the Act, judgment of death or of penal servitude shall have been pronounced upon a charge of treason or felony," the Act proceeds by sect. 8 to declare that a convict, while he is such, shall not bring any *action* or *suit* for recovery of any property, debt, or damage, and shall be incapable of *alienation* (*a*) and then sect. 9 empowers the Crown to appoint "an *administrator*" of the convict's property, in whom, upon appointment, all the real and personal estate of the convict is made by sect. 10 to vest, and such administrator is enabled by sect. 12 to let, mortgage, sell, convey, and transfer any part of the convict's property, and by subsequent sections to pay debts and liabilities, &c., and to make allowances for the support of any wife or child or reputed child, or other relative or reputed relative of such convict dependent upon him for support, or for the benefit of the convict himself while at large upon licence.

Subject as above, the property is, by sect. 18, to be held in trust for the convict, his heirs, or legal personal representatives, or other persons entitled; and on his ceasing to be subject to the operation of the Act (see sect. 7) is to revest in the convict or the persons claiming under him.

In the absence of an administrator appointed by the Crown, an "*interim curator*" may, by sect. 21, be appointed by Justices of the Peace in Petty Sessions, and by sect. 24 such curator is to sue or defend suits, sign discharges for income or debts, and generally manage the convict's property, make allowances for the maintenance of a wife or child, &c., and by sect. 25, may sell any personal property of the convict, but not without the sanction of a Justice or a Court of competent jurisdiction.

[(*a*) This however will not prevent the convict from paying his debts and applying his property for that purpose. The object of the section is to prevent the convict from improperly diverting his property either from his creditors or from his family. *Ex parte Graves*, 19 Ch. Div. 1. And the sentence does not work a forfeiture under a clause in a will directed against alienation by operation of law; *Re Dash*, 57 L. T. N. S. 219.]

SECTION II.

WHO MAY BE A TRUSTEE.

Who may be a trustee.

The question who may be a trustee involves a variety of considerations. Thus, a person to be a trustee must be capable of *taking* and *holding* the property of which the trust is declared. Again, the trustee should be competent to deal with the estate as required by the trust or as directed by the beneficiaries, whereas certain classes are by nature or by the rules of law under disability. Again, the execution of the trust may call for the application of judgment and a knowledge of business. And again, the trustee ought to be amenable to the jurisdiction of the Court which administers trusts. In general terms, therefore, a trustee should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and domiciled within the jurisdiction of a Court of Equity. With this outline we proceed to consider certain exceptional cases where the fitness for the trusteeship may more or less be called into question.

The Crown.

1. The *Sovereign* may sustain the character of a trustee, so far as regards the *capacity* to take the estate, and to execute the trust; but great doubts have been entertained whether the subject can, by any legal process, enforce the performance of the trust. The *right* of the *cestui que trust* is sufficiently clear, but the defect lies in the *remedy* (*a*). A Court of Equity has no jurisdiction over the king's conscience, for that it is a power delegated by the king to the chancellor to exercise the king's equitable authority betwixt subject and subject (*b*). The old Court of Exchequer had, in its character of a court of revenue, an especial superintendence over the royal property; and it has been thought that through that channel a *cestui que trust* might indirectly obtain the relief to which, on the general principles of equity, he was confessedly entitled. No such jurisdiction, however, appears to have been known when Lord Hale was Chief Baron (*c*). Lord Hardwicke once observed in Chancery, "I will

(*a*) *Paulett* v. *Attorney-General*, Hard. 467, 469; *Burgess* v. *Wheate*, 1 Ed. 255; *Kildare* v. *Eustace*, 1 Vern. 439; [and see *Rustomjee* v. *The Queen*, 2 Q. B. Div. 69, where it was held that in Sovereign acts, such as the making and performing of a treaty with another Sovereign, the Crown could not be a trustee for a subject.]

(*b*) Said by counsel in *Paulett* v. *Attorney-General*, Hard. 468.

(*c*) See *Paulett* v. *Attorney-General*, Hard. 467, 469; and see *Wikes' Case*, Lane, 54.

not decree a trust against the Crown in *this Court*, but it is a notion established in courts of *revenue* by modern decisions that the king may be a royal trustee" (*a*); but the doctrine was still unsettled in the time of Lord Northington (*b*); and in a more recent case (*c*), it was decided that though the Court of Exchequer could decree the *possession* of the property according to the equitable title, it had no jurisdiction to direct the Crown to *convey* the legal estate. The subject may undoubtedly appeal to the sovereign by presenting a petition of right (*d*), and it cannot be supposed that the fountain of justice would not do justice (*e*).

Corporations.

2. A *corporation* could not have been seised to a use, for, as was gravely observed, it had no *soul*, and how then could any confidence be reposed in it? But the technical rules upon which this doctrine proceeded, have long since ceased to operate in respect of trusts; and at the present day every body corporate, whether civil or ecclesiastical (*f*), is compellable in equity to carry the intention into execution (*g*). "A trust," said Lord Romilly, "may be of two characters, it may be of a general character or of a private and individual character. A person might leave a sum of money to a corporation in trust to support the children of A. B., and pay them the principal at 21. That would be a private and particular trust which the children could enforce against the corporation if the corporation applied the property to its own benefit. On the other hand, a person might leave money to a corporation in trust for the benefit of the inhabitants of a particular place, or for paving or lighting the town. That would be a public trust for the benefit of all the inhabitants, and the proper form of suit in the event of any breach of trust would be an *information* by the Attorney-General at the instance of

(*a*) *Penn* v. *Lord Baltimore*, 1 Ves. 453; and see *Reeve* v. *Attorney-General*, 2 Atk. 224; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 617.

(*b*) See *Burgess* v. *Wheate*, 1 Ed. 255.

(*c*) *Hodge* v. *Attorney-General*, 3 Y. & C. 342.

(*d*) As to the transfer of the equity jurisdiction of the Court of Exchequer to the Court of Chancery, see 5 Vict. c. 5, s. 1; and *Attorney-General* v. *Corporation of London*, 8 Beav. 270, 1 H. L. Ca. 440. As to petitions of right, see 23 & 24 Vict. c. 34 [and Clode on Petitions of Right].

(*e*) *Scounden* v. *Hawley*, Comb, 172, *per* Dolben, J.; *Reeve* v. *Attorney-General*, cited *Penn* v. *Lord Baltimore*, 1 Ves. 446.

(*f*) *Attorney-General* v. *St. John's Hosp.* 2 De G. J. & S. 621.

(*g*) See *Attorney-General* v. *Landerfield*, 9 Mod. 286; *Dummer* v. *Corporation of Chippenham*, 14 Ves. 252; *Green* v. *Rutherforth*, 1 Ves. 468; *Attorney-General* v. *Whorwood*, 1 Ves. 536; *Attorney-General* v. *Mayor of Stafford*, Barn. 33; *Attorney-General* v. *Foundling Hospital*, 2 Ves. jun. 46; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 499; *Attorney-General* v. *Caius College*, 2 Keen, 165.

all or some of the persons interested in the matter. If there was a particular trust in favour of particular persons and they were too numerous for all to be made parties, one or two might then sue, on behalf of themselves and the other *cestuis que trust*, for the performance of the trust (*a*)."

5 & 6 W. 4, c. 76.

Since the Municipal Corporations Act every municipal corporation named in the schedules to the Act (*b*), has *become a trustee*, and has now no longer the power to aliene and dispose of its property, except with the sanction of the lords of the Treasury, but is bound to apply it to certain public purposes pointed out by the Act; and if there be any misapplication, there lies a remedy in Equity by information (*c*).

Licence of the Crown.

Although the Court has ample jurisdiction to oblige a corporation to observe good faith, and the property already vested in a corporate body will be administered upon the trust attached to it, yet no real estate can be conveyed to a corporation upon any trust without the *licence* of the Crown.

But there is no objection to an assignment or bequest of pure *personal* estate to a corporation upon trust.

Bank of England.

3. The Bank of England cannot directly or indirectly be made a trustee of stock. The corporation manages the accounts of the public funds, and is charged with the care of paying the dividends, but refuses, and cannot be compelled by law, to notice any rights but those of the legal proprietors in whose name the stock is standing. [Nor can the Bank be required to recognize a tenancy in common of stock, and therefore as a corporation and individual can only hold stock as tenants in common, the Bank cannot be compelled to transfer consols into their names (*d*).]

(*a*) *Evan* v. *The Corporation of Avon*, 29 Beav. 149.

(*b*) 5 & 6 W. 4. c. 76 [repealed by the Municipal Corporations Act, 1882 (45 and 46 Vict. c. 50) s. 5, but substantially re-enacted, see sections 6, 105, *et seq.*; and as to the administration of charitable and other trusts by corporations, see sections 133–135]. Corporations not named in the schedules to the Act of 5 and 6 W. 4, might still dispose of their estates. *Evan* v. *The Corporation of Avon, ubi supra* [and the Act of 1882 applies to every city and town to which the former Act applied at the commencement of the Act of 1882, and to any town, district, or place whereof the inhabitants are incorporated after such commencement, or whereto the provisions of the Municipal Corporations Acts are extended by charter under the Act of 1882, but to no other place].

(*c*) *Attorney-General* v. *Aspinall*, 1 Keen, 513; 2 M. & C. 613; *Attorney-General* v. *Borough of Poole*, 4 M. & C. 17; *Parr* v. *Attorney-General*, 8 Cl. & Finn. 409; *Attorney-General* v. *Corporation of Lichfield*, 11 Beav. 120; *Attorney-General* v. *Mayor of Waterford*, 9 I. R. Eq. 522; [*Attorney-General* v. *Mayor of Brecon*, 10 Ch. D. 204; *Attorney-General* v. *Mayor of Stafford*, W. N. 1878, p. 74.]

[(*d*) *Law Guarantee and Trust Society* v. *Governor and Company of Bank of England*, 24 Q. B. D. 406, 411.]

Bank of England cannot be a trustee.

The Company will not enter notice of instruments *inter vivos* upon their books; and though they were formerly obliged by certain Acts of Parliament to enter the wills, or at least extracts from the wills, of deceased proprietors of stock, the object of the legislature, as the Court determined, was not to make the Company responsible for the due administration of the fund according to the equitable right, but to enable them to ascertain who under the will were the persons legally entitled (*a*). Had the construction been otherwise, the Bank of England would have been trustee for half the families in the kingdom. By 8 & 9 Vict. cap. 97 [repealed by 33 & 34 Vict. c. 69, but substantially re-enacted by the National Debt Act, 1870 (*b*)] executors and administrators of a deceased holder of stock are enabled to transfer on producing probate or letters of administration, and the Acts requiring an entry or registration by the Bank of any will or codicil are repealed (*c*).

[National Debt Commissioners and savings banks.]

[By the Government Annuities Act, 1882 (*d*), s. 8, the National Debt Commissioners or any savings bank are not to be affected by notice of any trust express implied, or constructive affecting any savings bank annuity or insurance (except such trusts as are from time to time recognized by law in relation to deposits in savings banks and except such trusts as are provided for by the Married Women's Property Acts.)]

Fence covert ought not to be appointed trustee. Has sufficient discretion.

4. A *feme covert* may be a trustee, but it would not be advisable to select a *feme covert* (*e*).

There is here no absolute want of discretion, for a woman has no less judgment after marriage than before (*f*); nay, as was quaintly added by Sir John Trevor, she rather improves it by her husband's teaching (*g*). The reasons upon which her disabilities are founded, are her own interest or her husband's, or both (*h*). Where these are not concerned, she possesses as much legal capacity, as if she were perfectly *sui juris*. Thus, she may execute powers simply collateral (*i*), and (somewhat contrary to principle)

(*a*) *Hartga* v. *Bank of England*, 3 Ves. 55; *Bank of England* v. *Parsons*, 5 Ves. 665; *Bank of England* v. *Lunn*, 15 Ves. 583, *per* Lord Eldon; *Humberstone* v. *Chase*, 2 Y. & C. 209.

[(*b*) 33 & 34 Vict. c. 71, s. 23.]

(*c*) As to the state of the law before the Act of 8 & 9 Vict., see 3rd Edit. p. 32, note (1).

[(*d*) 45 & 46 Vict. c. 51.]

(*e*) *Lake* v. *De Lambert*, 4 Ves. 595, *per* Lord Loughborough; and see *Re Kaye*, 1 L. R. Ch. App. 387.

(*f*) *Compton* v. *Collinson*, 2 B. C. C. 387, *per* Buller, J.; *Hearle* v. *Greenbank*, 1 Ves. 305, *per* Lord Hardwicke; *Bell* v. *Hyde*, Pr. Ch. 330, *per* Sir John Trevor; and see marginal note to *Moore* v. *Hussey*, Hob. 95; and see *Needler* v. *Bishop of Winchester*, Hob. 225.

(*g*) *Bell* v. *Hyde*, Pr. Ch. 330.

(*h*) *Compton* v. *Collinson*, 2 B. C. C. 387, *per* Buller, J.

(*i*) Co. Lit. 112, a; ib. 187, b; *Lord Antrim* v. *Duke of Buckingham*,

even powers appendant, or in gross (*a*). Now at law, the trustee is considered as the sole and absolute proprietor, and therefore he can have no power that does not flow from the legal ownership; but in equity, the absolute interest is vested in the *cestui que trust*, and, as the trustee is regarded in the light of a mere instrument, any authority communicated to a trustee must have the character of a power simply collateral (*b*). It follows that if a discretionary trust be committed to a *feme covert*, there is nothing to prevent her due administration of it, so far as relates to her legal *judgment and capacity*. At the same time a woman's will is not always her own, and if a trust were confided to a *feme covert*, the husband would, in fact, exercise no little influence; and, indeed, as [in cases not falling within the Married Women's Property Act, 1882], the husband is liable for her breaches of trust, [and as this liability is not confined to losses caused by her active misconduct, but extends to breaches of trust arising from negligence (*c*),] he must, for his own protection, look to the manner in which she discharges the office, and therefore she cannot be allowed to execute the trust without his concurrence (*d*). [This last remark, however, does not apply to the case of a married woman appointed a trustee, or to a *feme sole* trustee, marrying since the recent Act (*e*), in both of which cases the husband is exempted from all liability in respect of her breaches of trust committed during the coverture, unless he has acted or intermeddled in the trust; but the relief afforded to the husband by the Act has, by taking away from the *cestuis que trust* the security of the husband's liability, made the appointment of a married woman to be a trustee, at least as impolitic as it was before the Act.]

Her inability to pass the legal estate.

But further, the appointment of a *feme covert* [was, prior to the recent Act,] attended with inconvenience from her inability (except with the concurrence of her husband and through expensive forms) to join in the requisite assurances. At common law, if land be vested in a *feme covert* upon *condition* to enfeoff another, she may execute the feoffment by her own act, without

2 Freem. 168, *per* Lord Keeper Bridgman; *Blithe's Case*, ib. 91, *vid.* 2nd resolution; *Godolphin* v. *Godolphin*, 1 Ves. 23, *per* Lord Hardwicke.

(*a*) See Sugden on Powers, c. 5, sect. 1, 8th Ed.

(*b*) See *infra*.

(*c*) *Bahin* v. *Hughes*, 31 Ch. Div. 390.

(*d*) See *Smith* v. *Smith*, 21 Beav. 385; *Drummond* v. *Tracy*, Johns. 608; *Kingham* v. *Lee*, 15 Sim. 401; *Avery* v. *Griffin*, 6 L. R. Eq. 606; *Lloyd* v. *Pughe*, 8 L. R. Ch. App. 88; *Wainford* v. *Heyl*, 20 L. R. Eq. 321; [*Re Smith's Estate*, 48 L. J. N. S. Ch. 205].

[(*e*) 45 & 46 Vict. c. 75, ss. 1, 18, 24.]

the intervention of her husband (*a*); and hence it has been argued, that, in the case of a trust, she may, equally without her husband's concurrence, convey the estate to the parties *equitably* entitled (*b*). But between the two cases there is this clear and obvious distinction, that a *condition* is part and parcel of the common law, while a *trust* is only recognised in the *forum* of a court of equity; unless, therefore, the trust be so worded as to bear the construction of a legal condition, it seems impossible to contend that an instrument otherwise inoperative should, from the mere circumstance of the trust, which a court of law cannot notice, acquire a validity (*c*).

Feme covert a trustee for sale.

5. Should a *feme covert*, [married before the recent Act, be in respect of a trust created before the Act,] a trustee for sale, it would seem, if these views be correct, that she can *exercise the discretion*, and with the aid of the Fines and Recoveries Act, which requires the concurrence of the husband, can pass the *estate*. But there remains the consideration to whom the purchase-money is to be paid, and who is to sign the receipt. If it be paid to the husband it passes into the hands of a stranger, and if it be paid to the wife, the law immediately transfers it to the husband who is a stranger. If any receipt be taken it should be the joint receipt of the husband and wife (*d*). But the safest course would be to pay the money to the account of the wife at some responsible bank, payable upon the joint receipt of the husband and wife, and to remain there until required for the purposes of the trust, and if the husband and wife took it out of the bank for any other purpose he would be liable as for a breach of trust.

When the husband is a lunatic or idiot, or living apart from the wife, or otherwise incapable (as from infancy (*e*), or from being abroad and not heard of for years (*f*)), of joining in the execution of a deed, the [High Court of Justice (*g*)] has power to dispense with the husband's concurrence, [in which case the deed need not be acknowledged by the *feme covert* (*h*)]. The Court

(*a*) *Daniel* v. *Ubley*, Sir W. Jones, 137.

(*b*) *Daniel* v. *Ubley*, Sir W. Jones, 138, *per* Whitlock, and Dodridge, JJ.

(*c*) See Mr. Hargrave's Observations, Co. Lit. 112, a, note (6); and Mr. Fonblanque's Treat. on Equity, vol. i. p. 92; *McNeillie* v. *Acton*, 2 Eq. Re. 25.

(*d*) See *Drummond* v. *Tracy*, Johns. 611.

(*e*) *Re Haigh*, 2 C. B. N.S. 198.

(*f*) *Re Harriet Hedges*, W. N. 1867, p. 19; *Re Tarboton*, W. N. 1867, p. 276; *Ex parte Robinson*, 4 L. R. C. P. 205.

[(*g*) This jurisdiction, originally given to the Court of Common Pleas by the Fines and Recoveries Act, s. 91, has been transferred to the High Court of Justice by the "Supreme Court of Judicature Act, 1873." See *Ex parte Thompson*, W. N. 1884, p. 28.]

[(*h*) *Goodchild* v. *Dougal*, 3 Ch. D. 650.]

has frequently exercised this jurisdiction by enabling a *feme covert* entitled to freeholds or copyholds (*a*), in fee simple (*b*), in fee tail (*c*), or for life, either in possession or reversion (*d*), or to dower (*e*), or to leaseholds (*f*), [or to personal estate falling under 20 & 21 Vict. c. 57] (*g*), "by deed or surrender, to dispose of, release, or surrender all *her* estate and interest" (the words of the order on one occasion) (*h*), in the premises. The order therefore will not affect the husband's curtesy, if any (*i*). The Court will not direct the *form* of conveyance (*j*), but it looks to the propriety of the order with reference to each particular estate, and it will not give the *feme covert* a roving power of disposition over *any* property which she may happen to have (*k*). In most cases the Court has made the order to enable the wife to deal with her own property for her maintenance, but in other cases the court has enabled the *feme covert* to execute a trust (*l*): and it would seem therefore that where there is an incapacity of the husband to join in a deed, the *feme covert* (who has no want of discretion) can execute the trust by the aid of the Court.

Bare Trustee.

6. By 37 and 38 Vict. c. 78. s. 6, it is enacted that when any *freehold* or *copyhold* hereditaments shall be vested in a married woman as a *bare trustee* (*m*), she may convey or surrender the same as if she were a feme sole.

[Married Women's Property Act.]

[7. Now by sect. 18 of the Married Women's Property Act, 1882 (*n*), a married woman who is an executrix or administratrix

(*a*) *Ex parte Shuttleworth*, 4 Moore, and Scott, 332, note.

(*b*) *Re Kelsey*, 16 C. B. 197; *Re Cloud*, 15 C. B. N.S. 833; *Re Woodall*, 3 C. B. 639; *Re Woodcock*, 1 C. B. 437.

(*c*) *Ex parte Thomas*, 4 Moore and Scott, 331.

(*d*) *Ex parte Gill*, 1 Bing. N. C. 168.

(*e*) *Re Turner*, 3 C. B. 639.

(*f*) *Re Harriet Hedges*, W. N. 1867, p. 19.

[(*g*) *Re Alice Rogers*, 1 L. R. C. P. 47; *Ex parte Alice Cockerell*, 4 C. P. D. 39.]

(*h*) *Re Kelsey*, 16 C. B. 197.

[(*i*) By sect. 91 of the Fines and Recoveries Act, all deeds executed by the wife in pursuance of the order shall (but without prejudice to the rights of the husband as then existing independently of the Act) be as good and valid as they would have been if the husband had concurred. The words in parenthesis have occasioned some difficulty, but it is conceived that the only rights of the husband reserved by them are such rights as he is entitled to by virtue of an independent interest, and that the wife's deed passes all such estate and interest as she is by sect. 77 empowered to dispose of with the husband's consent. See *Goodchild* v. *Dougal*, 3 Ch. D. 650; *Re Jakeman's Trusts*, 23 Ch. D. 344; and see *Fowke* v. *Draycott*, 33 W. R. 701; 54 L. J. Ch. 977, where it was held that the wife's disposition did not deprive the husband of the common law rights which he had acquired by the coverture.]

(*j*) *Re Turner*, 3 C. B. 166.

(*k*) *Re Cloud*, 15 C. B. N.S. 833.

(*l*) *Re Mirfin*, 4 M. & G. 635; *Re Haigh*, 2 C. B. N.S. 198; [*Re Caine*, 10 Q. B. D. 284.]

[(*m*) See *Re Docwra*, 29 Ch. D. 693.]

[(*n*) 45 & 46 Vict. c. 75.]

alone, or jointly with any other person, or a trustee alone, or jointly with any other person, may transfer or join in transferring any annuity or bank deposit, or any part of the public stocks or funds, or of the stocks or funds of any bank, or any share stock debenture, debenture stock, or other benefit right claim, or other interest of or in any corporation, company, public body or society, without her husband as if she were a feme sole; and this seems to apply to trusts in existence at the time the Act was passed.

8. Where the feme has been married or the trust has been undertaken by her since the commencement of the Married Women's Property Act, 1882 (1 January, 1883), she can execute the trust without the concurrence of her husband, and as if she were a feme sole (*a*). Where therefore she is a trustee for sale she can exercise the discretion, pass the estate, and sign a good receipt for the purchase-money.] Feme sole.

9. It is almost equally undesirable to appoint a *feme* who is single a trustee, for should she marry [she would be liable to be influenced by her husband who, so long as he abstained from active interference, would be under no liability to make good any breaches of trust committed by her during the coverture.] The Court at one time refused to appoint a *feme sole* a trustee, as, in the event of her marriage [it might lead to inconvenience as the husband would have the power of interfering] (*b*). But in a more recent case the M. R., after consulting with the other judges, appointed a *feme sole* a trustee (*c*), and the Lords Justices have since made a similar order (*d*).

[(*a*) 45 & 46 Vict. c. 75, ss. 1. 2, 5, 24. See *Kingsman* v. *Kingsman*, 6 Q. B. Div. 122, 128. It is open to argument whether the 2nd and 5th sections of the Act apply to trust property, more particularly as the 18th section enables a married woman who is an executrix, administratrix, or trustee, to sue and be sued, and to transfer the trust property in certain special cases without her husband, as if she were a *feme sole*, and this section is to some extent redundant if the 2nd and 5th sections apply to trust property. It is, however, clear from the 1st and 24th sections that a married woman may accept a trust, or the office of executrix or administratrix, as if she were a *feme sole;* and that her husband is exempted from all liabilities in respect of her breaches of trust, so long as he does not act or intermeddle in the trust; and it would be a highly inconvenient construction of the Act to hold that a married woman is not empowered to acquire, hold, and dispose of the trust property generally without the concurrence of her husband. And inasmuch as the language of sections 2 and 5 is wide enough to include trust property, it is conceived that any inference to be drawn from section 18 is not sufficient to restrict the operation of sections 2 and 5 to property belonging to married women beneficially.]

(*b*) *Brook* v. *Brook*, 1 Beav. 531.

(*c*) *Re Campbell's Trusts*, 31 Beav. 176.

(*d*) *In re Berkley*, 9 L. R. Ch. App. 720.

Infant ought not to be appointed Trustee.

Has no legal discretion.

10. An *infant* labours under still greater disability than a *feme covert;* for, first, as regards *judyment and discretion*, a *feme* is admitted to *have* capacity, though she cannot in all cases freely exercise it; but an infant is said altogether to *want* capacity (*a*). An infant cannot be steward of the court of a manor (*b*), or attorney for a person in a suit (*c*), or guardian to a minor (*d*), or be a bailiff or receiver (*e*); but can only discharge such acts as are merely ministerial, as to be an attorney to deliver seisin (*f*), or as a lord of a manor to give effect to a custom (*g*), or to appoint a seneschal (*h*). So he might, until an Act to the contrary (*i*), have been, as executor, the channel or conduit pipe through which the assets found their way to the hands of creditors in a due course of administration (*j*); but had he acted otherwise than ministerially, as by signing an acquittance without receipt of the money, such an exercise of discretion had been actually void (*k*). [However an infant may by instrument *inter vivos* (*l*) exercise a power simply collateral over both real and personal estate (*m*), and as to personal estate he may exercise a power in gross notwithstanding that it may involve the application of discretion (*n*), but as to real estate it would seem that such a power could not be exercised unless expressly authorized by the instrument creating the power (*o*). And where an intention appears that the power is to be exercisable notwithstanding infancy, an infant may appoint even although his interest may be affected by the appointment (*p*). A trust which requires the exercise of discretion cannot be executed by an infant (*q*)].

(*a*) *Hearle* v. *Greenbank*, 3 Atk. 712, and 1 Ves. 305, *per* Lord Hardwicke; *Grange* v. *Tiving*, O. Bridg. 108, *per* Sir O. Bridgman; *Compton* v. *Collinson*, 2 B. C. C. 387, *per* Buller, J.; and see *Sockett* v. *Wray*, 4 B. C. C. 486.

(*b*) Co. Lit. 3, b; and see Mr. Hargrave's note (4), ib. But acts done by an infant in the character of steward cannot be avoided by reason of his disability. *Eddleston* v. *Collins*. 3 De G. M. & G. 1.

(*c*) Co. Lit. 128, a; Br. Ab. "Covert. and Infant," pl. 55, and see *Hearle* v. *Greenbank*, 3 Atk. 710.

(*d*) Co. Lit. 88, b; but see *Re D'Angibau*, 15 Ch. Div. 228, 245.]

(*e*) Co. Lit. 172, a.

(*f*) Co. Lit. 52, a; Br. Ab. "Covert. and Infant," pl. 55.

(*g*) 1 Watk. on Copyh. 24.

(*h*) *Halliburton* v. *Leslie*, 2 Hog. 252.

(*i*) 38 G. 3. c. 87, s. 6.

(*j*) Toller on Executors, 31.

(*k*) *Russel's case*, 5 Rep. 27, a; Co. Lit. 172, a; ib. 264, b; 1 Roll. Ab. 730, F. 2.

(*l*) But not by will; 7 Will. & 1 Vict. c. 26, s. 7.

[(*m*) Sug. on Pow. 8th ed. 177, 911; 1 Preston on Abstracts, 325; *King* v. *Bellord*, 1 H. & M. 343; *Re D'Angibau*, 15 Ch. Div. 228.]

[(*n*) *Re D'Angibau, ubi sup.*]

[(*o*) *Hearle* v. *Greenbank*, 3. Atk. 695; *S. C.* 1 Ves. 298; *Re Cardross's Settlement*, 7 Ch. D. 728.]

[(*p*) *Re Cardross's Settlement*, 7 Ch. D. 728; *Re D'Angibau*, 15 Ch. Div. 228.]

(*q*) *King* v. *Bellord*, 1 H. & M. 343.]

Power of passing the estate.

11. With respect to an infant's ability to pass the estate, it seems to be generally agreed that, at common law, a *feoffment* of land (*a*) or an actual *delivery* of goods and chattels (*b*), is an act of so great solemnity, that it serves to carry the present possession, and is voidable only, and not void. Where the property is of an *incorporeal* nature, as the delivery of the thing itself is impossible, the common law has substituted the kindred precaution of *delivery of the deed.* The effect of a deed delivered by an infant has been much disputed; by some it has been held to be absolutely null and void (*c*), by others to be voidable only (*d*), and by others again to be void or voidable, as the validity of the execution is taken to be for the infant's benefit or not (*e*). Another opinion still (which is that of Perkins (*f*), and was adopted in the case of *Zouch* v. *Parsons* (*g*), and may be regarded as the doctrine of the present day) is, that an infant's deed, where the delivery of it answers to livery of seisin, and operates as the conveyance of an interest, is merely voidable; but where it does not take effect as an assurance by delivery of the deed, as in a power of attorney (*h*), then it is actually void. Lord Mansfield, however, subjoined the qualification, that if a case should arise where it would be more beneficial to the infant that the deed should be considered as void, as if he might incur a forfeiture, or be subject to damage, or a breach of trust in respect of a third person (*i*), unless it was deemed void, the reason of an infant's privileges would in such case warrant an exception from the rule (*j*). Where the instrument *carries no solemnity with it,* equivalent to feoffment or delivery, the validity of the act must then depend on the question how far the assurance promotes the interest of the infant (*k*).

Effect of feoffment, or delivery of chattels.

Effect of delivery of a deed.

Effect of his assurance without feoffment, delivery or deed.

(*a*) *Thompson* v. *Leach*, 3 Mod. 311, *per Cur.*: Br. Ab. "Covert. and Inf." pl. 1; and see Co. Lit. 42, b. 51, b; *Whittingham's case*, 8 Rep. 42, b; Br. Ab. "Covert. and Inf." pl. 40.

(*b*) Perk. 14; Br. Ab. "Covert. and Inf." pl. 1.

(*c*) Br. Ab. "Covert. and Inf." pl. 1 & 10; *Lloyd* v *Gregory*, Cro. Car. 502, *per Cur.*; *Thompson* v. *Leach*, 3 Mod. 310, *per Cur.* See observations on the last two cases in *Zouch* v. *Parsons*, 3 Burr. 1806 & 1807; and see *Humphreston's case*, 2 Leon. 216.

(*d*) *Norton* v. *Turvill*, 2 P. W. 145, *per* Sir J. Jekyll.

(*e*) See *Zouch* v. *Parsons*, 3 Burr. 1804; and see *Humphreston's case*, 2 Leon. 216; *Lloyd* v. *Gregory*, Cro. Car. 502; *Nightingale* v. *Earl Ferrers*, 3 P. W. 210; *Inman* v. *Inman*, 15 L. R. Eq. 260.

(*f*) Sects. 12 & 154; and see Br. Ab. "Dum fuit infra ætatem," pl. 1; id. "Covert. and Inf." pl. 12; *Stone* v. *Wythipole*, Cr. El. 126; *Marlow* v. *Pitfield*, 1 P. W. 559.

(*g*) 3 Burr. 1807; confirmed by the recent case of *Allen* v. *Allen*, 1 Conn. & Laws. 427, 2 Drur. & War. 307.

(*h*) See Br. Ab. "Covert. and Inf." pl. 1; *Whittingham's case*, 8 Rep. 45, a.

(*i*) *Quære* if a Court of law could notice a breach of trust. See *Warwick* v. *Richardson*, 10 M. & W. 295. [But see now 36 & 37 Vict. c. 66, s. 24.]

[(*j*) *Zouch* v. *Parsons*, 3 Burr. 1807.

(*k*) *Humphreston's case*, 2 Leon. 216;

[Severance of joint tenancy.]

[A joint tenancy may be severed by an infant by an instrument taking effect by delivery of his hand, but as such instrument is voidable by the infant on attaining full age, there may arise this disadvantage to the other joint tenants, that during a certain period they might hold and consider that the infant had severed the joint tenancy, and then find at a later period that he had a right to undo that which he seemed to have done (*a*).

[Covenant by an infant.]

12. A covenant by an infant, if for his benefit, is not void but only voidable; and a covenant by an infant *feme*, in contemplation of her marriage, to settle her property to be acquired during the coverture, is binding until it is avoided; and the *feme* may, after attaining twenty-one, and during her coverture, either avoid the covenant or ratify it as to any property for the time being belonging to her for her separate use, but prior to the recent Act her ratification would not bind property acquired by her after the time of such ratification (*b*). Since the Married Women's Property Act, 1882 (*c*), it is conceived that the ratification by the *feme covert* of the covenant would bind not only the separate property she had then acquired, but any separate property she might thereafter acquire during the coverture.

[Appointing an attorney.]

13. By a recent Act, a married woman, whether an infant or not, has power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do (*d*)].

Infant cannot be guilty of a breach of trust.

14. Another objection to an infant trustee is, that he cannot be decreed to make satisfaction on the ground of a breach of trust (*e*). However, an infant has no privilege to cheat men (*f*), and therefore he will not be protected, if he be old and cunning enough to contrive a fraud (*g*).

and see *Lloyd* v. *Gregory*, Cro. Car. 502; Co. Lit. 51, b; *Grange* v. *Tiving*, Sir O. Bridg. 117.

[(*a*) *Burnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D. 416, 422; 54 L. J. Ch. 466, 469, *per* Pearson, J., explaining *May* v. *Hook*, Butler's Note to Co. Litt. 246 a; [and see Simpson on Infants, 2nd. ed. p. 24.]

[(*b*) *Smith* v. *Lucas*, 18 Ch. D. 531; *Willoughby* v. *Middleton*, 2 J. & H. 344; *Burnaby Equitable Reversionary Interest Society*, 28 Ch. D. 416; *Re Tottenham's Estate*, 17 L. R. Ir. 174.]

[(*c*) 45 & 46 Viet. c. 75.]

[(*d*) 44 & 45 Viet. c. 41, s. 40.]

(*e*) See *Whitmore* v. *Weld*, 1 Vern. 328; *Russell's case*, 5 Rep. 27, a; *Hindmarsh* v. *Southgate*, 3 Russ. 324. [Though there might be circumstances under which an infant trustee might be held liable after his majority for moneys previously received; see *Re Garnes*, 31 Ch. Div. 147, where the proper form of inquiry as to moneys received by an infant trustee was considered and settled.]

(*f*) *Evroy* v. *Nicholas*, 2 Eq. Ca. Ab. 489, *per* Lord King.

(*g*) See *Cory* v. *Gertcken*, 2 Mad. 40; *Evroy* v. *Nicholas*, 2 Eq. Ca. Ab. 488; *Earl of Buckingham* v. *Drury*, 2 Ed. 71, 72; *Clare* v. *Earl of Bedford*, 13 Vin. 536; *Watts* v. *Cresswell*, 9 Vin.

From the great inconveniences attending the appointment of an infant as trustee, there arises a strong presumption wherever property is given to an infant, that he is intended to take it *not as trustee*, but *beneficially* (*a*). Consequent presumption that he takes not as trustee, but beneficially.

15. An *alien* until a recent Act (*b*) could not effectually be a trustee in respect of freeholds or chattels real, for the policy of the law would not allow an alien to sue or be sued to the prejudice of the Crown touching lands in any court of law or equity (*c*); and on inquisition found, the legal estate of the property vested by forfeiture in the Crown. Alien formerly could not be trustee of freeholds or chattels real.

In a case where a testator devised real estate to his wife and an *alien* upon trust to sell, and they sold accordingly, and executed a conveyance, a question afterwards arose whether the purchaser had a good title, and with the view of curing the defect an Act of Naturalisation was obtained; but it was held, that the common form of the Act of Naturalisation did not confirm the purchaser's title *retrospectively*, but that the objection remained. The parties had endeavoured to introduce into the bill special words to meet the case, but the departure from the usual course was found impracticable (*d*). Real estate devised to British subject and alien upon trust.

In respect of chattels *personal* there was never any objection to an *alien* friend as trustee as regards his ability either to take or to hold the estate. Chattels personal.

Now by 33 Vict. c. 14, sect. 1, an alien may take, acquire, hold, and dispose of *real* and personal property of every description, in the same manner as if he were a natural born subject. The objection, therefore, to an alien being a trustee of freeholds or chattels real has been removed. 33 Vict. c. 14.

If, however, the alien be domiciled abroad, it is an objection to his *fitness* for the office of trustee, as he is not amenable to the jurisdiction of the Court (*e*). Alien domiciled abroad not a fit trustee.

16. Bankrupts may be appointed trustees, should any one be disposed to commit the administration of his property to those Bankrupts not absolutely disqualified.

415; *Beckett* v. *Cordley*, 1 B. C. C. 358; *Savage* v. *Foster*, 9 Mod. 37; *Overton* v. *Banister*, 3 Hare, 503; *Stikeman* v. *Dawson*, 1 De G. & Sm. 503; *Wright* v. *Snowe*, 2 De G. & Sm. 321; *Davies* v. *Hodgson*, 25 Beav. 177; *Re Constantinople & Alexandra Hotel Co., Ebbett's case*, 18 W. R. 202; 21 L. T. N.S. 574; [*Lemprière* v. *Lange*, 12 Ch. D. 675.]

(*a*) *Lamplugh* v. *Lamplugh*, 1 P. W. 112; *Blinkhorne* v. *Feast*, 2 Ves. sen. 30; *Mumma* v. *Mumma*, 2 Vern. 19; *Taylor* v. *Taylor*, 1 Atk. 386; *Smith* v. *King*, 16 East, 283; and see *King* v. *Denison*, 1 V. & B. 278.

(*b*) 33 Vict. c. 14.

(*c*) Gilb. on Uses, 43; and see *Fish* v. *Klein*, 2 Mer. 431.

(*d*) *Fish* v. *Klein*, 2 Mer. 431.

(*e*) See *Meinertzhagen* v. *Davis*, 1 Coll. 335; *Re Guibert*, 16 Jur. 852; *Re Harrison's Trusts*, 22 L. J. N.S. Ch. 69; *Curtis's Trusts*, 5 I. R. Eq. 429.

who have not been sufficiently careful in the management of their own. The past or any subsequent act of bankruptcy will have no operation upon the trust estate.

Cestuis que trust should not, as a general rule, be appointed trustees.

17. *Cestuis que trust* are not, as such, incapacitated from being trustees for themselves and others; but, as a general rule, they are not altogether fit persons for the office, in consequence of the probability of a conflict between their interest and their duty (*a*).

Relatives.

18. Sir John Romilly, M.R., considered it also objectionable to appoint any *relative* a trustee, from the frequency of breaches of trust committed by trustees at the instance of *cestuis que trust* nearly connected with them (*b*).

However, there is no positive legal objection to appointing either a *cestui que trust* or a relative, and indeed it is not always easy to find a trustee who is neither a *cestui que trust* nor a relative, and this the Court itself has experienced; for, notwithstanding its repugnance to such a course, it has been obliged occasionally to appoint a relative, who is also a *cestui que trust*, to be a trustee (*c*). In one case the Court, in appointing two new trustees, allowed the *husband* of a *cestui que trust* to be one of them upon his undertaking, that, if he became sole trustee, he would immediately take steps for the appointment of a co-trustee (*d*), [and in another case the appointment was made with a direction, that in case the husband should become sole trustee, a new trustee should forthwith be appointed (*e*). But in a recent case in Lunacy, where three new trustees were appointed, the Court allowed the husband of the tenant for life to be one of them, without requiring any such undertaking (*f*);] and in other cases the *husbands* of *cestuis que trust* in remainder have been appointed trustees (*g*); [but the late Master of the Rolls refused, in a recent case, to appoint a man a trustee of his own marriage settlement, though all the persons interested assented to the application, and no other person could be found to accept

(*a*) *Forster* v. *Abraham*, 17 L. R. Eq. 351.

(*b*) *Wilding* v. *Bolder*, 21 Beav. 222.

(*c*) *Ex parte Clutton*, 17 Jur. 988; *Ex parte Conybeare's Settlement*, 1 W. R. 458; *Re Clissold's Settlement*, 10 L. T. N.S. 642; and see *Re Lancaster Charities*, 9 W. R. 192; *Passingham* v. *Sherborn*, 9 Beav. 424; *Barnes* v. *Addy*, 9 L. R. Ch. App. 244; [*Tempest* v. *Lord Camoys*, 58 L. T. N.S. 221.]

(*d*) *Re Hattatt's Trusts*, 18 W. R. 416; 21 L. T. N.S. 781 [and see *Re Burgess's Trusts*, W. N. 1877, p. 87; *Re Lightbody's Trusts*, 33 W. R. 452; 52 L. T. N. S. 40.]

[(*e*) *Re Parrott*, W. N. 1881, p. 158; 30 W. R. 97.]

[(*f*) *Re Jesson*, 7 Aug. 1878, M. S.]

(*g*) *Re Davis's Trusts*, 12 L. R. Eq. 214; [*Re Sarah Knight's Will*, 26 Ch. Div. 82.]

the office, on the ground that the wife, who had a life interest to her separate use without power of anticipation, would not be properly protected (*a*).

[Settled Land Act.]

Neither the tenant for life of settled land (*b*) nor his solicitor (*c*) will be appointed by the Court a trustee of the settlement under the Settled Land Act, 1882. And in one case the Court refused to appoint two brothers trustees, and said there must be two independent trustees (*d*). In a recent case the Court refused to sanction the appointment by a continuing trustee, who was a solicitor and acted as such for the trust and for some of the *beneficiaries*, of his son and partner, who was also a solicitor, as a co-trustee in the place of the retiring trustee, but intimated that such an appointment made *bonâ fide* out of Court would be valid (*e*), and the Court has refused to appoint a person interested in remainder after the estate of an infant tenant in tail (*f*).

[Charity.]

19. Where a charity has been founded for the purpose of teaching or expounding certain religious doctrines, or for the exclusive benefit of persons holding certain religious views, the trusteeship of the charity should be confined to persons holding those doctrines or views (*g*), and the same rule would seem to apply where the religious object of the charity is the primary object, though there may be a secondary object, as for instance the repairing of roads, which can be administered as well by persons of one sect or religious belief as of another. But where the object of the charity is eleemosynary, and it is not restricted to persons of any particular religious denomination, the trusteeship need not be confined to persons holding the doctrines of the church or sect to which the founder belonged, but the most eligible person for the office may be selected without regard to his religious views (*h*).]

Proper number of trustees.

20. We may here remark, that care should be taken not only to provide for the fitness of the trustee, but also to secure an adequate number of trustees. A single trustee, whether originally appointed such or become so by survivorship, has the absolute and unlimited control at law over the property; and should he

[(*a*) *Re Lowdell's Trust*, M. S. S., M. R. 11 June, 1877.]

[(*b*) *Re Harrop's Trusts*, 24 Ch. D. 717.]

[(*c*) *Re Kemp's Settled Estates*, 24 Ch. Div. 485.]

[(*d*) *Re Knowles's Settled Estates*, 27 Ch. D. 707.]

[(*e*) *Re Norris*, 27 Ch. D. 333.]

[(*f*) *Re Paine's Trusts*, 33 W. R. 564.]

[(*g*) *Re Ilminster Free School*, 4 Jur. N. S. 676; S. C. *nom. Baker* v. *Lee*, 8 H. L. C. 495; *Attorney-General* v. *Pearson*, 3 Mer. 353; *Attorney-General* v. *St. John's Hospital, Bath*, 2 Ch. D. 554.]

[(*h*) *Attorney-General* v. *St. John's Hospital, Bath*, *ubi sup.*]

become involved in difficulties, he is under a temptation which, notwithstanding recent penal enactments, must still be regarded as strong, to sustain his credit by resorting to a fund of which he can with certainty possess himself, and without the fear of immediate detection. The fallacious hope of replacing the money before the day of payment arrives, has lulled the conscience of many, not the worst of mankind, when suffering under the pressure of poverty. There can be no objection to the appointment of a single trustee, where the trust reposed in him is merely a nominal confidence; but where the administration of the trust involves the receipt and custody of money, the safeguard of at least two trustees ought never to be dispensed with (*a*).

Appointment of new trustees.

And on the death of one of the original trustees, no time should be lost in restoring the fund to its proper security by the substitution of a new trustee, a precaution, it is feared, but too frequently neglected, from motives of delicacy,—the surviving trustee being sensitive, and conceiving his honesty to be called into question, and the *cestuis que trust* (often too ignorant of the world to see the necessity of taking precautions against fraud), being apt to suspect their legal adviser of a wish to create business at the expense of the estate.

To guard against the constant recurrence of appointments of new trustees, it is common, at least where the property is considerable, to appoint four trustees originally, for then, on the decease of the first or even a second trustee, an immediate substitution is not very material, but the safe rule is, where money is concerned, always to appoint at least three trustees, and to keep the number full. As regards stock, more than *four* trustees are scarcely ever appointed, and it is a *general* rule of the Bank not to allow stock to be transferred into the names of more than four joint proprietors. But in *special* cases so many as five or six have been admitted. (*b*)

(*a*) See *Baillie* v. *McKewan*, 35 Beav. 183; *Re Dickson's Estate*, 3 I. R. Eq. 345; [*Grant* v. *Grant*, 34 L. J. Ch. 641.]

[(*b*) It seems also that the Bank object to government stock of one description being placed in the names of the same persons except in the same order; *Re Newman's Trusts*, W. N. 1887, p. 47. And, as a corporation and an individual cannot hold stock as joint tenants, the Bank cannot be compelled to transfer stock into the names of an individual and a trust company; *Law Guarantee Society* v. *Bank of England*, 24 Q. B. D. 406.]

SECTION III.

WHO MAY BE CESTUI QUE TRUST.

1. It may be laid down as a general rule that as *æquitas sequitur legem*, those who are capable of taking the legal estate, may, through the channel of the trust, be made recipients of the equitable.

The Crown may be *cestui que trust.*

2. A trust may be declared in favour of the *Sovereign.* While uses were in their fiduciary state, it was held that in order effectually to limit a use to the Crown, the title must have been matter of record. "It behoveth," says Lord Bacon, "that both the declaration of the use and the conveyance itself be matter of record, because the king's title is compounded of both; I say not appearing of record, but by conveyance of record. And, therefore, if I *covenant* with J. S. to levy a fine to him to the king's use, which I do accordingly, and the *deed of covenant be not enrolled*, and the deed be found by office, the use vesteth not. *E converso*, if enrolled. If I covenant with J. S. to enfeoff him to the king's use, and the deed be enrolled and the feoffment also be found by office, the use vesteth. But if I levy a fine, or suffer a recovery to the king's use, and declare the use by deed of covenant enrolled, though the king be not a party, yet it is good enough" (*a*). These observations apply only to original gifts of land from a subject to the Crown, and, when the limits of the prerogative were much less accurately defined than they now are, the interposition of such a barrier between the subject and the Crown may have been necessary. Where an equitable interest in real or personal estate (*b*) accrued to the Crown by course of law, as by the treason of the subject, or by forfeiture, or on the doctrine of *bona vacantia*, it was not doubted that the Crown could sue without even a previous inquisition. According to Sir T. Clarke, an inquisition was necessary only where the Crown asserting its prerogative chose to make a seizure without interpleading with the subject in Court to establish its title, but where the Crown waiving its prerogative interpleaded with the subject, as by filing a bill, there an inquisition was unnecessary and superfluous (*c*).

(*a*) Bac. on Uses, 60; and see Gilb. on Uses, 44, 204.

(*b*) *Middleton* v. *Spicer*, 1 B.C.C. 201; *Brummell* v. *M'Pherson*, 5 Russ. 263.

(*c*) *Burgess* v. *Wheate*, 1 Eden, 188. See now 33 & 34 Vict. c. 23.

[By the Intestates Estates Act, 1884 (*a*), the Court is empowered, on the application or with the consent of the Attorney-General, notwithstanding that no office has been found, and no commission issued or executed, to order a sale of any hereditament or any estate or interest therein to which the Crown is entitled, and to dispose of the proceeds of such sale (*b*).]

A corporation.

3. A trust of lands cannot be limited to a *corporation* without a license from the Crown, both on general principle, and also by analogy to the statutory enactment as to uses (*c*). If corporations could take in the *names of trustees* without a license, the rule requiring a license would become a dead letter and the rights of the Crown effectually evaded, for it makes no material difference whether the legal estate be limited to the corporation directly or to a trustee for the corporation.

Alien.

4. As regards *an alien*, a trust of lands might always have been *declared* in his favour (*d*), and might as against all but the Crown have been enforced by him for his own benefit (*e*); but as the same mischiefs would follow from an alien's enjoyment of the equitable, as of the legal interest in lands (*f*), the equitable interest might at any time have been claimed by the Crown. The legal estate was not affected (*g*), but the Crown had the right of suing a *subpœna* against the trustee in equity (*h*). An alien could not, however, take an equitable interest by *act of law* as by descent or curtesy (*i*).

Executory trust for alien.

A distinction was taken, that although where a trust was perfected in favour of an alien the Crown might be entitled, yet where a trust in favour of an alien was not in *esse*, but only in *fieri* and executory, the Court would do no act to give it to the Crown in right of the alien (*j*).

[(*a*) 47 & 48 Vict. c. 71, s. 5.]

[(*b*) For an order for sale under this section see *Re Pratt's Trusts*, W. N. 1886, p. 144; 55 L. T. N.S. 313; 34 W. R. 757.]

(*c*) See Shep. Touch. 509; Sand. on Uses, 339, note E.; 15 Ric. II. c. 5.

(*d*) *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. Rep. 92; and see Vin. Ab. Alien, A. 8; *Godfrey and Dixon's case*, Godb. 275; Br. Feff. al. Uses, 389, a, pl. 29.

(*e*) See *Barrow* v. *Wadkin*, 24 Beav. 1; *Godfrey and Dixon's case*, Godb. 275, but see Gilb. on Uses, 43; *King* v. *Holland*, Al. 16; *S. C.* Styl. 21; *Burney* v. *Macdonald*, 15 Sim. 6; *Rittson* v. *Stordy*, 3 Sm. & G. 230.

(*f*) *Attorney-General* v. *Sands*, Hard. 495, *per* Lord Hale; *Fourdrin* v. *Gowdey*, 3 M. & K. 383. See *Burney*, v. *Macdonald*. 15 Sim. 6.

(*g*) *Rex* v. *Holland*, Al. 14; *Sir John Dack's case*, cited ib. 16; *Attorney-General* v. *Sands*, Hard. 495, *per* Lord Hale.

(*h*) *Sharp* v. *St. Sauveur*, 7 L. R. Ch. App. 351; *King* v. *Holland*, Al. 16, *per* Rolle, J.; Roll. Ab. 194, pl. 8. See *Burney* v. *Macdonald*, 15 Sim. 6; *Burgess* v. *Wheate*, 1 Eden, 188. [And see *Perry* v. *Eames* (1891), 1 Ch. 668.]

(*i*) See *Calvin's case*, 7 Rep. 49; *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. Rep. 92. As to dower, see Co. Lit. 31 b. note (9) by Harg.

(*j*) See *Burney* v. *Macdonald*, 15 Sim. 14; *Rittson* v. *Stordy*, 3 Sm. & G.

Where a testator directed an estate to be sold, and the proceeds divided amongst certain persons, some of whom were aliens; there, as according to the intention, which was supposed to be executed at the time of death, the interest devised was money, the Crown was not entitled, for the mere purpose of working a forfeiture, to exercise an election by retaining the property as land; and therefore, aliens were not debarred from enjoying their legacies in the pecuniary character which the testator had stamped upon them (*a*).

Alien might be *cestui que trust* of proceeds of sale of land.

Now by 33 Vict. c. 14, an alien may take, acquire, hold and dispose of real and personal property of every description in the same manner as if he were a natural born subject. But the Act is not retrospective (*b*).

33 Vict. c. 14.

5. It may be remarked, that in certain cases persons are capable of taking an equitable interest, to whom the legal estate could not have been similarly limited. Thus, at common law [until the recent Married Women's Property Acts] no property, real or personal, could be so limited to a married woman, as to exclude the legal rights of the husband during coverture: but, by way of trust, the beneficial interest could be placed entirely at the disposal of a married woman, so that she should be regarded as a *feme sole*, and the husband should not participate in the enjoyment.

Distinctions in reference to equitable and legal interests.

6. So the *legal* estate cannot be limited to the objects of a charity, as to the poor of a parish, in perpetual succession; but in a court of equity, where the feudal rules do not apply, the intention of the donor will be carried into effect (*c*), provided the requisitions of 51 & 52 Vict. c. 42 be complied with. The Act last referred to does not produce any incapacity in the *cestuis que trust* to take, but only prohibits the alienation of land, or property savouring of land, in any other mode than that prescribed by the Act, for objects falling within the legal definition of charitable purposes.

240, but see *Barrow* v. *Wadkin*, 24 Beav. 1; *Sharp* v. *St. Sauveur*, 7 L. R. Ch. App. 351.

(*a*) *Du Hourmelin* v. *Sheldon*, 1 Beav. 79, 4 Myl. & Cr. 525; *Sharp* v. *St. Sauveur*, 17 W. R. 1002, 20 L. T. N.S. 799, overruled on another ground, 7 L. R. Ch. App. 343, and see *Master* v. *De Croismar*, 11 Beav. 184.

(*b*) *Sharp* v. *St. Sauveur*, 7 L. R. Ch. App. 350; [*De Geer* v. *Stone*, 22 Ch. D. 243.]

(*c*) Gilb. on Uses, 204.

CHAPTER IV.

WHAT PROPERTY MAY BE MADE THE SUBJECT OF A TRUST.

As a general rule, all property, whether real or personal, and whether legal or equitable (*a*), may be made the subject of a trust, provided the policy of the law, or any statutory enactment, does not prevent the settlor from parting with the beneficial interest in favour of the intended *cestui que trust*.

Copyholds may be subject of trust, and equitable interest descends as legal.

1. A trust may be created of lands regulated by local custom, as copyholds. Thus, A., tenant of a manor, may surrender to the use of B. and his heirs, upon trust for C. and his heirs. And as equity follows the law, the trust in C will devolve in the same manner as the legal estate.

Power to entail equitable interest depends on custom to entail legal estate.

2. If the custom of the manor permit an *entail* of the legal estate, an entail may in like manner be created of the equitable (*b*); but if there be no such custom as to the legal estate, there can be no entail of the equitable (*c*). Where, therefore, the equitable interest in lands held of a manor not permitting an entail is limited to A., and the heirs of his body, the estate is not construed as an entail but as a fee conditional;—that is, on issue born the condition is fulfilled, and A. may alienate in fee. But until alienation, the equitable interest descends in the line of the issue like an entail; and if A. die without issue, an equitable right of entry reverts to the settlor or his heir. This doctrine is attended with important consequences, which are often overlooked. Thus copyholds are devised to trustees upon trusts corresponding with the limitations of freeholds in strict settlement, and A., the first tenant for life, has a son born, but who lives only a few weeks. If the manor do not permit an entail, the son takes a fee simple con-

(*a*) *Knight* v. *Bowyer*, 23 Beav. 609, see p. 635; 2 De G. & J. 421. [But there can be no trust of a peerage, which is by its very nature a personal possession, *Buckhurst Peerage*, 2 App. Cas. 1.]

(*b*) *Pullen* v. *Middleton*, 9 Mod. 484; 1 Preston Conv. 152.

(*c*) The opinion of Watkins, Treat. on Cop. p. 153, and following pages, that there may be an entail of copyholds without a special custom, cannot be maintained.

ditional, and all the subsequent limitations are void. In such a case, the copyholds should be settled like leaseholds, so as not to vest absolutely unless a child attain twenty-one, and on his death under that age to devolve on the next taker under the entail of the freeholds.

Equitable interests in foreign personal property.

3. How far equitable interests may be engrafted on *foreign* property requires consideration. As regards *movable* estate there is no difficulty, for it follows the person, and if the settlor himself be domiciled within the jurisdiction of the Court, all his movable estate, whether in the East or West Indies, or elsewhere, is deemed to be at home, and governed by the laws of this country. A trust, therefore, may freely be created of such interests, and would be enforced in equity. In certain cases, however, there might be practical obstructions in the way of executing the trust, from the circumstance of the property lying in fact beyond the reach of the Court.

Equitable interests in foreign real property.

4. As to *lands* lying in a foreign country, the Court will enforce *natural equities*, and compel the specific performance of *contracts*, provided the *parties* be within the jurisdiction, and there be no insuperable obstacle to the execution of the decree. Thus Lord Eldon allowed a consignee to have a lien, upon the application of general principles, for proper advances upon estates in the West Indies (*a*). So the Court has enforced specific performance of articles between parties for ascertaining the boundaries of their estates abroad (*b*), has compelled a person entitled to an estate in Scotland to give effect to an equitable mortgage by deposit of deeds of the Scotch estate, though by the law of Scotland a deposit of deeds created no lien (*c*), has directed an account of the rents

(*a*) *Scott* v. *Nesbitt*, 14 Ves. 438.

(*b*) *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444, and Belt's Suppt.; and see *Roberdeau* v. *Rous*, 1 Atk. 543; *Angus* v. *Angus*, West's Rep. 23; *Tullock* v. *Hartley*, 1 Y. & C. Ch. Ca. 114; *Cood* v. *Cood*, 33 Beav. 314; *Drummond* v. *Drummond*, 37 L. J. N.S. Ch. 811; 17 W. R. 6; [*Ewing* v. *Orr Ewing*, 9 App. Cas. 34, 40.]

(*c*) *Ex parte Pollard*, 3 Mont. & Ayr. 340; *reversed* Mont. & Chit. 239. But see *Norris* v. *Chambres*, 29 Beav. 246. *Martin* v. *Martin*, 2 R. & M. 507, may be supported on the ground that the mortgagee had a lien for advances and supplies. Had the lien not existed, Sir J. Leach thought the plaintiff might have compelled a sale as against the husband, but that such equity attached not to the *estate*, but to the *person* only: that after the institution of a suit, the equity would have bound the estate, but until bill filed the husband could make a good title even to a purchaser with notice; and the Court instanced the case of a husband, the apparent owner of two estates of equal value, and that he made a settlement of estate A. under the direction of the Court, and that the trustees were afterwards evicted by defect of the husband's title: in that case the Court would oblige the husband to make a settlement of estate B., but that until the bill was on the file the husband remained the owner of the estate B., and could

and profits of lands abroad (*a*), has ordered an absolute sale (*b*), and foreclosure of a mortgage (*c*), and has relieved against a fraudulent conveyance of an estate abroad (*d*), and prevented a defendant by injunction from taking possession (*e*). In such cases, however, the Court, according to the modern doctrine, requires as a substratum for its jurisdiction that there should exist a personal privity between the plaintiff and defendant, and in the absence of such privity, no remedy lies by way of lien against the land itself (*f*). Parties out of the jurisdiction may now be served abroad, but this does not extend the jurisdiction of the Court in respect of relief (*g*).

5. While the Court will, to this extent, administer *equities*, and enforce *contracts* as to lands abroad, so far as the Court, by acting upon the parties, can give effect to the decree (*h*) there are cases where the foreign law presents an insuperable obstacle to the execution of the decree, and then the Court will not make a decree which would be nugatory (*i*).

Trusts of lands abroad.

6. The better opinion is that *trusts*, not constructively such, like natural equities or equities arising from contract, but properly such, and formerly known as *uses*, cannot be engrafted upon foreign real estate. The law regulating lands in England has a *local* character. How then can a system adapted exclusively to lands in England be transplanted and attached to lands abroad? Could entails, for instance, be created when none are allowed,

effectually sell or charge it. As to personal equities, see further, *Morse* v. *Faulkner*, 1 Anst. 11, 3 Sw. 429, note (a); *Averall* v. *Wade*, Ll. & Go. temp. Sugden, 261; *Johnson* v. *Holdsworth*, 1 Sim. N. S. 108; *Hastie* v. *Hastie*, 2 Ch. Div. 304.

(*a*) *Roberdeau* v. *Rous*, 1 Atk. 543.

(*b*) Ib. 544.

(*c*) *Toller* v. *Carteret*, 2 Vern. 494; *Paget* v. *Ede*, 18 L. R. Eq. 118; [and see *Re Longdendale Cotton Spinning Company*, 8 Ch. D. 150.]

(*d*) *Arglasse* v. *Muschamp*, 1 Vern. 75.

(*e*) *Cranstown* v. *Johnston*, 5 Ves. 278; and see *Bunbury* v. *Bunbury*, 1 Beav. 318; *Hope* v. *Carnegie*, 1 L. R. Ch. App. 320.

(*f*) *Norris* v. *Chambres*, 29 Beav. 246; 3 De G. F. & J. 583; [and see *Re Hawthorne*, 23 Ch. D. 743, shewing that the Court will not determine a dispute as to the title to foreign immovable property.]

(*g*) *Cookney* v. *Anderson*, 31 Beav. 452. In this case the Court said that to found the jurisdiction either the persons against whom the relief was sought must be within the jurisdiction, or the subject matter in dispute must be within those limits, or the contract must have been entered into or intended to be performed within the same limits; *ib.* And see *Maunder* v. *Lloyd*, 2 J. & H. 718; *Edwards* v. *Warden*, 9 L. R. Ch. App. 495; [and the rules of the Supreme Court, 1883, Order xi. R. 1.]

(*h*) [See *Ewing* v. *Orr Ewing*, 10 App. Cas. 453.]

(*i*) *Waterhouse* v. *Stansfield*, 9 Hare, 234; 10 Hare, 254; *Carteret* v. *Petty*, 2 Swans. 323, note (a), and S. C. *nom Cartwright* v. *Pettus*, 2 Ch. Ca. 214, the case not of a *contract* as in *Penn* v. *Lord Baltimore*, but of a *partition* which the Court had no means of carrying into effect; and see *Norris* v. *Chambres*, 29 Beav. 246.

and if created, by what machinery could they be barred? It has been seen that in the case of copyholds, when the custom of the manor does not allow entails of the legal estate, none can be created of the equitable, and the same principle will apply to trusts of foreign lands. The few authorities upon the subject tend to confirm this view, but there is little light to be obtained from them, and the law must be regarded as still somewhat unsettled (*a*).

(*a*) *Glover* v. *Strothoff*, 2 B. C. C. 33; *Nelson* v. *Bridport*, 8 Beav. 547, see 570; *Martin* v. *Martin*, 2 R. & M. 507 (in which case it did not occur either to the bar or the bench that the legal estate could be held upon the trusts of the settlement without the intervention of a sale); *Godfray* v. *Godfray*, 12 Jur. N. S. 397.

CHAPTER V.

OF THE FORMALITIES REQUIRED FOR THE CREATION OF TRUSTS.

UPON this subject we propose to treat—First, Of Declarations of Trusts at common law. Secondly, Of the Statute of Frauds. Thirdly, Of the Statutes of Wills.

SECTION I.

OF TRUSTS AT COMMON LAW.

Trusts averrable.

1. TRUSTS, like uses, are of their own nature *averrable, i.e.*, may be declared by word of mouth without writing (*a*); as, if before the Statute of Frauds an estate had been conveyed unto and to the use of A. and his heirs, a trust might have been raised by parol in favour of B. (*b*), and since the statute, though a trust of lands cannot be declared by parol without proof of it in writing, no other proof is requisite than a simple note in writing duly signed, but not under seal (*c*).

Averment must not contradict the instrument.

2. But the Court, following the analogy of uses, never permitted the averment of a trust in contradiction to any expression of intention on the face of the instrument itself (*d*).

Nor be repugnant to the scope of the instrument.

3. And averment is excluded, if from *the nature of the instrument* or *any circumstance of evidence* appearing on the face of it, an intention of making the legal holder the beneficiary also, can be clearly implied. Thus a trust cannot be averred, where a *valuable*

(*a*) See *Fordyce* v. *Willis*, 3 B. C. C. 587; *Benbow* v. *Townsend*, 1 M. & K. 506; *Bayley* v. *Boulcott*, 4 Russ. 347; *Crabb* v. *Crabb*, 1 M. & K. 511; *Kilpin* v. *Kilpin*, Id. 520.

(*b*) See *Bellasis* v. *Compton*, 2 Vern. 294; *Fordyce* v. *Willis*, 3 B. C. C. 587; *Thruxton* v. *Attorney-General*, 1 Vern. 341.

(*c*) *Adlington* v. *Cann*, 3 Atk. 151, *per* Lord Hardwicke; *Boson* v. *Statham*, 1 Eden, 513, *per* Lord Keeper Henley.

(*d*) *Lewis* v. *Lewis*, 2 Ch. Rep. 77; *Finch's case*, 4 Inst. 86; *Fordyce* v. *Willis*, 3 B. C. C. 587; see *Childers* v. *Childers*, 3 K. & J. 310; 1 De G. & J. 482.

consideration is paid (*a*); and if a *pension* from the Crown be granted to A., a trust cannot be raised by parol in favour of B.; for a pension is conferred upon motives of honour, and the inducements to the bounty are the personal merits of the annuitant (*b*).

Trusts not averrable where deed required to pass the legal estate.

4. It was a principle of uses that, on a *feoffment*, which could be made by parol, a use might be declared by parol, but where a *deed* was necessary for passing the legal estate, there the use which was engrafted could not be raised by averment (*c*). As trusts have been modelled after the likeness of the use (*d*), the distinction at the present day may deserve attention. It is laid down by Duke expressly, that, where the things given may pass *without deed* there a charitable use may be averred by witnesses; but, where the things *cannot pass without deed*, there charitable uses cannot be averred without a deed proving the use (*e*). And Lord Thurlow, it is probable, alluded to the same distinction when he observed, "I have been accustomed to consider uses as averrable, but perhaps, when looked into, the cases may relate to *feoffment*, not to conveyances by bargain and sale, or lease and release" (*f*). And in *Adlington* v. *Cann* (*g*), where a testator devised the legal estate in lands to A. and B. and their heirs by a will duly executed, and left an unattested paper referring to trusts for a charity, Mr. Wilbraham in the argument observed, "If this were a voluntary *deed*, would a *paper*, even declaring a trust, be sufficient to take it from the grantee? no, certainly" (*h*); and it is very observable that Lord Hardwicke, in referring to this observation, excludes the case of a *deed*, and lays it down that "if the testator had made a *feoffment* to himself and his heirs, and left such a *paper*, this would have been a good declaration of trust" (*i*).

Declaration of trust *by* the king.

5. The declaration of a *use* by the *king* must have been by letters patent (*j*); and it seems that the same doctrine is now applicable to trusts (*k*).

(*a*) See Gilb. on Uses, 51, 57; *Pilkington* v. *Bayley*, 7. B. P. C. 526.
(*b*) *Fordyce* v. *Willis*, 3 B. C. C. 587.
(*c*) Gilb. on Uses, 270.
(*d*) *Fordyce* v. *Willis*, 3 B. C. C. 587; *Lloyd* v. *Spillet*, 2 Atk. 150; *Attorney-General* v. *Lockley*, Append. to Sug. Vend. & Purch. No. 16, 11th ed.; *Chaplin* v. *Chaplin*, 3 P. W. 234; *Attorney-General* v. *Scott*, Cas. *t.* Talb. 139; *Burgess* v. *Wheate*, 1 Eden, 195, 217, 248; *Geary* v. *Bearcroft*, Sir O. Bridg. 488.
(*e*) Duke, 141.
(*f*) *Fordyce* v. *Willis*, 3 B. C. C. 587.
(*g*) 3 Atk. 141.
(*h*) Ib. 145.
(*i*) Ib. 151.
(*j*) Bacon on Uses, 66.
(*k*) *Fordyce* v. *Willis*, 3 B. C. C. 577.

SECTION II.

OF THE STATUTE OF FRAUDS.

By the seventh section of the Statute of Frauds (*a*) it is enacted, that "all declarations or creations of trusts or confidences of any *lands, tenements, or hereditaments,* shall be *manifested and proved* by some *writing, signed* by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Upon the subject of this enactment we shall first briefly point out what interests are within the Act; and, secondly, what formalities are required by it.

I. *Of the interests within the Act.*

Copyholds.

1. *Copyholds* are to be deemed within the operation of the clause, for as a trust is engrafted on the estate of the *copyhold* tenant, the rights of the lord, who claims by title paramount, cannot in any way be injuriously affected, and therefore the ordinary ground for exempting copyholds from statutory enactments does not exist (*b*). A trust, therefore, of a copyhold cannot be declared by *parol* so as to make the copyholder a trustee for another (*c*).

Chattels real within the Act.

2. *Chattels real* are within the purview of the Act, and a trust of them must therefore be evidenced by writing, as in the case of freeholds (*d*).

Chattels personal not within the Act.

3. But *chattels personal* are not within the Act, and a trust by averment will be supported (*e*). It has even been held that a

(*a*) 29 Car. 2. c. 3.

(*b*) See *Withers* v. *Withers,* Amb. 151; *Goodright* v. *Hodges,* 1 Watk. on Cop. 227; *S. C.* Lofft. 230; *Acherley* v. *Acherley,* 7 B. P. C. 273; but see *Devenish* v. *Baines,* Pr. Ch. 5.

(*c*) Mr. Hargrave seems to have thought, that even the *uses of a surrender* were *trusts* within the intention of the Act; for, in a note to Coke on Littleton, he observes, "A nuncupative will of copyholds was a valid declaration of the uses, where the surrender was silent as to the form, till the 29 Car. 2 required all delarations of trust to be in writing." But the surrender of a copyhold to uses is merely a direction to the lord in what manner to regrant the estate, and the surrenderee is a *cestui que use* by misnomer only, and not in fact; and indeed the Court of Queen's Bench has expressly decided that uses of copyholds are not within the Statute of Frauds, on the ground that a surrender to uses is not the creation of a trust or confidence apart from the legal estate, but a mode established by custom of transferring the legal estate itself; *Doe* v. *Danvers,* 7 East, 299.

(*d*) *Skett* v. *Whitmore,* 2 Freem. 280; *Forster* v. *Hale,* 3 Ves. 696; *Riddle* v. *Emerson,* 1 Vern. 108; and see *Hutchins* v. *Lee,* 1 Atk. 447; *Bellasis* v. *Compton,* 2 Vern. 294.

(*e*) *Bayley* v. *Boulcott,* 4 Russ. 347, *per* Sir J. Leach; *M'Fadden* v. *Jen-*

sum of money secured upon a mortgage of real estate, is not an interest within the Act, and that a parol declaration is good (*a*). And if a trust be once created by parol declaration, it cannot be affected by any subsequent parol declaration of the settlor to the contrary (*b*). But the approval of a draft declaration of trust, subject to further consideration as to one of the provisions of it, will not amount to a parol declaration (*c*). If a settlor direct a sum to be invested in the names of the trustees of her marriage settlement, the Court considers this as tantamount to a parol declaration, or rather the presumption is, that the sum so invested should be held upon the same trusts as the settled funds (*d*).

Case of fraud.

4. The Statute of Frauds cannot be pleaded by a defendant to whom the estate has been conveyed without consideration and who claims to retain it under circumstances which the Court deems *fraudulent* (*e*).

Charitable uses within the Act.

5. An attempt was formerly made to have a *charitable use* excepted from the statute, but Lord Talbot decreed (*f*), and Lord Hardwicke affirmed the decision (*g*), and Lord Northington said every man of sense must subscribe to it (*h*), that a gift to a charity must be treated on the same footing with any other disposition.

Whether the Crown is bound by the statute.

6. It was held by the Court of Queen's Bench (*i*), that the *Crown* was bound by the Statute of Frauds, and therefore was not at liberty to prove a *superstitious use* by parol; but in the Court of *Exchequer* it was ruled, on the contrary, that the Statute of Frauds did *not* bind the Crown, but took place only between subject and subject. Lord Hardwicke expressed his doubts upon the latter

kyns, 1 Hare, 461, *per* Sir J. Wigram; *S. C.* 1 Ph. 157, *per* Lord Lyndhurst; *Grant* v. *Grant*, 34 Beav. 623; *Thorpe* v. *Owen*, 5 Beav. 224; *George* v. *Bank of England*, 7 Price, 646; *Hawkins* v. *Gardiner*, 2 Sm. & G. 451, *per* V. C. Stuart; *Peckham* v. *Taylor*, 31 Beav. 250; *Fordyce* v. *Willis*, 3 B. C. C. 587, *per* Lord Thurlow; *Benbow* v. *Townsend*, 1 M. & K. 510, *per* Sir J. Leach; *Fane* v. *Fane*, 1 Vern. 31, *per* Lord Nottingham; *Nab* v. *Nab*, 10 Mod. 404. (But this case, as reported 1 Eq. Ca. Ab. 404, appears an authority the other way.) The dictum of Lord Cranworth in *Scales* v. *Maude*, 6 De G. M. & G. 43, that a trust could not be declared by parol in favour of a volunteer was afterwards disclaimed by him; *Jones* v. *Lock*, 1 L. R. Ch. App., 28.

(*a*) *Benbow* v. *Townsend*, 1 M. & K. 506; and see *Bellasis* v. *Compton*, 2 Vern. 294.

(*b*) *Kilpin* v. *Kilpin*, 1 M. & K. 520, see 539; *Crabb* v. *Crabb*, 1 M. & K. 511.

(*c*) *Re Sykes's Trusts*, 2 J. & H. 415.

(*d*) *Re Curteis' Trusts*, 14 L. R. Eq. 217.

(*e*) *Davies* v. *Otty* (No. 2), 35 Beav. 208; *Haigh* v. *Kaye*, 7 L. R. Ch. App. 469; *Childers* v. *Childers*, 1 De G. & J. 482; *Lincoln* v. *Wright*, 4 De G. & J. 16; [*Booth* v. *Turle*, 16 L. R. Eq. 182.]

(*f*) *Loyd* v. *Spillet*, 3 P. W. 344.

(*g*) *S. C.* 2 Atk. 148; *S. C.* Barn. 384; and see *Adlington* v. *Cann*, 3 Atk. 150.

(*h*) *Boson* v. *Statham*, 1 Eden, 513.

(*i*) *Rex* v. *Portington*, 1 Salk. 162; and see *Adlington* v. *Cann*, 3 Atk. 146.

doctrine, that the Crown was not bound by a statute unless specially named; but at the same time mentioned a case in which that doctrine had been followed (*a*).

Colonial lands.

7. It seems the statute will not apply to lands situate in a *colony* planted before the Statute of Frauds was passed (*b*). Planters carry out with them their country's laws as they subsist at the time; but subsequent enactments at home do not follow them across the sea, unless it be so specially provided.

The statute to be a bar must be pleaded.

[8. If an action be brought to have the benefit of a parol trust of lands, a defendant, who would rely on the Statute of Frauds as a bar, must under the present practice insist upon it by his pleading (*c*).]

II. *What formalities are required by the statute.*

Trusts to be proved *by*, not declared *in* writing.

1. The principle point to be noticed is, that trusts, as already observed, are not necessarily to be *declared* in writing, but only to be *manifested and proved by* writing; for if there be written evidence of the existence of such a trust, the danger of parol declarations, against which the statute was directed, is effectually removed (*d*). It may be questioned whether the Act did not intend that the *declaration itself* should be in writing; for the ninth section enacts, that "all grants and assignments of any trust or confidence shall *likewise be in writing*, signed by the party granting or assigning the same, or by such last will or devise (*e*);" but whatever may have been the actual intention of the legislature, the construction put upon the clause in practice is now firmly established.

As by a letter, recital, &c.

2. The statute will be satisfied, if the trust can be manifested and proved by any subsequent acknowledgment by the trustee (*f*), as by an express declaration by him (*g*), or any memorandum to that effect (*h*), or by a letter under his hand (*i*), by his answer

(*a*) *Adlington* v. *Cann*, 3 Atk. 154 [and see *Re Bonham*, 10 Ch. Div. 595, 601; *Perry* v. *Eames* (1891), 1 Ch. 658, 665.]

(*b*) See 2 P. W. 75; *Gardiner* v. *Fell*, 1 J. & W. 22.

[(*c*) Rules of the Supreme Court Order XIX. R. 15. As to the former practice see the 7th Edition of this Treatise, p. 51.]

(*d*) *Forster* v. *Hale*, 3 Ves. 707, *per* Lord Alvanley; *S. C.* 5 Ves. 315, *per* Lord Loughborough; *Smith* v. *Matthews*, 3 De G. F. & J. 139.

(*e*) *i.e.* A will executed in conformity with section 5. Note that *Crooke* v. *Brooking*, 2 Vern. 50, 106, was before the Statute of Frauds.

[(*f*) *i.e.* as explained in *Forster* v. *Hale*, 3 Ves. at p. 707, "a person having a right to declare himself a trustee."]

(*g*) *Ambrose* v. *Ambrose*, 1 P. W. 321; *Crop* v. *Norton*, 9 Mod. 233.

(*h*) *Bellamy* v. *Burrow*, Cas. *t.* Talb. 98; and see *Re Bennett's Settlement Trusts*, 17 L. T. N. S. 438; 16 W. R. 331.

(*i*) *Forster* v. *Hale*, 3 Ves. 696; *S. C.* 5 Ves. 308; *Morton* v. *Tewart*, 2 Y. & C. Ch. Ca. 67; *Bentley* v. *Mackay*, 15 Beav. 12; *Childers* v. *Childers*, 1 De G. & J. 482; *Smith* v. *Wilkinson*, cited 3 Ves. 705; *O'Hara* v. *O'Neill*, 7 B. P. C. 227; and see *Gardner* v. *Rowe*, 2 S. & S. 354.

in Chancery (*a*), or by an affidavit (*b*), or by a recital in a bond (*c*), or deed (*d*), &c.; and the trust, however late the proof, operates retrospectively from the time of its creation. Even where a lease was granted to A., who afterwards became bankrupt, and *then* executed a declaration of trust in favour of B., a jury having found upon an issue directed from Chancery that A.'s name was *bonâ fide* used in the lease in trust for B., it was held that the assignees of A. had no title to the property (*e*).

Relation to subject-matter, and nature of trust must be clear.

3. But with regard to letters and loose acknowledgments of that kind, the Court expects demonstration that they relate to the subject matter (*f*); nor will the trust be executed if the precise nature of the trust cannot be ascertained (*g*); and if the trust be established on the answer of the trustee, the terms of it must be regulated by the whole answer as it stands, and not be taken from one part of the answer to the rejection of another (*h*); and the plaintiff, if he read the answer in proof of the trust, must at the same time read from it the particular terms of the trust (*i*). When the trust is manifested and proved by letters, parol evidence may be admitted to show the position in which the writer then stood, the circumstances by which he was surrounded, and the degree of weight and credit to be attached to the letters, independently of any question of construction (*j*).

The writing must be signed.

4. It will be observed, that the words of the statute require the writing to be *signed* (*k*); and not only the fact of the trust, but also the terms of it, must be supported by evidence under signature (*l*); but, as in the analogous case of agreements under the fourth section of the Act (*m*), the terms of the trust may be collected from a paper not signed, provided such paper can be

(*a*) *Hampton* v. *Spencer*, 2 Vern. 288; *Nab* v. *Nab*, 10 Mod. 404; *Cottington* v. *Fletcher*, 2 Atk. 155; *Ryall* v. *Ryall*, 1 Atk. 59, *per* Lord Hardwicke; *Wilson* v. *Dent*, 3 Sim. 385. A bill differed from an answer, as it was not *signed* by the party. See, however, *Butler* v. *Portarlington*, 1 Conn. & Laws. 1.

(*b*) *Barkworth* v. *Young*, 4 Drew. 1.

(*c*) *Moorecroft* v. *Dowding*, 2 P. W. 314.

(*d*) *Deg* v. *Deg*, 2 P. W. 412.

(*e*) *Gardner* v. *Rowe*, 2 S. & S., 346; *S. C.* affirmed, 5 Russ. 258; and see *Plymouth* v. *Hickman*, 2 Vern. 167.

(*f*) *Forster* v. *Hale*, 3 Ves. 708, *per* Lord Alvanley; *Smith* v. *Matthews*, 3 De G. F. & J. 139.

(*g*) *Forster* v. *Hale*, 3 Ves. 707, *per* Lord Alvanley; *Morton* v. *Tewart*, 2 Y. & C. Ch. Ca. 80, *per* Sir J. L. K. Bruce; *Smith* v. *Matthews*, 3 De G. F. & J. 139.

(*h*) *Hampton* v. *Spencer*, 2 Vern. 288; *Nab* v. *Nab*, 10 Mod. 404.

(*i*) *Freeman* v. *Tatham*, 5 Hare 329.

(*j*) *Morton* v. *Tewart*, 2 Y. & C. Ch. Ca. 67, see 77.

(*k*) See *Denton* v. *Davies*, 18 Ves. 503.

(*l*) *Forster* v. *Hale*, 3 Ves. 707, *per* Lord Alvanley; *Smith* v. *Matthews*, 3 De G. F. & J. 139.

(*m*) See Sug. Vend. & Purch. 14th ed. ch. 4, s. 3.

clearly connected with, and is referred to by, the writing that is signed (*a*).

Who is the party "enabled to declare the trust."

5. The signature must be by the party "who is by law enabled to declare such trust." It has been occasionally contended, that by this description was meant the person seised or possessed of the *legal estate;* but it has been decided that whether the property be real (*b*), or personal (*c*), the party enabled to declare the trust is the owner of the beneficial interest, and who has therefore the absolute control over the property, the holder of the legal estate being a mere instrument or conduit pipe. [Where, therefore, an antenuptial agreement that the intended wife's realty should belong to her for her separate use was signed only by the husband, the fee was not affected by the agreement so as to enable the wife to devise it as separate property (*d*).]

SECTION III.

OF THE STATUTES OF WILLS.

Statute of Frauds.

1. By the fifth section of the Statute of Frauds (*e*), all devises of *lands* are required to be in writing and signed by the testator, or by some person in his presence and by his direction, and to be attested or subscribed in his presence by three witnesses; and by the nineteenth section, all bequests of *personal* estate are required to be in writing, with the exception of certain specified cases in which nuncupative wills were allowed (*f*). And by the 1 Vict. c. 26, s. 9, wills made on or after January 1, 1838, whether of real or personal estate, must be executed and attested with the special solemnities there mentioned.

Principle of rejecting declarations not testamentary in respect of wills.

2. To trace the operations of these enactments we must bear in mind that the absolute owner of property combines in himself both the legal and equitable interest, and when the legislature enacts that no devise or bequest of property shall be valid without certain

(*a*) *Forster* v. *Hale*, 3 Ves. 696.

(*b*) *Tierney* v. *Wood*, 19 Beav. 330; [*Kronheim* v. *Johnson*, 7 Ch. D. 60; *Dye* v. *Dye*, 13 Q. B. Div. 147] see *Donohoe* v. *Conrahy*, 2 Jon. & Lat. 688.

(*c*) *Bridge* v. *Bridge*, 16 Beav. 315; *Ex parte Pye*, 18 Ves. 140, &c.

[(*d*) *Dye* v. *Dye*, 13 Q. B. Div. 147. And upon the question whether a parol agreement to settle may, notwithstanding sect. 4 of the Statute of Frauds, be rendered effectual by part performance, see *Ex parte Whitehead*, 14 Q. B. Div. 419, *per* Cave, J., at p. 421, and cases there cited.]

(*e*) 29 Car. 2, c. 3.

(*f*) See *Adlington* v. *Cann*, 3 Atk. 151.

ceremonies, a testator cannot by an informal instrument affect the equitable, any more than the legal, estate, for the one is a constituent part of the ownership as much as the other. Thus, if a testator by will duly signed and attested give lands to A. and his heirs "*upon trust*," but without specifying the particular trust intended, and then by a paper, not duly signed and attested as a will or codicil, declare a trust in favour of B., the beneficial interest under the will is a part of the original ownership and cannot be passed by the informal paper, but will descend to the heir-at-law, or if the will be made since 1837, and contain a residuary devise, will pass to the residuary devisee. So if a legacy be bequeathed by a will, duly executed, to A. "*upon trust*," and the testator, by parol, express an intention that it shall be held by A. upon trust for B., such a direction is in fact a testamentary disposition of the equitable interest in the chattel, and therefore void by the statute, which requires a will duly executed. If it be said that such expression of intention, though void as a devise or bequest, may yet be good as a declaration of trust, and therefore that where the *legal estate* of a freehold is well devised, a *trust* may be engrafted upon it by a simple note in writing; and where a chattel personal is well bequeathed, a trust of it, as excepted from the seventh section of the Statute of Frauds, may be raised by a mere parol declaration; the answer is, that a wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the death of the testator, but the latter take effect, if at all, at the time of the execution. "A deed," observed Mr. Justice Buller, in a similar case, "must take place upon its execution, or not at all; it is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing the interest to be conveyed at the execution; but a will is quite the reverse, and can only operate after death" (*a*). [It seems therefore on principle], that if the intended disposition be of a testamentary character, and not to take effect in the testator's lifetime, but to be ambulatory until his death, such disposition is inoperative unless it be declared in writing in conformity with the statutory enactments regulating devises and bequests (*b*).

(*a*) *Habergham* v. *Vincent*, 2 Ves. jun. 230.

(*b*) [See however *Re Fleetwood*, 15 Ch. D. 594; *Re Boyes*, 26 Ch. D. 531.] The law laid down by Jenkins, 3 Cent. Cas. 26, is founded on mistake, as from the report of the case in Fitzherb. Ab. Devise, 22, it appears that the beneficial interest was decreed to the heir, not, as Jenkins supposed, of the devisee, but of the testator.

In *Metham* v. *Devon*, 1 P. W. 529, a testator by his will directed his executors to pay 3000*l.* as he should by

Where no trust appears on the will and no fraud.

3. If a testator, by his will, devise an estate, and the devisee, so far as appears on the face of the will, is intended to take the beneficial interest, and the testator leaves a declaration of trust not duly attested, and not communicated to the devisee and assented to by him in the testator's lifetime, the devisee is the party entitled both to the legal and beneficial interest: for the estate was well devised by the will, and the informal declaration of trust is not admissible in evidence (*a*). This doctrine, of course, does not interfere with the well-known rule, that a testator may, *by his will, refer to and incorporate therein* any document which at the date of the will has an actual existence, and is thus made part of the will.

Where the devisee is made by the will a trustee, and the testator leaves an informal declaration of trust.

4. Should the testator devise the estate in such language that the will passes the *legal* estate only to the devisee, and manifests an intention of not conferring the equitable, in short, *stamps the devisee with the character of trustee*, and yet does not define the particular trusts upon which he is to hold; in this case, no paper

deed appoint, and subsequently by deed appointed the 3000*l.* to certain children, and the Court established the gift to the children on the ground that the deed referred to the will, and was part thereof, and in the nature of a codicil. It does not appear whether the deed had been proved with the will, but it might have been, as, though a deed in form, it was of a testamentary character. If the deed was not proved, or assumed to have been proved, it is difficult to find any principle upon which the case can be supported from the brief statement of it in the report.

In *Inchiquin* v. *French*, 1 Cox, 1, a testator devised all his real estate, charged with debts and legacies, in strict settlement, and gave a legacy of 20,000*l.* to Sir Wm. Wyndham; by a deed poll of even date with his will, the testator declared that the 20,000*l.* was given to Sir Wm. Wyndham upon trust for Lord Clare. "The deed poll," adds Mr. Cox, the reporter, "does not appear to have been proved as a testamentary paper;" and according to the same report, Lord Hardwicke decreed that the legacy of 20,000*l.* given to Sir Wm. Wyndham, and by the *codicil* declared to be in trust for Lord Clare, was a subsisting legacy. It might be inferred from this statement, that Lord Hardwicke admitted the deed poll as a declaration of trust; but it will be observed that he calls it a codicil, and from the report of the same case in *Ambler*, p. 33, we learn the facts, viz., that Lord Clare was out of the jurisdiction, and Lord Hardwicke declined to entertain the question as to Lord Clare's right in his absence; but the counsel, for all parties, desiring his Lordship to determine whether, assuming the legacy to be valid, it was to be paid out of the real or personal estate, his Lordship held, that as the will contained a general charge of legacies and the gift by the codicil, though not attested according to the Statute of Frauds, was a legacy, it was raisable primarily out of the personal estate, and then out of the real estate. This was the only point determined by him. [And see *Re Fleetwood*, 15 Ch. D. at p. 603.]

The dictum of Lord Northington, in *Boson* v. *Statham*, 1 Eden, 514, is clearly not law; see *Adlington* v. *Cann*, 3 Atk. 151; *Muckleston* v. *Brown*, 6 Ves. 67; *Stickland* v. *Aldridge*, 9 Ves. 519; and see *Puleston* v. *Puleston*, Finch, 312.

(*a*) *Adlington* v. *Cann*, 3 Atk. 141; *Juniper* v. *Batchellor*, 19 L. T. N.S. 200; and see *Stickland* v. *Aldridge*, 9 Ves. 519; and the observations of Sir J. L. K. Bruce in *Briggs* v. *Penny*, 3 De G. & Sm. 547.

not duly attested (except of course papers existing at the date of the will, and incorporated by reference) will be admissible to prove what were the trusts intended (*a*). Nor will the devisee be allowed to retain the beneficial interest himself; but while the legal estate passes to him, the equitable will, according to the date and terms of the will, result to the testator's heir-at-law or general residuary devisee (*b*).

Personal estate.

5. So if by will, *personal estate* be given upon trusts to be *afterwards* declared, the testator cannot by any instrument not duly executed as a will, and *a fortiori* he cannot by parol, declare a valid trust, but the equitable interest will result to the next of kin, or pass to the residuary legatee (*c*). [And the same rule will be applied if the bequest be on the face of the will a beneficial one, but the legatee undertakes to hold upon trusts to be afterwards declared (*d*).

6. But where personal estate was by codicil given to A. "to be applied as I have requested him to do," and an unsigned memorandum was written out by A. at the time of the execution of the codicil containing the wishes of the testator, V. C. Hall allowed the trust to be established by the evidence of A. in support of it (*e*).]

Admission and rejection of parol evidence as against the title of executors.

7. So if a person before the Act of 11 G. 4. & 1 W. 4, c. 40, had been simply appointed executor, which conferred upon him a title to the surplus beneficially, averment was not admissible to make him a trustee for the next of kin (*f*). But apparently, the authorities established that if from any circumstance appearing on the face of the will, as the gift of a legacy to the executor, the law *presumed* only that he was *not* intended to take the surplus beneficially, the executor might rebut that presumption by the production of parol evidence (*g*), when of course the next of kin

[(*a*) See however *Re Fleetwood*, 15 Ch. Div. 594, *infra*.]

(*b*) *Muckleston* v. *Brown*, 6 Ves. 52; [*Scott* v. *Brownrigg*, 9 L. R. Ir. 246;] *Bishop* v. *Talbot*, as cited 6 Ves. 60, was a devise to trustees in trust, but on consulting the Reg. Lib. it appears there was no notice of the trust upon the will, Reg. Lib. 1772, A. Fol. 137. In *Boson* v. *Statham*, 1 Eden, 508, the devisees were described as trustees, but this circumstance was not adverted to by the counsel or the Court.

(*c*) *Johnson* v. *Ball*, 5 De G. & Sm. 85; [*Scott* v. *Brownrigg*, 9 L. R. Ir. 246; see *Riordan* v. *Banon*, 10 Ir. R. Eq. 469; *Re Boyes*, 26 Ch. D. 531; *Re Fleetwood*, 15 Ch. D. 594; [*Towers* v. *Hogan*, 23 L. R. Ir. 53.]

[(*d*) *Re Boyes*, 26 Ch. D. 531.]

[(*e*) *Re Fleetwood*, 15 Ch. D. 594; and see *Re Boyes*, 26 Ch. Div. 531.]

(*f*) *Langham* v. *Sanford*, 19 Ves. 641, *per* Lord Eldon; *White* v. *Williams*, 3 V. & B. 72; *S. C. G.* Coop. 58; [see *Stewart* v. *Stewart*, 15 Ch. D. 539.]

(*g*) *Walton* v. *Walton*, 14 Ves. 322, *per* Sir W. Grant; *Clennell* v. *Lewthwaite*, 2 Ves. Jun. 474; *Langham* v. *Sanford*, 17 Ves. 442, 443; *Lynn* v. *Beaver*, 1 T. & R. 66.

might fortify the presumption by opposing parol evidence in contradiction. Where, however, the will itself invested the executor with the character of trustee, as by giving him a legacy "for his trouble," or by styling him a "trustee" expressly, the *primâ facie* title to the surplus was then in the next of kin, and parol evidence was not admissible to disprove the express intention (*a*). By the Act referred to, an executor is made *primâ facie* a trustee for the next of kin (*b*). But where there are *no next of kin* the title of the executor, as against the *Crown*, is not affected by the statute, and the old law applies (*c*). But if the executor be stamped by the will with the character of trustee, and there are no next of kin, the Crown will take (*d*). And of course, whether there be next of kin or not, if it appear from the whole will that the executors were intended to take beneficially, the statute is excluded (*e*).

Fraud.

8. An exception to the rule, that parol trusts cannot be declared upon an estate devised by a will, exists in the case of fraud. The Court will never allow a man to take advantage of his own wrong, and therefore if an heir, or devisee, or legatee, or next of kin, contrive to secure to himself the succession of the property through fraud, the Court affects the conscience of the legal holder, and converts him into a trustee, and compels him to execute the disappointed intention.

Case of fraud in heir.

Thus if the owner of an estate hold a conversation with the heir, and be led by him to believe that if the estate be suffered to descend, the heir will make a certain provision for the mother, wife, or child or the testator, a Court of Equity, notwithstanding the Statute of Wills, will oblige the heir to make a provision in conformity with the express or implied engagement; for the heir ought to have informed the testator, that he, the heir, would not hold himself bound to give effect to the intention, and then the testator would have had the opportunity of intercepting the right of the heir by making a will (*f*).

(*a*) *Rachfield* v. *Careless*, 2 P. W. 158; *Langham* v. *Sanford*, 17 Ves. 453; *S. C.* 19 Ves. 641; *Gladding* v. *Yapp*, 5 Mad. 59; *White* v. *Evans*, 4 Ves. 21; *Walton* v. *Walton*, 14 Ves. 322, *per* Sir W. Grant; and see *Read* v. *Stedman*, 26 Beav. 495.

(*b*) *Love* v. *Gaze*, 8 Beav. 472; *Juler* v. *Juler*, 29 Beav. 34; *Travers* v. *Travers*, 14 L. R. Eq. 275; [*Stewart* v. *Stewart*, 15 Ch. D. 539.]

[(*c*) So now decided, *Re Knowles*, 49 L. J. N.S. Ch. 625; *Re Bacon's Will*, 31 Ch. D. 460.]

(*d*) *Read* v. *Stedman*, 25 Beav. 495; [*Dillon* v. *Reilly*, 9 L. R. Ir. 57; *Re Mary Hudson's Trusts*, 52 L. J. N.S. Ch. 789.]

(*e*) *Harrison* v. *Harrison*, 2 H. & M. 237; and see *Williams* v. *Arkle*, 7 L. R. H. L. 606.

(*f*) *Sellack* v. *Harris*, 5 Vin. Ab. 521; *Stickland* v. *Aldridge*, 9 Ves. 519; *per* Lord Eldon; *Harris* v. *Horwell*,

So if a father devise to his youngest son, who promises that if the estate be given to him he will pay 10,000*l.* to the eldest son, the Court, at the instance of the eldest son, will compel the youngest son to disclose what passed between him and the testator, and if he acknowledge the engagement, though he pray the benefit of the statute in bar, he will be a trustee for the eldest son to the extent of 10,000*l* (*a*). In devisee.

And so, generally, if a testator devise real estate or bequeath personal estate to A., *the beneficial owner upon the face of the will*, but upon the understanding between the testator and A. that the devisee or legatee will as to a part or even the entirety of the beneficial interest hold upon any trust which is *lawful* in itself, in favour of B., the Court, at the instance of B., will affect the conscience of A., and decree him to execute the testator's intention (*b*). But in this, as in other cases, if it appear that A. was not meant to be a trustee, but to have a mere discretion, the Court cannot convert the arbitrary power into a trust (*c*). In legatee.

[9. But where the bequest was on the face of the will a beneficial one, and the understanding between the testator and the legatee was, that the legatee should take the property as trustee upon trust to deal with it according to further directions which the testator was to give by letter, and the testator subsequently wrote letters containing the directions, but never sent them or communicated their contents to the legatee, it was held that the legatee was a trustee for the next of kin; and it was considered to be essential for the validity of the trust that it [Intention not communicated.]

Gilb. Eq. Rep. 11; *McCormick* v. *Grogan*, 4 L. R. H. L. 88, *per* L. C.

(*a*) *Stickland* v. *Aldridge*, 9 Ves. 519.

(*b*) *Kingsman* v. *Kingsman*, 2 Vern. 559; *Drakeford* v. *Wilks*, 3 Atk. 539; *Attorney-General* v. *Dillon*, 13 Ir. Ch. Rep. 127; *Gray* v. *Gray*, 11 Ir. Ch. Rep. 218; *Barrow* v. *Greenough*, 3 Ves. 152; *Marriot* v. *Marriot*, 1 Strange, 672, *per Cur.*; *Segrave* v. *Kirwan*, 1 Beatt. 164, *per* Sir A. Hart; *Leister* v. *Foxcroft*, cited ib.; *Chamberlaine* v. *Chamberlaine*, 2 Eq. Ca. Ab. 43; ib. 465; *Irvine* v. *Sullivan*, 8 L. R. Eq. 673; *Norris* v. *Frazer*, 15 L. R. Eq. 318; *Thynn* v. *Thynn*, 1 Vern. 296; *Devenish* v. *Baines*, Prec. Ch. p. 3; *Oldham* v. *Litchford*, 2 Vern. 506; *S. C.* Freem. 284; *Reech* v. *Kennigate*, Amb. 67; *S. C.* 1 Ves. 123; *Newburgh* v. *Newburgh*, 5 Madd. 366, *per* Sir John Leach; *Chamberlain* v. *Agar*, 2. Ves. & B. 259; *Nab* v. *Nab*, 10 Mod. Rep. 404; *Strode* v. *Winchester*, 1 Dick. 397; *S. C.* stated from Reg. Lib. App. No. 1 to 3rd edition of the present work; and see *Alison's case*, 9 Mod. Rep. 62; *Dixon* v. *Olmius*, 1 Cox, 414. But in the case put, B. takes by the rules of equity, and not by testamentary disposition, and, therefore, where A. had undertaken, at the request of a testatrix in Ireland to hold for a charity, he paid legacy duty as beneficial owner, though by the Irish Stamp Acts a legacy to a charity was exempted; *Cullen* v. *Attorney-General*, 1 L. R. H. L. 190.

(*c*) *McCormick* v. *Grogan*, 1 Ir. R. Eq. 313; 4 L. R. H. L. 82; *Creagh* v. *Murphy*, 7 Ir. R. Eq. 182.

should be communicated to the legatee in the testator's lifetime, and that he should *accept the particular trust* (*a*).

Engagement to execute an unlawful trust.

10. It often happens that a proposed devisee enters into an engagement with the testator in his lifetime to execute a secret trust of an *unlawful* character, one which the policy of the law does not allow to be created by will. In this case the Court will not suffer the devisee to profit by his fraud, but on proof of the fact raises a resulting trust in favour of the testator's heir-at-law. If, therefore, a testator devise an estate in words carrying upon the face of the will the beneficial interest, and obtain a promise from the devisee either expressed or tacitly implied that he will hold the estate upon trust for a charitable purpose, the heir-at-law, as entitled to a resulting trust, may bring an action against the devisee, and compel him to answer whether there existed any such understanding between him and the testator; and if the defendant acknowledge it, he will be decreed a trustee for the plaintiff, and to convey the estate to him accordingly (*b*).

Devise may be good as to one and void as to another.

11. Where a devise is to several persons as tenants in common, it may be void as to one to whom the testator's unlawful intention was communicated in his lifetime, and good as to the others who were not privies to his intention (*c*). But if there be a joint devise to two, one of whom has by active fraud procured the devise, the other cannot claim under the fraud, but the devise will be void as to both (*d*).

Devise not void because devisee means to execute the unlawful trust.

12. Where no trust is imposed by the will, and no communication was made in the testator's lifetime, the devise will be good, although the devisee may, notwithstanding the absence of legal obligation, be disposed from the bent and impulse of his own mind, to carry out what he believes to have been the testator's wishes (*e*).

[(*a*) *Re Boyes*, 26 Ch. D. 531; *Re King's Estate*, 21 L. R. Ir. 273, where the law is summarised at p. 277, and see *Re Downing*, 60 L. J. N.S. 140.]

(*b*) *Adlington* v. *Cann*, Barn. 130; *Springett* v. *Jennings*, 10 L. R. Eq. 488; *Burr* v. *Miller*, W. N. 1872, p. 63; *Rex* v. *Portington*, 1 Salk. 162; *Muckleston* v. *Brown*, 6 Ves. 52; *Stickland* v. *Aldridge*, 9 Ves. 516; *McCormick* v. *Grogan*, 1 Ir. R. Eq. 313; 4 L. R. H. L. 82; and see *Attorney-General* v. *Duplessis*, Park. 144; *Russell* v. *Jackson*, 10 Hare, 204; *Tee* v. *Ferris*, 2 K. & J. 357; *Lomax* v. *Ripley*, 3 Sm. & G. 48; *Carter* v. *Green*, 3 K. & J. 591; *Burney* v. *Macdonald*, 15 Sim. 6; *Moss* v. *Cooper*, 1 J. & H. 352; *Baker* v. *Story*, W. N. 1874, p. 211; [*Re Spencer's Will*, 57 L. T. N.S. 519.]

(*c*) *Tee* v. *Ferris*, 2 K. & J. 357; *Rowbotham* v. *Dunnett*, 8 Ch. Div. 430]; and see *Burney* v. *Macdonald*, 15 Sim. 6; *Moss* v. *Cooper*, 1 J. & H. 352.

(*d*) *Russell* v. *Jackson*, 10 Hare, 204; and see *Carter* v. *Green*, 3 K. & J. 603; *Burney* v. *Macdonald*, 15 Sim. 6.

(*e*) *Wallgrave* v. *Tebbs*, 2 K. & J. 313; *Lomax* v. *Ripley*, 3 Sm. & G. 48; *Jones* v. *Badley*, 3 L. R. Eq. 635, reversed, 3 L. R. Ch. App. 362; and see *Carter* v. *Green*, 3 K. & J. 591;

[Admission by one joint tenant.]

13. Where property was devised to four persons as joint tenants, and one of them in his will made certain statements which pointed to a secret trust, it was held that these statements could not affect the right of the survivor of the joint tenants, and in the absence of other evidence his representatives were held to be entitled to the property (*a*).]

An engagement to hold an indefinite part of the estate upon an unlawful trust.

14. A devise may be a beneficial one upon the face of a will, but there may have existed an understanding between the testator in his lifetime and the devisee, that, without any particular part of the estate being specified, such portions of it as the devisee, in the exercise of his discretion, might think proper, should be applied to a charitable purpose. Under such circumstances the heir of the testator would have a right to interrogate the devisee whether he has exercised that discretion, and to call for a conveyance of so much as the devisee may have made subject to the unlawful purpose (*b*).

Defendant must discover what the secret trust was.

15. In the above cases it is not a sufficient answer to an action by the heir for the defendant to say that the secret trust is *not for the plaintiff*, for thus the devisee makes himself the judge of the title. The trust may be for a charity, and if so, the beneficial interest would result for want of a lawful intention, or the equitable interest might, on some other ground, enure to the heir as undisposed of (*c*). If the defendant deny the trust by his answer, the fact in this, as in other cases of fraud, may be established against him by parol evidence (*d*).

Engagement to execute a trust and no trust declared.

16. It is clear that if the devisee enters into an engagement with the testator to execute an unlawful trust, the heir may bring an action, and claim the beneficial interest; but suppose the devise is a beneficial one upon the face of it, and the testator communicates his will to the devisee, and requests him to be a trustee for such purposes as the testator shall declare, which the devisee undertakes to do, but the testator afterwards *dies without having expressed any trust*, it seems that in this case also the devisee will not be allowed to take the beneficial interest, but the heir-at-law will be entitled (*e*).

[*Rowbotham* v. *Dunnett*, 8 Ch. D. 430.]

[(*a*) *Turner* v. *Attorney-General*, 10 Ir. R. Eq. 386.]

(*b*) *Muckleston* v. *Brown*, 6 Ves. 69.

(*c*) *Newton* v. *Pelham*, cited *Boson* v. *Statham*, 1 Eden, 514; [*Re Boyes*, 26 Ch. D. 531.]

(*d*) *Kingsman* v. *Kingsman*, 2 Vern. 599; *Pring* v. *Pring*, 2 Vern. 99; [*Riordan* v. *Banon*, 10 Ir. R. Eq. 469; *Re Boyes*, 26 Ch. D. 531, at p. 535.]

(*e*) *Muckleston* v. *Brown*, 6 Ves. 52; [*Re Boyes*, 26 Ch. D. 531.] See also the observations of V. C. (afterwards L. J.) Turner, in *Russell* v. *Jackson*, 10 Hare, p. 214.

Case of devisee made a trustee on face of the will, and parol declaration of trust for a stranger.

17. Another case, distinct from all the preceding, is where a testator *devises an estate to persons as trustees*, but no trusts are declared by the will, so that the equitable interest would, upon the face of the instrument, result to the heir-at-law, and the testator *inform the devisees* that his intention in making the devise is, that they shall hold the estate *in trust for certain persons*, which the devisees undertake to do. Will the Court, under such circumstances, compel the devisees *to execute the parol intention*, or will the equitable interest result to the *heir?* In favour of the parol trust, it will be argued that the testator left his will in the form in which it appears, under the impression that his object, verbally communicated, would be carried out, and that the trust can therefore be supported, on the ground of mistake in himself, or fraud in the devisees in not apprising the testator that the trust could not be executed. To this the answer is, that, upon the face of the will, the equitable interest results to the heir-at-law, and that, if the testator has not disposed of the equitable interest, as required by the statute, the Court cannot make a will for him, on the plea of mistake or fraud (*a*): that the Court has interfered in the case of fraud in those instances only where the *devisee* taking the beneficial interest under the will, was the contriver of the fraud, and, as no man may take advantage of his own wrong, the Court compels the devisee to execute the intention fraudulently intercepted: but in the case supposed, the *legal estate* only is in the *devisees*, while the beneficial interest is in the heir-at-law, who is wholly disconnected from the fraud. What jurisdiction, therefore, has the Court to act upon the conscience of the heir, to deprive him of that estate, which has not been devised away according to the Statute of Wills? and how can the trustees for the heir be held to be trustees for another in the absence of all fraud on the part of the heir? It would seem, upon principle, that where a trust results upon the face of the will, the circumstance of an express or implied promise on the part of the devisee to execute a certain trust is not a sufficient ground for authorising the Court to execute the trust as against the heir-at-law (*b*).

(*a*) *Newburgh* v. *Newburgh*, 5 Madd. 364.

(*b*) The cases upon the subject are *Pring* v. *Pring*, 2 Vern. 99; *Crooke* v. *Brooking*, 2 Vern. 50, 107; *Smith* v. *Attersoll*, 1 Russ. 266; *Podmore* v. *Gunning*, 7 Sim. 644. Other cases are not uncommonly referred to, which really have no application,—as *Jones* v. *Nabbs*, Gilb. Eq. Rep. 146 (but there the money passed, and the parol trust was declared in the life-time of the testator); *Inchiquin* v. *French*, 1 Cox, 1; *Metham* v. *Devon*, 1 P. W. 529; as to which last two cases, see the observations at pages 57 and 58 *supra*.

Case of parol declaration of trust of a legacy for a stranger.

[18. However, in a recent case in Ireland where a pecuniary legacy was given "to be disposed of by the legatee in a manner of which he alone should be cognizant, and as contained in a memorandum which the testator should leave with him," and the testator before the execution of the will verbally informed the legatee of the manner in which he was to dispose of the legacy, to which the legatee assented, it was held that there was a valid trust, and that the legacy was to be applied according to the testator's directions, to the exclusion of the claims of the residuary legatees (*a*).]

Effect of the Statute of Mortmain.

19. We have stated the rule that if a testator make a devise carrying the beneficial interest on the face of the will, but it appears from the admission of the devisee or by evidence that the devisee was pledged to the testator to execute a charitable trust, the Court will not allow the execution of such a trust, but will give the estate to the heir-at-law. The question here [arose] whether the Statute 9 Geo. 2 c. 36, which declared a devise "in trust or for the benefit of" a charity to be absolutely void, applied to such a case, so as not only to defeat the equitable interest admitted or proved to have been intended for a charity, but also to make void the devise of the legal estate itself, so that by the effect of the statute, when the fact had been established, the devisee took no interest either at law or in equity. After some conflict of authority (*b*), it was decided that the devise of the legal estate was good, but that equity would set it aside on the ground of fraud, upon public policy (*c*). [Now by the Mortmain and Charitable Uses Act, 1888 (*d*), the statute 9 Geo. 2 c. 36 has been repealed, and in lieu thereof it is enacted (*e*) that every "assurance" of land, which includes testamentary gift (*f*) "to or for the benefit of any charitable uses," shall be void unless made in accordance with the requirements of the Act. The law therefore in this respect appears to be unchanged.]

The provisions of the Statute of Frauds relating to wills have now been repealed, but the principles established by the foregoing cases with reference to the Statute of Frauds will apply, *mutatis mutandis*, to the enactments of the Statute of Wills at present in force.

[(*a*) *Riordan* v. *Banon*, 10 I. R. Eq. 469; *Re Fleetwood*, 15 Ch. Div. 594, 606; and *ante*, p. 59.]

(*b*) See *Adlington* v. *Cann*, 3 Atk. 141, 150, & 153; *Edwards* v. *Pike*, 1 Eden, 267; *Boson* v. *Statham*, 1 Eden, 508; *Bishop* v. *Talbot*, cited *Muckleston* v. *Brown*, 6 Ves. 60, 67, Reg. Lib. A. 1772, fol. 137, A. 1773, fol. 686.

(*c*) *Sweeting* v. *Sweeting*, 3 N. Rep. 240.

[(*d*) 51 & 52 Vict. c. 42.]

[(*e*) Section 4.]

[(*f*) Section 10.]

CHAPTER VI.

OF TRANSMUTATION OF POSSESSION.

WHERE *there is valuable consideration*, and a trust is intended to be created, formalities are of minor importance, since if the transaction cannot take effect by way of trust executed, it may be enforced by a Court of Equity as a contract. But *where there is no valuable consideration*, and a trust is intended, it has been not unfrequently supposed that, in order to give the court jurisdiction, there must be *Transmutation of possession—i.e.*, the legal interest must be divested from the settlor, and transferred to some third person. But upon a careful examination of the authorities the principle will be found to be, that whether there was transmutation of possession or not, the trust will be supported—provided it was in the first instance *perfectly created* (*a*).

The cases upon this subject may be marshalled under the following heads:—

Where some further act is intended.

1. It is evident that a trust is *not perfectly created* where there is a *mere intention* of creating a trust, or a *voluntary agreement* to do so, and the settlor himself contemplates some further act for the purpose of giving it completion (*b*).

Where the settlor declares himself a trustee.

2. If the settlor proposes to *convert himself* into a trustee, then the trust is *perfectly created*, and will be enforced as soon as the settlor has executed an express declaration of trust, intended to

(*a*) See *Ellison* v. *Ellison*, 6 Ves. 662; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 99; *Sloane* v. *Cadogan*, Sug. Vend. & P. Append.; *Edwards* v. *Jones*, 1 M. & Cr. 226; *Wheatley* v. *Purr*, 1 Keen, 551; *Garrard* v. *Lauderdale*, 2 R. & M. 453; *Collinson* v. *Pattrick*, 2 Keen, 123; *Dillon* v. *Coppin*, 4 M. & Cr. 647; *Meek* v. *Kettlewell*, 1 Hare, 469; *Fletcher* v. *Fletcher*, 4 Hare, 74; *Price* v. *Price*, 14 Beav. 598; *Bridge* v. *Bridge*, 16 Beav. 315; *Beech* v. *Keep*, 18 Beav. 285; *Donaldson* v. *Donaldson*, Kay, 711; *Scales* v. *Maude*, 6 De G. M. & G. 43; *Airey* v. *Hall*, 3 Sm. & G. 315; [*Paul* v. *Paul*, 20 Ch. Div. 742; *Re Earl of Lucan*, 45 Ch. D. 470.]

(*b*) *Cotteen* v. *Missing*, 1 Mad. 176; *Bayley* v. *Boulcott*, 4 Russ. 345; *Dipple* v. *Corles*, 11 Hare, 183; *Jones* v. *Lock*, 1 L. R. Ch. App. 25; *Lister* v. *Hodgson*, 4 L. R. Eq. 30; *Heartley* v. *Nicholson*, 19 L. R. Eq. 233.

be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable, whether it be capable or incapable of transfer (*a*).

Gift of husband to his wife.

[3. Prior to the Married Women's Property Act, 1882] a husband was incapable of making a gift of chattels at law to his wife, and, therefore, if he purported to make such a gift, a Court of Equity considered it tantamount to a declaration that the husband would hold in trust for the wife for her separate use. The words of gift need not be in writing, or of a technical description, but must be clear, irrevocable, and complete; the unsupported testimony of the wife on her own behalf will not be sufficient, but the gift may be proved not only by witnesses at the time, but also by the husband's subsequent declaration. "If," observed Sir J. Romilly, M.R., "A. (who has £1,000 Consols standing in his name) says to B., 'I give you the £1,000 Consols standing in my name,' that in my opinion would make A. a trustee for B. It would be a valid declaration of trust for B., though the stock remained in the name of A." (*b*).

[So where a husband by a deed poll, after reciting that he was beneficially possessed of the ground-rents thereby agreed to be settled, "settled, assigned, transferred and set over unto his wife as though she were a single woman," certain leasehold houses and the ground-rents thereof, it was held that the deed was not void as being an intended assignment, but operated as a declaration of trust (*c*). So where a husband by deed assigned leaseholds to his "wife, her executors, administrators, and assigns, as her separate estate," it was held that the deed operated as a valid declaration

(*a*) *Gee* v. *Liddell*, 35 Beav. 621; *Morgan* v. *Malleson*, 10 L. R. Eq. 475; *Armstrong* v. *Timperon*, W. N. 1871, p. 4; *Ex parte Pye*, or *Ex parte Dubost*, 18 Ves. 140; *Thorpe* v. *Owen*, 5 Beav. 224; *Stapleton* v. *Stapleton*, 14 Sim. 186; *Vandenberg* v. *Palmer*, 4 Kay & J. 204; *Searle* v. *Law*, 15 Sim. 99; *Steele* v. *Waller*, 28, Beav. 466; *Paterson* v. *Murphy*, 11 Hare, 88; *Drosier* v. *Brereton*, 15 Beav. 221; *Bentley* v. *Mackay*, 15 Beav. 12; *Bridge* v. *Bridge*, 16 Beav. 315; *Gray* v. *Gray*, 2 Sim. N. S. 273; *Wilcocks* v. *Hannyngton*, 5 Ir. Ch. Rep. 38; [*Kelly* v. *Walsh*, 1 L. R. Ir. 275; and see *Re Shield*, 53 L. T. N.S. 57; *Johnstone* v. *Mappin*, 64 L. T. N.S. 48.] In the case of *McFadden* v. *Jenkyns*, 1 Hare, 471; Sir J. Wigram expressed himself more cautiously than was necessary, as to the jurisdiction of the Court in enforcing a trust against the settlor himself, and suggested several accompanying circumstances as material to the establishment of such a trust. "If," he said, "the owner of property having the legal interest in himself, were to execute an instrument by which he declared himself a trustee for another, and had *disclosed that instrument* to the *cestui que trust*, and afterwards *acted upon it*, that might perhaps be sufficient; or a Court of Equity, adverting to what Lord Eldon said in *Ex parte Dubost*, might not be bound to inquire further into an equitable title so established in evidence."

(*b*) *Grant* v. *Grant*, 34 Beav. 623. As to the general dictum of M. R. see also *Morgan* v. *Malleson*, 10 L. R. Eq. 475; but see contra *Warriner* v. *Rogers*, 16 L. R. Eq. 349.

[(*c*) *Baddeley* v. *Baddeley*, 9 Ch. D. 113.]

of trust (*a*). But these cases have since been disapproved of by V.C. Hall, who held that the principle laid down in *Milroy* v. *Lord* (*b*) applies equally to an imperfect gift from husband to wife as to a gift to a stranger, and that such a gift cannot be supported as a declaration of trust (*c*); and this view has since been adopted in Ireland (*d*).

4. Now by the recent Act (*e*), sect. 1, a married woman is capable of acquiring and holding property as her separate property, as if she were a *feme sole*, without the intervention of any trustee, and a gift by a husband to his wife will now be valid, as well at law as in equity. But by sect. 10 it is provided that nothing in the Act contained shall give validity as against creditors of the husband to any gift by a husband to his wife of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband, made by or in the name of his wife in fraud of his creditors, but any moneys so deposited or invested may be followed as if the Act had not been passed.

And since the Act has put a gift by a husband to his wife on a similar footing to a gift to a stranger, the principles governing imperfect gifts to strangers (*f*) must be equally applied to gifts from husband to wife.]

Where the property is a legal interest.

5. If it be proposed to make a stranger the trustee, and the subject of the trust is a *legal interest*, and one *capable of legal transmutation*, as land or chattels which pass by conveyance, assignment, or delivery, or stock which passes by transfer (*g*), in this case the trust is not perfectly created unless the legal interest be actually vested in the trustee. It is not enough that the settlor executed a deed affecting to pass it, and that he believed nothing to be wanting to give effect to the transaction: the intention of divesting himself of the legal property must in fact have been executed, or the Court will not recognise the trust (*h*). "I take

[(*a*) *Fox* v. *Hawks*, 13 Ch. D. 822.]

[(*b*) See *post*, p. 74.]

[(*c*) *Re Breton's Estate*, 17 Ch. D. 416; and see *Re Whittaker*, 21 Ch. D. 657, 666.]

[(*d*) *Hayes* v. *Alliance Assurance Company*, 8 L. R. Ir. 149.]

[(*e*) 45 & 46 Vict. c. 75; see *Re March*, 24 Ch. D. 222; 27 Ch. Div. 166; *Re Jupp*, 39 Ch. D. 148.]

[(*f*) See *post*, p. 74.]

[(*g*) Without formal acceptance by the transferee; see *Standing* v. *Bowring*, 31 Ch. Div. 282.]

(*h*) See *Garrard* v. *Lauderdale*, 2 Russ. & M. 452; *Meek* v *Kettlewell*, 1 Hare, 469; *Dillon* v. *Coppin*, 4 M. & Cr. 647; *Coningham* v. *Plunkett*, 2 Y. & C. Ch. Ca. 245; *Searle* v. *Law*, 15 Sim. 95; *Price* v. *Price*, 14 Beav. 598; *Bridge* v. *Bridge*, 16 Beav. 315; *Weale* v. *Ollive*, 17 Beav. 252; *Beech* v. *Keep*, 18 Beav. 285; *Tatham* v. *Vernon*, 29 Beav. 604; *Dilrow* v. *Bone*, 3 Giff. 538; *Milroy* v. *Lord*, 8 Jur. N. S. 806; 4 De G. F. & J. 264; *Warriner* v. *Rogers*, 16 L. R. Eq. 340;

the distinction," said Lord Eldon, "to be, that if you want the assistance of the Court to constitute a *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting a *cestui qui trust*, as upon a covenant to transfer stock, &c.; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court (*a*)." If, however, the settlor purport to transfer the legal estate to a trustee, but the trustee afterwards *disclaims*, the accident of the disclaimer has been held not to vitiate the deed, but the Court will appoint a new trustee (*b*).

Where the property is a legal interest incapable of legal transfer.

6. If the subject of the trust be a *legal interest*, but *one not capable of legal transfer*, then whether we look to principle or authority, there is considerable difficulty. On the one hand, it may be urged that in equity the universal rule is that the Court will not enforce a voluntary agreement in favour of a volunteer; and as by the supposition the legal interest remains in the settlor (who therefore at law retains the full benefit), a Court of equity will not in the absence of any consideration deprive him of that interest which he has not actually parted with. On the other hand, as the settlor *cannot* divest himself of the legal interest, to say that he shall not constitute another a trustee without passing the legal interest, would be to debar him from the creation of a trust in the hands of another at all, and the rule therefore should be that if the settlor make all the assignment of the property in his power and perfect the transaction as far as the law permits, the Court in such a case should recognise the act, and support the validity of the trust.

Some Judges have adopted the one view of the question, and some the other (*c*). But in the leading case of *Kekewich* v.

Richards v. *Delbridge*, 18 L. R. Eq. 11; *Heartley* v. *Nicholson*, 19 L. R. Eq. 233; *Batstone* v. *Salter*, 19 L. R. Eq. 250; 10 L. R. Ch. App. 431; [*Re Caplen's Estate*, 45 L. J. N.S. Ch. 280; *West* v. *West*, 9 L. R. Ir. 121. And that the legal interest in railway stock does not pass until delivery of transfer to the secretary of the company, see *Nanney* v. *Morgan*, 37 Ch. Div. 346.]

(*a*) *Ellison* v. *Ellison*, 6 Ves. 662; *Antrobus* v. *Smith*, 12 Ves. 39; *Colman* v. *Sarrel*, 1 Ves. jun. 50; *S. C.* 3 B. C. C. 12; *Dening* v. *Ware*, 22 Beav. 184; but see *Airey* v. *Hall*, 3 Sm. & Gif. 315; *Kiddill* v. *Farnell*, 3 Sm. & Gif. 428; and see *Pulvertoft* v. *Pulvertoft*, 18 Ves. 89.

(*b*) *Jones* v. *Jones*, W. N. 1874, p. 190.

(*c*) The authorities for the validity of the trust are, *Fortescue* v. *Barnett*, 3 M. & K. 36; *Roberts* v. *Lloyd*, 2 Beav. 376; *Blakely* v. *Brady*, 2 Drur. & Walsh, 311; *Airey* v. *Hall*, 3 Sm. & Gif. 315; *Parnell* v. *Hingston*, 3 Sm. & Gif. 337; *Pearson* v. *Amicable Assurance Office*, 27 Beav. 229. In favour of the opposite view, see *Edwards* v. *Jones*, 1 M. & Cr. 226; *Ward* v. *Audland*, 8 Sim. 571; C. P. Cooper's Cases, 1837–1838, 146; 8 Beav. 201;

Manning (*a*), Lord Justice K. Bruce observed, "It is upon legal and equitable principle, we apprehend, clear that a person *sui juris* acting freely, fairly, and with sufficient knowledge, ought to have and *has it in his power* to make in a binding and effectual manner a voluntary gift of any part of his property, *whether capable or incapable of manual delivery, whether in possession or reversionary or howsoever circumstanced.*" And it is conceived that this principle will for the future prevail (*b*), [but since debts and legal choses in action have been made transferable at law, questions under this head will be of less frequent occurrence (*c*).]

Where the subject was incapable of transfer as a debt, and a parol declaration of trust was made to the *debtor*, who undertook to hold it upon those trusts, it was held to be a valid settlement without any transfer or attempt at transfer (*d*).

Policies of assurance.

[7. Where a person wrote a letter to one of the two trustees of the settlement made on his first marriage, stating that he was desirous of making a settlement of six policies on the children of that marriage, and undertaking to make to the trustee and another trustee, to be named by the settlor, an assignment by way of settlement of the policies, *and until the settlement was executed he was to be bound by the agreement, as if the settlement were actually executed*, and afterwards he sent to the trustee another letter enclosing the former letter and three of the policies (the other three being in the possession of a mortgagee), and stating that "the enclosed was the formal letter of assignment previous to a deed, and as binding," but no notice of the letters was ever given to the offices (*e*), no formal settlement was ever executed, and no second trustee was named; it was held by V.C. Hall, that as a complete assignment of the policies had been made, the settlement of them was binding and effectual, notwithstanding that the execution by the settlor of a further instrument was contemplated in order to carry out his intention; and the Vice-Chancellor treated the case as

Meek v. *Kettlewell*, 1 Hare, 464; *Scales* v. *Maude*, 6 De G. M. & G. 43; *Sewell* v. *Moxsy*, 2 Sim. N. S. 189.

(*a*) 1 De G. M. & G. 187, 188.

(*b*) See *Wilcocks* v. *Hannyngton*, 5 Ir. Ch. Rep. 45; *Penfold* v. *Mould*, 4 L. R. Eq. 564; [*Lee* v. *Magrath*, 10 L. R. Ir. 45, 313; *Re Patrick* (1891), 1 Ch. 82.]

[(*c*) *Lee* v. *Magrath*, 10 L. R. Ir. 313.]

(*d*) *Roberts* v. *Roberts*, 11 Jur. N. S. 992; reversed 12 Jur. N. S. 971. As to the legal transfer, see now 36 & 37 Vict. c. 66, s. 25, rule 6.

[(*e*) Which however is not a material circumstance as between assignor and assignee; *Gorringe* v. *Irwell India Rubber Company*, 34 Ch. D. 128; and *post* p. 74; and that it is the duty of the trustee to give the notice, see *Re King*, 14 Ch. D. 179, 186.]

falling within *Fortescue* v. *Barnett* and *Pearson* v. *Amicable Assurance Office* (*a*).]

If a settlor assign all his personal estate with a power of attorney, the deed, being perfect and all that was intended, will pass a promissory note notwithstanding the want of indorsement, which is required for giving it currency (*b*).

Subject partly incapable of transfer.

8. If the subject of the settlement be partly *incapable* of legal transfer, and partly *capable*, and that part which is capable of transfer is not transferred, in this case all has not been done that might have been done, and no trust is created. Thus where there was a mortgage in fee and the mortgagee assigned the debt with a power of attorney, but did not convey the mortgaged lands, though they were legally transferable, it was held that the settlement was incomplete (*c*). [But where debts due on bills of sale were assigned to trustees, with power to sue for and get in the debts and execute all necessary assurances, but without any express assignment of the securities, it was held that the debts were completely assigned, and the settlor having got them in, the trustees were creditors against his estate for the amount (*d*).]

36 & 37 Vict. c. 66.

9. By a recent Act, 36 & 37 Vict. c. 66, s. 25, sub-sect. 6, "any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) (*e*), of any *debt* or other *legal chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person, from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if that Act had not passed) to pass, and transfer the *legal* right to such debt or chose in action from the date of such notice (*f*)." [The notice may be given at any time, even after the death of the assignor; but the effect of delaying to give notice will be to

[(*a*) *Re King*, 14 Ch. D. 179; and see *Johnstone* v. *Mappin*, 64 L. T. N.S. 48.]

(*b*) *Richardson* v. *Richardson*, 3 L. R. Eq. 686. But see *Richards* v. *Delbridge*, 18 L. R. Eq. 11.

(*c*) *Woodford* v. *Charnley*, 28 Beav. 96; [but see observations of Lindley, L. J., *Re Patrick* (1891), 1 Ch. (C. A.), 82, 88.]

[(*d*) *Re Patrick* (1891), 1 Ch. (C. A.), 82, 88.]

[(*e*) As to what amounts to such an assignment, see *National Provincial Bank* v. *Harle*, 6 Q. B. D. 626; *Burlinson* v. *Hall*, 12 Q. B. D. 347.]

[(*f*) Under the corresponding section in the Irish Act, 40 & 41 Vict. c. 57, s. 28, sub-s. 6, it was held that the voluntary assignee of a promissory note, not negotiable, and not payable at the time of the indorsement, was within the Act. *Lee* v. *Magrath*, 10 L. R. Ir. 45; reversed on other grounds, 10 L. R. Ir. 313.]

let in any equities arising in the interval before the notice is given (*a*).]

Where the property is an equitable interest.

10. If the subject of the trust be an *equitable* interest, then on the authority of *Sloane* v. *Cadogan* (*b*) a valid trust is created when the settlor has executed an assignment of it to a new trustee; for an equitable interest is capable of transmission from one to another; and here the Court finds the relation of trustee and *cestui que trust* established without the necessity of calling on the settlor to join in any act for giving it completion.

The late Vice-Chancellor of England questioned the case of *Sloane* v. *Cadogan* upon this point (*c*); but in *Kekewich* v. *Manning* (*d*), Lord Justice K. Bruce observed, "Suppose stock or money to be legally vested in A. as a trustee for B. for life, and subject to B.'s life interest for C. absolutely; surely it must be competent to C. in B.'s lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D. by way of pure bounty, leaving the legal interest and legal title untouched. If so, can C. do this better or more effectually than by executing an assignment to D.?"

These principles have since been acted upon (*e*), and *Sloane* v. *Cadogan* may be regarded as law. It had been before contended that the assignment operated by way of *contract*, and as there was no consideration the Court could not enforce it; but the rule now is, that the assignment passes the equitable *estate* (*f*).

[(*a*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.]

(*b*) Appendix to Sug. Vend. & Purch. *Quære*, also, if the same point was not ruled in *Ellison* v. *Ellison*, 6 Ves. 656; for though the facts are very imperfectly stated, it would seem from some expressions that at the date of the settlement the legal estate was not in the settlor; and see *Reed* v. *O'Brien*, 7 Beav. 32; *Bridge* v. *Bridge*, 16 Beav. 315; *Gannon* v. *White*, 2 Ir. Eq. Rep. 207.

(*c*) *Beatson* v. *Beatson*, 12 Sim. 281.

(*d*) 1 De G. M. & G. p. 188.

(*e*) *Voyle* v. *Hughes*, 2 Sm. & Gif. 18; *Lambe* v. *Orton*, 1 Dr. & Sm. 125; *Gilbert* v. *Overton*, 2 H. & M. 110; *Woodford* v. *Charnley*, 28 Beav. 99, *per* M.R.; *Re Way's Trust*, 2 De G. J. & S. 365; reversing same case, 4 New Rep. 453.

(*f*) *Donaldson* v. *Donaldson*, 1 Kay, 711. "If," Sir J. Wigram on one occasion observed, "the equitable owner of property, the legal interest of which is in a trustee, should execute a voluntary assignment, and authorise the assignee to sue for and recover the property from that trustee, and the assignee should give notice thereof to the trustee, and the trustee should accept the notice and act upon it, by paying the interest and dividends of the trust property to the assignee during the life of the assignor, and with his consent, it might be difficult for the executor or administrator of the assignor afterwards to contend that the gift of the property was not perfect in equity," 1 Hare, 471. The Vice-Chancellor here enumerates all the safeguards and confirmatory acts of which the transaction was capable, but it must not be inferred that if some of these were wanting the trust would not be supported.

[The rule above stated was held not to apply where the deed was not an absolute assignment, but took effect only by way of equitable charge, for then the transaction depended only upon contract, which could not be enforced in favour of a volunteer; *Re Earl of Lucan*; 45 Ch. D. 470.]

Where new trust is created without new trustees.

11. In other cases a person entitled to an equitable interest, instead of assigning it to new trustees, has directed the old trustees to stand possessed of it upon the new trusts (*a*), and, of course, it has been considered quite immaterial whether the settlor selected new trustees or was content with the original trustees.

Assignment to a stranger for his own benefit.

12. In other cases the owner of an equitable interest has simply assigned it to a stranger for the stranger's own benefit (*b*), which also in principle is the same as *Sloane* v. *Cadogan*, for there can be no difference between the gift of an equitable interest to A. himself and the gift of it to B. in trust for A.

Case of particular mode intended, but not effectual.

13. If the settlor intend to make the settlement in one particular mode which fails, the Court will not go out of its way to give effect to it by applying another mode; as if the settlement be intended to be made by transfer of the legal estate, the Court will not hold such intended but ineffectual transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust (*c*).

Meek *v.* Kettlewell.

14. In a case (*d*) heard before Sir J. Wigram, and affirmed by Lord Lyndhurst (*e*), it was held that a voluntary assignment of a mere *expectancy* (as of an heir or next of kin) in an equitable interest, and *not communicated to the trustees*, did not amount to the creation of a trust. This was the only point decided, and perhaps a distinction may be said to exist between the settlement of an *actual interest* and an *expectancy*, for a trust to be enforced must be *perfectly created*, whereas any dealing with what a person *has not*, but only *expects to have*, must necessarily in some sense be *in fieri*. (*f*) However, Sir J. Wigram, in the course of his judgment, denied that any distinction existed between settlements of a *legal* interest, as in *Edwards* v. *Jones*, and of an *equitable* interest, as in *Sloane* v. *Cadogan*, two cases which, both on principle and authority, ought not to be confounded.

(*a*) *Rycroft* v. *Christy*, 3 Beav. 238; *M'Fadden* v. *Jenkyns*, 1 Hare, 458; 1 Phill. 153; *Lambe* v. *Orton*, 1 Dr. & Sm. 125; [*Harding* v. *Harding*, 17 Q. B. Div. 442; *Re Hancock*, 57 L. J. Ch. 793, 796.]

(*b*) *Cotteen* v. *Missing*, 1 Mad. 176; *Collinson* v. *Pattrick*, 2 Keen, 123; *Wilcocks* v. *Hannyngton*, 5 Ir. Ch. Rep. 38; and see *Godsal* v. *Webb*, 2 Keen, 99.

(*c*) *Milroy* v. *Lord*, 8 Jur. N. S. 809; 4 De G. F. & J. 274, *per* L. J. Turner; *Richards* v. *Delbridge*, 18 L. R. Eq. 11; *Heartley* v. *Nicholson*, 19 L. R. Eq. 233; [*Bottle* v. *Knocker*, 46 L. J. N.S. Ch. 159; *Re Shield*, 53 L. T. N.S. 5; *Cross* v. *Cross*, 1 L. R. Ir. 389; 3 L. R. Ir. 342; *Hayes* v. *Alliance Assurance Coy.* 8 L. R. Ir. 149; *West* v. *West*, 9 L. R. Ir. 121; *Lee* v. *Magrath*, 10 L. R. Ir. 313; *Re Hancock*, 57 L. J. Ch. 793, 796; 59 L. T. N.S. 197.]

(*d*) *Meek* v. *Kettlewell*, 1 Hare 464. See observations upon this case in *Penfold* v. *Mould*, 4 L. R. Eq. 564.

(*e*) 1 Ph. 342.

[(*f*) See *Re Parsons*, 45 Ch. D. 51, 59.]

Notice unnecessary.

15. Great importance was also attached by his Honour to the circumstance that *notice of the assignment* was not given to the trustees. But notice in these cases is not indispensable. As against the *settlor*, an equitable interest is perfectly transferred without notice. It is only as between *purchasers* that the service of notice on the trustee, or the want of it, has a material effect upon the transfer (*a*).

[Addition to trust property.]

[16. Where trustees voluntarily added certain sums to the settled share of a beneficiary, under an erroneous impression as to the construction of a will, they were held to have constituted themselves trustees for the beneficiary, but not on the trusts of the will as construed by the Court (*b*).]

Settlement retained in settlor's possession.

17. If a person execute a voluntary *settlement*, which is duly sealed and delivered at the time, but the settlor keeps it in his possession and never parts with it, the settlement is nevertheless as binding as if it had been handed over to the parties entitled (*c*). But in the case of a conveyance upon a *sale*, though the deed be duly sealed and delivered, and the word "escrow" be not used, yet if it be retained in the hands of the vendor's solicitor it has no operation until handed over to the purchaser on payment of the purchase-money (*d*). The distinction is that in the former case nothing remains to be done, but in the latter case the substance of the agreement on one side, viz. the payment of the purchase-money, is still to be performed.

Where donee incurs expense in respect of the property.

18. Though a settlement be voluntary at the time, and the legal estate do not pass, yet if the donee with the knowledge and sanction of the donor incur expense in respect of the property upon the faith of the gift, the donee is no longer regarded as a volunteer, but, in the character of purchaser, may call for a conveyance of the legal estate (*e*).

Voluntary settlement by way of trust not revocable by settlor.

19. If a complete voluntary settlement, whether with or with-

(*a*) See *Burn* v. *Carvalho*, 4 M. & Cr. 690; *Donaldson* v. *Donaldson*, Kay, 711; *Sloper* v. *Cottrell*, 6 Ell. & Bl. 504; *Gilbert* v. *Overton*, 2 H. & M. 110; [*Gorringe* v. *Irwell India Rubber Coy.* 34 Ch. D. 128; *Re Patrick* (1891) Ch. (C.A.) 82, 87.] Lord Romilly had attached importance to notice, even as against the settlor. See *Bridge* v. *Bridge*, 16 Beav. 315; *Re Way's Trust*, 4 New Rep. 453, but this view has been overruled, see *Re Way's Trust*, 2 De G. J. & S. 365.

[(*b*) *Re Walters*; *Neison* v. *Walters*, 63 L. T. N.S. 328; reversing S. C., 61 L. T. N.S. 872; and see *Re Curteis*, 14 L. R. Eq. 217.]

(*c*) *Re Way's Trust*, 2, De G. J. & S. 365; *Fletcher* v. *Fletcher*, 4 Hare, 67; *Hope* v. *Harman*, 11 Jur. 1097; *Armstrong* v. *Timperon*, 19 W. R. 558; 24 L. T. N.S. 275; and see *Jones* v. *Jones*, 23 W. R. 1.

(*d*) *Hudson* v. *Temple*, 29 Beav. 545, *per* M. R.; *Murray* v. *Stair*, 2 Barn. & Cr. 82; *Nash* v. *Flyn*, 1 Jon. & Lat. 162; [and see *Whelan* v. *Palmer*, 58 L. T. N.S. 937, 940.]

(*e*) *Dillwyn* v. *Llewelyn*, 4 De G. F. & J. 517.

out transmutation of possession, be once executed, it cannot be revoked by a subsequent *voluntary* settlement (*a*), and the circumstance that the legal estate which was vested in the trustee becomes afterwards by some accident revested in the settlor is immaterial, as he will take it as trustee (*b*). But if the voluntary settlement be in trust for the settlor for life, and then in trust for others, but subject to such debts as the settlor may leave, the settlor may in effect nullify the settlement by creating new debts (*c*). [And where a settlor covenanted that he would in his lifetime, or his executors should after his decease, settle certain specific stocks or others of equivalent value, and, reserving a life interest to himself, declared himself to be trustee, it was held, notwithstanding the use of the words of futurity, that a present complete settlement was intended, and was binding on the settlor (*d*).]

Fraud.

20. A voluntary settlement, though complete on the face of it, may be set aside in equity, where obtained by undue influence (*e*), or where it was not intended to take effect in the events which have actually happened, and was therefore executed under a mistake (*f*).

But in case of lands may be defeated by a sale.

21. *A voluntary settlement of land* by way of trust, perfectly created, is liable, under 27 Eliz. cap. 4, like a settlement of the legal estate, to be defeated by a subsequent *sale* to a *purchaser*, even with notice (*g*). And the *cestui que trust* can neither obtain

(*a*) *Newton* v. *Askew*, 11 Beav. 145; *Rycroft* v. *Christy*, 3 Beav. 238.

(*b*) *Ellison* v. *Ellison*, 6 Ves. 656; *Smith* v. *Lyne*, 2 Y. & C. C. C. 345; *Paterson* v. *Murphy*, 11 Hare, 88.

(*c*) *Markwell* v. *Markwell*, 34 Beav. 12.

(*d*) *Johnston* v. *Mappin*, 64 L. T. N.S. 48.

(*e*) *Huguenin* v. *Baseley*, 14 Ves. 273; [*Allcard* v. *Skinner*, 36 Ch. Div. 145.]

(*f*) See *Forshaw* v. *Welsby*, 30 Beav. 243; *Nanney* v. *Williams*, 22 Beav. 452; *Bindley* v. *Mulloney*, 7 L. R. Eq. 343.

[(*g*) In *Price* v. *Jenkins*, 5 Ch. Div. 619, it was held that a settlement of leaseholds by assignment was not voluntary, although the deed contained no covenant by the trustees to pay the rent or perform the covenants of the lease under which the premises were held, on the ground that the trustees came under a responsibility for payment of rent and performance of the covenants, which might be such a responsibility, that a lessee might be actually willing to pay money to get rid of it. This case arose under 27 Eliz. cap. 4; but the doctrine laid down in it has no application to cases arising under 13 Eliz. cap. 5; *Re Ridler*, 22 Ch. Div. 74; and see *Ex parte Hillman*, 10 Ch. Div. 622; *Re Marsh and Earl Granville*, 24 Ch. Div. 11; [*Green* v. *Paterson*, 32 Ch. Div. 75.] The Irish case of *Gardiner* v. *Gardiner*, 12 Ir. C. L. R. 565, in which it was held that even a covenant by the assignee of a leasehold interest to indemnify the lessee against the rent and covenants in the lease was not necessarily such a valuable consideration as to take the case out of the Statute of Fraudulent Conveyances, 10 Car. 1, S. 2, c. 3, was not cited in *Price* v. *Jenkins*, and the question whether the principle of *Gardiner* v. *Gardiner*, or *Price* v. *Jenkins*, was to prevail, was treated as an open one in Ireland in *Hamilton* v. *Molloy*, 5 L. R. Ir. 339; and in a subsequent case in the Irish Court of Appeal, *Price* v. *Jenkins* has been dissented from, and *Gardiner* v. *Gardiner* followed; see *Lee* v. *Mathews*

an injunction against the sale, though the settlement was founded on meritorious consideration, as a provision for a wife or child (*a*), nor follow the estate into the hands of the purchaser (*b*), nor charge him with misapplication of the purchase-money, if, with notice of the voluntary settlement, he paid it to the vendor (*c*), nor can come upon the settlor himself to compensate the *cestui que trust* for the loss (*d*). However, the settlement must be purely voluntary, and not founded on valuable consideration at all (for the Court does not look at the *quantum* of consideration) (*e*): and where the settlement is purely voluntary the trust will be executed by the Court until the estate is actually sold (*f*); and the author of the settlement, if he contract for the sale, cannot himself take proceedings to enforce specific performance (*g*), though the purchaser may do so (*h*), and though the settlor himself may defeat the trust by a subsequent sale, the *heir* or *devisee* of the settlor has no such power (*i*); [and where a voluntary settlement is made of land subject to an existing mortgage, and the property is sold by the mortgagee under his power of sale, the settlement is not thereby defeated as to the

6 L. R. Ir. 530, over-ruling *S. C.* 6 L. R. Ir. 167; [In *Re Lulham*, 53 L. J. N.S. Ch. 928; 32 W. R. 1013, Kay, J., followed *Price* v. *Jenkins* against his own opinion; and in *Harris* v. *Tubb*, 42 Ch. D. 79, Kekewich, J., observed that although *Price* v. *Jenkins* seemed to have been treated as applicable to cases arising under 27 Eliz. c 5, and to none other, yet he found no judgment of the Court of Appeal anywhere saying that that was so, and felt himself bound to hold that an assignment of leaseholds is not voluntary.]

(*a*) *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84.

(*b*) *Williamson* v. *Codrington*, 1 Ves. 516, *per* Lord Hardwicke.

(*c*) *Evelyn* v. *Templar*, 2 B. C. C. 148; and see *Pulvertoft* v. *Pulvertoft*, 18 Ves. 91, 93; *Buckle* v. *Mitchell*, 18 Ves. 112; but compare *Leach* v. *Dean*, 1 Ch. Rep. 146, with *Pulvertoft* v. *Pulvertoft*, 18 Ves. 91; and see 18 Ves. 92 note (b), and *Townend* v. *Toker*, 1 L. R. Ch. App. 447.

(*d*) *Williamson* v. *Codrington*, 1 Ves. 516, *per* Lord Hardwicke; but see *Leach* v. *Dean*, 8 Ch. Rep. 146; *S. C.* cited *Pulvertoft* v. *Pulvertoft*, 18 Ves. 91. [But if the settlor becomes administrator of the *cestui que trust*, a subsequent conveyance by him is a breach of trust, and equity will compel compensation; *Harding* v. *Howell*, 14 App. Cas. 307, 317.]

(*e*) *Townend* v. *Toker*, 1 L. R. Ch. App. 447; *Bayspoole* v. *Collins*, 6 L. R. Ch. App. 228; [*Shurmur* v. *Sedgwick*, 24 Ch. Div. 597; see *Paget* v. *Paget*, 9 L. R. Ir. 128; Reversed, 11 L. R. Ir. 26. And as to the distinction which prevails between the settlement of a widow on her children by a former marriage, and the settlement of a widower, see *Re Cameron and Wells*, 37 Ch. D. 33.]

(*f*) *Pulvertof* v. *Pulvertoft*, 18 Ves. 94.

(*g*) *Johnson* v. *Legard*, Turn. & Russ. 294; *Smith* v. *Garland*, 2 Mer. 123; but see *Hogarth* v. *Phillips*, 4 Drew. 360; *Peter* v. *Nicolls*, 11 L. R. Eq. 391. [*Re Briggs & Spicer*, 39 W. R. 377.]

(*h*) *Willats* v. *Busby*, 5 Beav. 193; *Daking* v. *Whimper*, 26 Beav. 568; *Townend* v. *Toker*, 1 L. R. Ch. App. 447. But he cannot file a bill to have the voluntary deed delivered up, *De Hoghton* v. *Money*, 35 Beav. 98; S. C. 1 L. R. Eq. 154.

(*i*) *Doe* v. *Rusham*, 17 Q. B. 723; *Lewis* v. *Rees*, 3 K. & J. 132.

surplus proceeds of sale after satisfying the mortgage (*a*)]. But chattels *personal* (in which respect they differ from chattels *real*) (*b*) are not within the statute 27 Eliz. c. 4, relating to *purchasers*, and therefore a voluntary settlement of chattels personal cannot be defeated by a subsequent sale (*c*). But voluntary deeds may acquire a validity by matter *ex post facto*, as by a sale or mortgage by the volunteer on the footing of the voluntary deed, and this doctrine has been extended to the disposition for valuable consideration of any equitable interest (*d*).

13 Eliz. c. 5.

22. A voluntary settlement, whether of real or personal estate, may be defeated by the operation of 13 Eliz. c. 5, which makes all instruments devised and contrived of "fraud, covin, collusion, or guile," with intent to delay, hinder, or defraud creditors, utterly void as against the creditors "disturbed, hindered, delayed, or defrauded," but the Act is not to extend to any estate or interest in lands, chattels, &c., assured or to be assured on "good consideration and *bonâ fide*" to any person not having notice of covin, fraud, or collusion.

Deeds invalid as against creditors.

Upon the construction of this statute it has been held, that where the settlor was *insolvent* at the time (*e*), or substantially indebted (*f*), or the object of defeating creditors may be inferred from a person settling his whole property, real and personal, and so depriving himself of the means of paying an existing debt (*g*), a voluntary deed, though supported by the meritorious consideration of providing for a wife or child (*h*), and though made in pursuance of a *verbal* ante-nuptial promise (*i*), and though it was a settlement of the purchase money, or of an annuity in lieu of

[(*a*) *Re Walhampton Estate*, 26 Ch. D. 391.]

(*b*) *Saunders* v. *Dehew*, 2 Vern. 272, second note.

(*c*) *Bill* v. *Cureton*, 2 M. & K. 503; *M'Donnell* v. *Hesilrige*, 16 Beav. 346; *Jones* v. *Croucher*, 1 Sim. & Stu. 315 (this case cites also the authority of Sir W. Grant in *Sloane* v. *Cadogan*, Append to Sugd. Vend. & Purch., but the *dictum* does not appear); *Meek* v. *Kettlewell*, 1 Hare, 473, *per* Sir J. Wigram.

(*d*) *George* v. *Milbanke*, 9 Ves. 190; and see 1 Mer. 638: 7 Cl. & Fin. 463; [*Halifax Joint Stock Banking Co.* v. *Gledhill* (1891), 1 Ch. 31.]

(*e*) *Barrack* v. *M'Culloch*, 3 K. & J. 110; *Lush* v. *Wilkinson*, 5 Ves. 384; *Whittington* v. *Jennings*, 6 Sim. 493; *French* v. *French*, 6 De G. M. & G. 95; *Acraman* v. *Corbett*, 1 J. & H. 410; *Crossley* v. *Elworthy*, 12 L. R. Eq. 158; *Taylor* v. *Coenen*, 1 Ch. Div. 636.

(*f*) *Townsend* v. *Westacott*, 2 Beav. 340; 4 Beav. 58; *Martyn* v. *Macnamara*, 2 Conn. & Laws. 554 *per Cur.*; *Holmes* v. *Penney*, 3 K. & J. 99; *Cornish* v. *Clark*, 14 L. R. Eq. 184; and see *Richardson* v. *Smallwood*, Jac. 557; *Skarf* v. *Soulby*, 1 Mac. & G. 375.

(*g*) *Smith* v. *Cherrill*, 4 L. R. Eq. 390; and see *Spirett* v. *Willows*, 3 De G. J. & S. 303.

(*h*) *Barrack* v. *M'Culloch*, 3 K. & J. 110; and see *Lush* v. *Wilkinson*, 5 Ves. 384.

(*i*) *Crossley* v. *Elworthy*, 12 L. R. Eq. 158.

purchase money upon a sale (*a*), is fraudulent as against creditors, (though only general creditors without any lien (*b*), or creditors under a voluntary post obit bond (*c*)). But [the question is always one of intent (*d*), and] a deed is not impeachable merely because it comprises the whole of a person's property (*e*), or merely because it is voluntary (*f*), and although it be upon the face of it voluntary, it may be shewn by extrinsic evidence to have been founded on valuable consideration (*g*), or to have been otherwise *bonâ fide* (*h*). And on the other hand, a deed, though it was founded on *valuable consideration*, even in consideration of marriage (*i*), may, if it was executed for the purpose of *defrauding* creditors, be declared to be void (*j*).

[The exception of interests assured upon good consideration and *bonâ fide* protects not only a *bonâ fide* purchase by the settlement itself, but also a *bonâ fide* purchase of any interest derived under the settlement whether legal or equitable (*k*)].

Valid deeds.

23. If the settlor was *solvent* at the time (*l*), or was indebted only in the ordinary course as for current expenses which he had the means of paying (*m*), or not substantially indebted (*n*), or in a sum of considerable amount but adequately secured by mortgage (*o*), or which the settlor's other property was amply

(*a*) *French* v. *French*, 6 De G. M. & G. 95; *Neale* v. *Day*, 4 Jur. N. S. 1225.

(*b*) *Reese River Company* v. *Atwell*, 7 L. R. Eq. 347.

(*c*) *Adames* v. *Hallett*, 6 L. R. Eq. 468.

[(*d*) *Thompson* v. *Webster*, 4 Drew. 632; *Godfrey* v. *Poole*, 13 App. Cas. 497, 503.]

(*e*) *Alton* v. *Harrison*, 4 L. R. Ch. App. 622; *Allen* v. *Bonnett*, 5 L. R. Ch. App. 577; [*Ex parte Games*, 12 Ch. Div. 314].

(*f*) *Holloway* v. *Millard*, 1 Mad. 414; *Thompson* v. *Webster*, 4 Drew. 632; *Holmes* v. *Penney*, 3 K. & J. 90.

(*g*) *Gale* v. *Williamson*, 8 M. & W. 450.

(*h*) *Thompson* v. *Webster*, 4 Drew. 628; 4 De G. & J. 600; [*Godfrey* v. *Poole*, 13 App. Cas. 497, 503.]

(*i*) *Bulmer* v. *Hunter*, 8 L. R. Eq. 46; *Colombine* v. *Penhall*, 1 Sm. & G. 228.

(*j*) *Twyne's* case, 3 Rep. 80, b; *Bott* v. *Smith*, 21 Beav. 511; *Acraman* v. *Corbett*, 1 J. & H. 410; *Hollamby* v. *Oldrieve*, W. N. 1866, p. 94; and see *Harman* v. *Richards*, 10 Hare, 81; *Holmes* v. *Penney*, 3 K. & J. 90. [*Re Pennington*, *Ex parte Cooper*, 59 L. T. N. S. 774 (affirmed C. A. W. N. (88) 205), where see observations of Cave, J., as to the degree of complicity on the part of the wife which is necessary to avoid the settlement where the intent is to defraud the creditors of the husband.]

[(*k*) *Halifax Joint Stock Banking Co.* v. *Gledhill* (1891), 1 Ch. 31.]

(*l*) *Lush* v. *Wilkinson*, 5 Ves. 384; *Battersbee* v. *Farrington*, 1 Swans. 106; *Kent* v. *Riley*, 14 L. R. Eq. 190; *Middlecome* v. *Marlow*, 2 Atk. 519; *Townshend* v. *Windham*, 2 Ves. Sen. 11, *per* Lord Hardwicke; *Russel* v. *Hammond*, 1 Atk. 15: *Walker* v. *Burrows*, 1 Atk. 94; and see *Martyn* v. *Macnamara*, 2 Conn. & Laws. 554.

(*m*) *Skarf* v. *Soulby*, 1 Mac. & G. 375, *per Cur.*; *Lush* v. *Wilkinson*, 5 Ves. 387, *per Cur.*

(*n*) *Graham* v. *O'Keeffe*, Ir. Ch. Rep. 1.

(*o*) *Stephens* v. *Olive*, 2 B. C. C. 90; and see *Skarf* v. *Soulby*, 1 Mac. & G. 375.

sufficient to meet (*a*), and the settlement was *bonâ fide*, the deed cannot be impeached. The indebtedness of the party at the time is only one circumstance of evidence upon the question of *fraud*, and under all the circumstances the Court may see that no fraud was intended or can be presumed (*b*). On the other hand, though the settlor was perfectly solvent at the time, yet if he executed the settlement with a view of withdrawing the bulk of his property from the reach of his creditors in the event of insolvency, which is in his contemplation, as when a person about to embark in a hazardous business makes a settlement on his wife and family to guard against the consequences, the settlement is void (*c*).

What creditors can set aside the deed.

24. If it can be proved that the settlor contemplated, in fact, a fraud upon *subsequent* creditors, the deed can no doubt be set aside at their instance, though the settlor was not indebted at the date of the deed, or the debts which did exist have since been paid (*d*). But where fraud is merely *presumed* from the want of consideration and the indebtedness of the party, the settlement is deemed fraudulent only as against those creditors who were such at the date of the settlement (*e*); and if those creditors have since been satisfied, the intention of defrauding them is rebutted (*f*). But when the deed has once been set aside as fraudulent against a creditor who was such at the time, other subsequent creditors are allowed to come in *pro ratâ* (*g*): and as subsequent creditors have this equity, they may themselves, though this was formerly doubted (*h*), institute proceedings to set aside the deed, so long as any debt incurred at the date of the deed remains unsatisfied (*i*);

(*a*) *Kent* v. *Riley*, 14 L. R. Eq. 190.

(*b*) *Richardson* v. *Smallwood*, Jac. 556; [*Re Johnson*, 20 Ch. D. 389; affirmed *nom. Golden* v. *Gillam*, 51 L. J. N.S. Ch. 503; and see *Ex parte Mercer*, 170 B. Div. 290.]

(*c*) *Mackay* v. *Douglas*, 14 L. R. Eq. 106; [*Ex parte Russell*, 19 Ch. Div. 588; *Re Ridler*, 22 Ch. Div. 74.]

(*d*) *Barling* v. *Bishopp*, 29 Beav. 417; *Jenkyn* v. *Vaughan*, 3 Drew. 426; *Richardson* v. *Smallwood*, Jac. 556; *Tarback* v. *Marbury*, 2 Vern. 510; *Hungerford* v. *Earle*, Ib. 261; *Spirett* v. *Willows*, 3 De G. J. & S. 303; *Ware* v. *Gardner*, 7 L. R. Eq. 317; *Freeman* v. *Pope*, 9 L. R. Eq. 206; 5 L. R. Ch. App. 538.

(*e*) *Kidney* v. *Ceussmaker*, 12 Ves. 136; *Montague* v. *Sandwich*, cited Ib.; *White* v. *Sansom*, 3 Atk. 410; *Lush* v. *Wilkinson*, 5 Ves. 384; *Townsend* v. *Westacott*, 2 Beav. 340; 4 Beav. 58; and see *Whittington* v. *Jennings*, 6 Sim. 493; *Spirett* v. *Willows*, 3 De G. J. & S. 293.

(*f*) See *Jenkyn* v. *Vaughan*, 3 Drew. 425; *Richardson* v. *Smallwood*, Jac. 557.

(*g*) *Richardson* v. *Smallwood*, Jac. 558; *Montague* v. *Sandwich*, cited 12 Ves. 156, note (a); *Jenkyn* v. *Vaughan*, 3 Drew. 424; *Taylor* v. *Jones*, 2 Atk. 600.

(*h*) See *Ede* v. *Knowles*, 2 Y. & C. C. C. 178.

(*i*) *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Freeman* v. *Pope*, 9 L. R. Eq. 206; 5 L. R. Ch. App. 538; and see *Lush* v. *Wilkinson*, 5 Ves. 387; *Richardson* v. *Smallwood*, Jac. 552.

and where the subsequent creditor proves such a debt to be still in existence, but does not shew the insolvency or substantial indebtedness of the settlor at the date of the deed, the Court in its discretion may direct an inquiry (*a*).

[The mere abstaining from suing for a period less than that required to raise a bar under the Statute of Limitations, as for ten years, will not prevent the creditors from setting aside the deed (*b*)].

Whether settlements of stock, &c., within 13 Eliz. c. 5.

25. It was formerly held that settlements of stock, policies of insurance, &c., which were not liable to be taken in execution at the suit of a creditor, were exempt from the operation of the Act, and therefore that settlements of them could not be defeated (*c*). But now that by 1 & 2 Vict. c. 110, such interests are liable to execution, or to be charged by a judge's order, the distinction must be considered as obsolete (*d*).

[Bankruptcy.]

[26. Under the Bankruptcy Act, 1883, (*e*) a *fraudulent* conveyance of a person's property, or any part thereof, is an act of bankruptcy, as also is any conveyance of property which would be void as a fraudulent preference, and by section 47 a voluntary settlement is void as against the trustee in bankruptcy if the settlor become bankrupt within *two years;* and if the settlor become bankrupt within *ten years* it is void, unless the parties claiming under the settlement can show (*f*) that he was solvent at the time without the aid of the property comprised in the settlement, and that the interest of the settlor in the settled property passed to the trustee of the settlement on the execution thereof. And in estimating the solvency of the settlor the value of the life interest which he takes under the settlement must be regarded (*g*). But the section does not apply to the case of a gift of money to a son made for the purpose of enabling him to commence business on his own account (*h*); and it is not retrospective so far as it differs from section 91 of the Bankruptcy Act, 1869 (*i*). "Settlement," for the purposes of the

(*a*) *Richardson* v. *Smallwood*, Jac. 557; *Jenkyn* v. *Vaughan*, 3 Drew. 427; *Townsend* v. *Westacott*, 2 Beav. 345; *Skarf* v. *Soulby*, 1 Mac. & G. 364; *Christy* v. *Courtenay*, 13 Beav. 101.

[(*b*) *Three Towns Banking Company* v. *Maddever*, 27 Ch. Div. 523.]

(*c*) *Grogan* v. *Cooke*, 2 B. & B. 230; *Cockrane* v. *Chambers*, Amb. 79, note 1; *Rider* v. *Kidder*, 10 Ves. 368; *Dundas* v. *Dutens*, 2 Cox, 235; 1 Ves. J. 196.

(*d*) *Norcutt* v. *Dodd*, Cr. & Ph. 100; *Sims* v. *Thomas*, 12 A. & E. 536; *Barrack* v. *M'Culloch*, 3 K. & J. 110.

[(*e*) 46 & 47 Vict. c. 52, s. 4.] See *Ex parte Dawson*, 19 L. R. Eq. 433; [*Re Pumfrey*, 10 Ch. Div. 622; *Hance* v. *Harding*, 20 Q. B. D. 732.]

[(*f*) A purchaser under a trust for sale contained in the settlement is within these words; *Re Briggs and Spicer*, 39 W. R. 377.]

[(*g*) *Re Lowndes*, 18 Q. B. D. 677.]

[(*h*) *Re Player*, 15 Q. B. D. 682.]

[(*i*) *Re Ashcroft*, 19 Q. B. Div. 186, and quære whether the section is retrospective at all, *per* Fry, L.J., p. 198.]

section includes "any conveyance or transfer of property." A deed declaring trusts of shares intended to be transferred, but not containing any covenant by the intending settlor to transfer the shares, was held not to be a settlement within the meaning of the section (*a*).

[Settlement of future property on marriage.]

27. Under the Bankruptcy Act, 1883 (*b*), a covenant or contract made in consideration of marriage for the future settlement on the settlor's wife or children of any property wherein he had not at the date of the marriage any estate or interest, and not being property of the wife, is on his becoming bankrupt before the property is actually transferred pursuant to the covenant or contract, void against the trustee in the bankruptcy.]

Whether a Court of equity will enforce specific performance of agreements under seal where there is no valuable consideration.

28. As every *agreement under hand and seal* carries a consideration upon the face of it, and will support an action at law, the inference has not unfrequently been drawn, that equity in such a case, though the trust was not perfectly created, will specifically execute the contract in favour of volunteers (*c*). But equity never enforced a covenant to stand seised to the *use of a stranger in blood;* and, if we examine the authorities, we shall find there is very little ground in support of the position; and it is now well settled that a voluntary covenant, notwithstanding the solemnity of the seal, will *not* be specifically executed (*d*).

[(*a*) *Re Ashcroft*, 19 Q. B. Div. 186. A declaration of trust by a debtor, or a mere agreement by him, that his property shall be dealt with for the benefit of creditors, is not a "conveyance or assignment" within sec. 4 sub-sec. 1 (a); *Re Spackman*, 24 Q. B. Div. 728.]

[(*b*) 46 & 47 Vict. c. 52.]

(*c*) See *Wiseman* v. *Roper*, 1 Ch. Rep. 158; *Beard* v. *Nutthall*, 1 Vern. 427; *Husband* v. *Pollard*, cited *Randal* v. *Randal*, 2 P. W. 467; *Vernon* v. *Vernon*, 2 P. W. 594; *Goring* v. *Nash*, 3 Atk. 186, 2nd ground; *S. C.* cited 1 Ves. 513; *Stephens* v. *Trueman*, 1 Ves. 73; and see *Williamson* v. *Codrington*, 1 Ves. 511; *Hervey* v. *Audland*, 14 Sim. 531.

(*d*) *Hale* v. *Lamb*, 2 Eden, 294, *per* Lord Northington; *Fursaker* v. *Robinson*, Pr. Ch. 475; *Evelyn* v. *Templar*, 2 B. C. C. 148; *Colman* v. *Sarel*, 3 B. C. C. 12; *Jefferys* v. *Jefferys*, Cr. & Ph. 138; *Meek* v. *Kettlewell*, 1 Hare, 474, *per* Sir J. Wigram; *Fletcher* v. *Fletcher*, 4 Hare, 74; *per eundem*; *Newton* v. *Askew*, 11 Beav. 145; *Dillon* v. *Coppin*, 4 M. & Cr. 647; *Kekewich* v. *Manning*, 1 De G. M. & G. 188; *Dening* v. *Ware*, 22 Beav. 184.

But a voluntary *covenant* to pay a sum to A. in trust for B. has been allowed to create a debt in favour of B.; *Fletcher* v. *Fletcher*, 4 Hare, 67; *Ward* v. *Audland*, 16 M. & W. 862; *Cox* v. *Barnard*, 8 Hare, 310; *Williamson* v. *Codrington*, 1 Ves. 511; and see *Bridge* v. *Bridge*, 16 Beav. 320. But as the ground of this is, that the covenant is perfect at law and the covenantee could recover upon it, it seems to follow that where only *nominal* damages would be given a law, a Court of Equity would not give more.

A voluntary *bond* or *covenant* creates a debt, which will be paid before legatees, and even at the expense of specific legatees, *Patch* v. *Shore*, 2 Drew. & Sm. 589; though after creditors for value, *Watson* v. *Parker*, 6 Beav. 288; *Dening* v. *Ware*, 22 Beav. 188; *Hales* v. *Cox*, 32 Beav. 118; and before interest allowed by the general orders of the Court on debts not carrying interest, *Garrard* v. *Dinorben*, 5 Hare, 213.

Meritorious consideration.

29. It has also been sometimes supposed that where the trust is imperfectly created, yet the Court, without proof of *valuable* consideration, will act upon *meritorious* consideration, as payment of debts, or provision for a wife or child (*a*).

Agreement founded thereon not enforced against the settlor.

30. After much conflict of authority (*b*), it may now be considered as settled that an agreement founded on meritorious consideration will not be executed as against the *settlor himself* (*c*).

How far enforced as against parties claiming under him.

31. *As regards parties claiming under the settlor*, it was always admitted, that had the settlor sold the estate or become indebted, the equity of the *cestui que trust* claiming on the ground of meritorious consideration, would not bind a purchaser or creditors (*d*). But if he subsequently made a voluntary settlement, or died without disposing of the estate by act *inter vivos*, then the old cases were that the equity would attach as against the volunteers under the settlement (*e*), a devisee or legatee (*f*), the heir-at-law

And the same principle has been applied to a voluntary promissory note, *Dawson* v. *Kearton*, 3 Sm. & Gif. 191. But though a voluntary promissory note can, if circulated, be recovered upon at law by a *bonâ fide* holder, yet it is conceived that the original payee cannot recover if the maker prove want of consideration; and if this be so, then, as equity follows the law, this debt should not be allowed in equity; see *Vez* v. *Emery*, 5 Ves. 141; *Hill* v. *Wilson*, 8 L. R. Ch. App. 901; *Curteis* v. *Adams*, W. N. 1875, p. 53. In one case a person gave his promissory note to a trustee, for the settlor's natural daughter, and deposited the title deeds of an estate in the hands of the trustee to secure the debt, and the M. R. held that a valid trust had been created of the amount. *Arthur* v. *Clarkson*, 35 Beav. 458. [And a delivery of a promissory note to the donor's executor to be handed over after the donor's death to a third person on her fulfilling a condition was held to create a trust; *Re Richards*; *Shenstone* v. *Brock*, 36 Ch. D. 541.]

A bond or covenant which is voluntary at first, may acquire support from valuable consideration by matter *ex post facto*. *Payne* v. *Mortimer*, 1 Giff. 118; 4 De G. & J. 447. [For reference to decisions at law shewing that the assignor of a debt is liable to be sued by the assignee, if the assignor defeats his own assignment by getting in or releasing the debt, and that if the assignor, being a settlor, could have been sued at law by the trustees, it follows that his estate is liable in equity, see *Re Patrick* (1891), 1 Ch. 82, 88, *per* Lindley, L. J.]

(*a*) A child may plead meritorious consideration as against the parent, but of course a parent cannot plead it as against the child; *Downing* v. *Townsend*, Amb. 592.

(*b*) See *Bonham* v. *Newcomb*, 2 Vent. 365; *Leech* v. *Leech*, 1 Ch. Ca. 249; *Fothergill* v. *Fothergill*, Freem. 256; *Sear* v. *Ashwell*, cited *Gordon* v. *Gordon*, 3 Swans. 411, note; *Watts* v. *Bullas*, 1 P. W. 60; *Bolton* v. *Bolton*, Serjt. Hill's MSS. 77; *S.C.* 3 Sw. 414, note; *Goring* v. *Nash*, 3 Atk. 186; *Darley* v. *Darley*, 3 Atk. 399; *Hale* v. *Lamb*, 2 Eden, 292; *Evelyn* v. *Templar*, 2 B. C. C. 148; *Colman* v. *Sarrel*, 1 Ves. jun. 50; *S. C.* 3 B C. C. 12; *Antrobus* v. *Smith*, 12 Ves. 39; *Rodgers* v. *Marshall*, 17 Ves. 294; *Ellis v. Nimmo*, Ll. & G. *t.* Sugd. 333. The subject will be found discussed at length in 3rd. edit. p. 95.

(*c*) *Antrobus* v. *Smith*, 12 Ves. 46; *Holloway* v. *Headington*, 8 Sim. 325; *Walrond* v. *Walrond*, Johns. 25.

(*d*) *Bolton* v. *Bolton*, 3 Serjt. Hill's MSS. 77; *S. C.* 3 Sw. 414, note; *Goring* v. *Nash*, 3 Atk. 186; *Fineh* v. *Earl of Winchelsea*, 1 P. W. 277; and see *Garrard* v. *Lauderdale*, 2 R. & M. 453, 454.

(*e*) *Bolton* v. *Bolton*, *ubi supra*.

(*f*) Ib.

or next of kin (*a*), with however the saving clause, that the Court would not have enforced it even as against these classes of persons, where they too could plead meritorious consideration (as if they were the children of the settlor), without a previous inquiry by the Master, whether they had any adequate provision independently of the estate (*b*). At the present day, however, it is conceived that even as against volunteers claiming under the settlor, with or without an adequate provision, a voluntary agreement, whether under seal or not, cannot be enforced on the mere ground of meritorious consideration (*c*).

No trust unless there be an intention to create one.

32. It is obviously essential to the creation of a trust, that there should be the *intention* of creating a trust, and therefore if upon a consideration of all the circumstances the Court is of opinion that the settlor did not mean to create a trust, the Court will not impute a trust where none in fact was contemplated (*d*).

Field *v.* Lonsdale.

Thus, where a person, having deposited in a savings bank as much money in his own name as the rules allowed, deposited a further sum in his name as trustee for his sister, but without making any communication to her; and it appeared that he made such deposit with a view of evading the rules of the bank, and not to benefit his sister; and by the Act of Parliament he retained the control of the fund; the Court held that no trust was created (*e*). So, if a person indorse and hand over promissory notes with the intention of making a testamentary disposition, the transaction does not create a trust *inter vivos* (*f*).

Money scrivener.

33. As the business of a money scrivener is now almost obsolete, and the looking for and procuring investments for the money of clients on landed security is now commonly transacted by solicitors, it has been held that if a sum of money be placed by a client in the hands of *a solicitor* for *investment*, the mere deposit will not *per se* create the relation of trustee and *cestui que trust* between the solicitor and the client (*g*). [If the solicitor

(*a*) *Watts* v. *Bullas*, 1 P. W. 60; *Goring* v. *Nash*, 3 Atk. 186; *Rodgers* v. *Marshall*, 17 Ves. 294.

(*b*) See *Goring* v. *Nash*, *Rodgers* v. *Marshall*, *ubi supra*.

(*c*) *Jefferys* v. *Jefferys*, Cr. & Ph. 138; *Antrobus* v. *Smith*, 12 Ves. 39; *Evelyn* v. *Templar*, 2 B. C. C. 148; *Holloway* v. *Headington*, 8 Sim. 324; *Joyce* v. *Hutton*, 11 Ir. Ch. Rep. 123. *Ellis* v. *Nimmo*, Ll. & G., *t.* Sugd. 333, must be considered as overruled.

(*d*) See *Gaskell* v. *Gaskell*, 2 Y. & J. 502; *Hughes* v. *Stubbs*, 1 Hare, 476; *Smith* v. *Warde*, 15 Sim. 56.

(*e*) *Field* v. *Lonsdale*, 13 Beav. 78; and see *Davies* v. *Otty*, 33 Beav. 540.

(*f*) *Re Patterson's Estate*, 4 De G. J. & S. 422; and see *Kennard* v. *Kennard*, 8 L. R. Ch. App. 230; *Maguire* v. *Dodd*, 9 Ir. Ch. R. 452; [*Towers* v. *Hogan*, 23 L. R. Ir. 53.]

(*g*) *Mare* v. *Lewis*, 4 Ir. R. Eq. 219; [but see *Dooby* v. *Watson*, 39 Ch. D. 178, at p. 186; and see *Hamilton* v. *Lane*, 25 L. R. Ir. 188, 218.]

is merely employed to invest in a particular security or securities to be approved by the client, it is clear that the relation of trustee and *cestui que trust* is not created between them, but it may be otherwise where the solicitor is employed generally to find securities and invest the money, the client taking little or no part in the business (*a*).]

[Special credit.] 34. [A letter of advice that a special credit for a particular sum has been opened with the person writing the letter in favour of a third person to whom the letter is sent, and that it will be paid rateably as certain goods are delivered, upon receipt of certificates of reception of the goods, will not of itself constitute an equitable assignment or specific appropriation of monies in the hands of the person writing the letter amounting to that particular sum, so as to create a trust thereof in favour of the third person (*b*).]

[(*a*) *Dooby* v. *Watson*, 39 Ch. D. 178; *Hamilton* v. *Lane*, 25 L. R. Ir. 188, 220.]

[(*b*) *Morgan* v. *Larivière*, 7 L. R. H. L. 423, overruling S. C. *sub. nom.* *Larivière* v. *Morgan*, 7 L. R. Ch. App. 550.]

CHAPTER VII.

OF THE OBJECT PROPOSED BY THE TRUST.

TRUSTS, with reference to their *object*, are *Lawful* or *Unlawful:* the former, such as are directed to some legitimate purpose; the latter such as are in contravention of the policy of the law.

SECTION I.

OF LAWFUL TRUSTS.

Intention.

1. The *general and primâ facie* rule is, that the intention of the settlor is to be carried into effect (*a*).

No objection to a trust because the legal estate cannot be so dealt with.

2. If the object of the trust do not contravene the *policy* of the law, the mere circumstance that the same end cannot be effectuated by moulding the *legal* estate is no argument that it cannot be accomplished through the medium of the *equitable*. The common law has interwoven with it many technical rules, the reason of which does not appear, or at the present day does not apply; but a trust is a thing *sui generis*, and, where public policy is not disturbed, will be executed by the Court.

Fee upon a fee.

3. In legal estates, for example, a fee cannot, except by executory devise, be limited upon a fee—that is, cannot be shifted from one person to another; but this modification of property was allowable in uses, and by the statute of Hen. 8. has gained admittance into legal estates, and the shifting of the fee from one person to another is now matter of daily occurrence in settlements by way of trust (*b*).

Contingent remainders

4. At law, except in executory devises, a freehold contingent limitation must be supported by a freehold particular estate, and if the contingent limitation do not vest at the determination of the

(*a*) *Attorney-General* v. *Sands*, Hard. 494, *per* Lord Hale; *Pawlett* v. *Attorney-General*, ib. 469; Bacon on Uses, 79; *Burgess* v. *Wheate*, 1 Eden, 195, *per* Sir T. Clarke; and see *Attorney-General* v. *Dedham School*, 23 Beav. 355.

(*b*) See *Duke of Norfolk's case*, 3 Ch. Ch. 35.

particular estate, it is extinguished (*a*), but to trusts the rule is held not to be applicable, or, as the doctrine is expressed, the legal estate in the trustees is sufficient to support all the equitable interests (*b*).

Limitations of chattels.

5. At law a chattel real can by *executory devise* only, and not by *deed*, and a chattel personal can neither by *will* nor by *deed*, be limited to one person for life, with a limitation over to another; but in trusts a chattel interest, whether real or personal, can be subjected to any number of limitations, provided there be no perpetuity (*c*).

Trusts for a church or chapel.

6. If a testator before the Statute of Mortmain (9 G. 2. c. 36) had devised to one that served the cure of a church, and to all that should serve the cure after him, all the tithes, profits, &c.: here, as the successive curates were not a body corporate, they were incapable of taking the legal estate, but equity carried the intention into effect by way of trust, and decreed the devisee or heir to hold in trust for the persons intended to be benefited (*d*). So on the erection of a chapel, the endowment cannot, without an Act of Parliament, be transmitted at law to the successive preachers and their congregations, but the ordinary mode of accomplishing the object is by vesting the legal estate of the property in trustees (with a power of renewing their number on vacancies by death, &c.), upon trust to permit the preacher and congregation for the time being to have the use and enjoyment of the chapel.

Trust of the poor of a parish.

7. The limitation of an estate to the *poor of a parish* would *at law*, be void (*e*), because the rules of pleading require the claimants to bring themselves under the gift, and no indefinite multitude, without public allowance, can take by a general name; but by way of trust they are capable of purchasing, for they assert no title in themselves, but only require the trustees to keep good faith (*f*).

Trust of an advowson for the parishioners.

8. Again, an *advowson* cannot at law be given to a parish which is not a corporate body, but it may be vested in trustees, upon trust for the "*parishioners and inhabitants*," that is, the parish-

[(*a*) But see now 40 & 41 Vict. c. 33.]

(*b*) *Chapman* v. *Blissett*, Cas. *t.* Talb. 145; *Hopkins* v *Hopkins*, ib. 43. ["The principle is, that as the legal estate in the trustees fulfils all feudal necessities, there being always an estate of freehold in existing persons who can render the services to the lord, there is no reason why the limitations in remainder of the equitable interest should not take effect according to the intention of the testator." *Per* M.R. *Abbiss* v. *Burney*, 17 Ch. Div. 211, 229.]

(*c*) See Lord Nottingham's observations in *Duke of Norfolk's case*, 3 Ch. Ca. 32.

(*d*) *Anon. case*, 2 Vent. 349.

(*e*) Co. Lit. 3, a.

(*f*) Gilb. on Uses, 44.

ioners, being inhabitants (*a*) of a parish. [It has been said that a] trust of this kind is not a charity, but is [to be] administered on the footing of an ordinary trust, and that application must be made to the Court, not by way of information, but by action (*b*). The case of an advowson held in trust for a parish has been called an anomalous one. A valid trust, for the benefit of a parish or the parishioners for ever, cannot be made, except on the ground that it is a charity; and the reasoning by which it [has been] sought to bring it under this head is, that the parishioners who elect get no *personal* benefit, but it is a mode of selecting the charity trustee, for the incumbent who performs divine service and ministers to the spiritual wants of the parish is in a large sense a trustee for the parish (*c*). [But in a recent case this has been described as a "far-fetched theory," and it has been held that an advowson is no exception from the general law as to charitable trusts (*d*).]

Who shall elect the clerk.

9. From the infinite mischiefs arising from popular election (*e*), the Court, where the settlement does not expressly give the election to the parishioners, or usage has not put such a construction upon the instrument, will infer the donor's intention to have been that the trustees should themselves exercise their discretion in the election of a clerk for the benefit of the parish (*f*); but if the language of the instrument, or the evidence of common usage, prevent such a construction, then the parishioners, as the *cestuis que trust* and beneficial owners of the advowson, will be entitled to elect, and the trustees will be bound to present the person upon whom the choice of the electors shall fall (*g*). Had the point been unprejudiced by decision, Lord Eldon doubted whether the Court could execute such a trust, at least otherwise than *cy près* (*h*),

(*a*) *Fearon* v. *Webb*, 14 Ves. 24, *per* Chief Baron M'Donald; ib. 26, *per* Baron Graham; *Wainwright* v. *Bagshaw*, Rep. *t.* Hardwicke, by Ridg. 56, *per* Lord Hardwicke.

(*b*) *Attorney-General* v. *Forster*, 10 Ves. 344; *Attorney-General* v. *Newcombe*, 14 Ves. 1; *Fearon* v. *Webb*, ib. 19.

(*c*) *Attorney-General* v. *Webster*, 20 L. R. Eq. 483, see 491; [and see *Re St. Botolph's Parish Estates*, 35 Ch. D. 142; *Re St. Bride's Parish Estate*, 35 Ch. D. 147 n.]

[(*d*) *Re St. Stephen's, Coleman Street*, 39 Ch. D. 492, 504, 505, *per* Kay, J.]

(*e*) See, in addition to the cases cited in the next note, the observations of Vice-Chancellor Knight Bruce, *Attorney-General* v. *Cuming*, 2 Y. & C. Ch. Ca. 158; and 19 & 20 Vict. c. 50, authorising the sale of advowsons held upon trust for parishioners.

(*f*) See *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 106, 109; *Attorney-General* v. *Scott*, 1 Ves. 413; *Attorney-General* v. *Foley*, cited ib. 418.

(*g*) *Attorney-General* v. *Parker*, 3 Atk. 577, *per* Lord Hardwicke; *Attorney-General* v. *Forster*, 10 Ves. 338, 341, *per* Lord Eldon; *Attorney-General* v. *Newcombe*, 14 Ves. 6, 7, *per eundem*.

(*h*) *Attorney-General* v. *Forster*, 10 Ves. 340, 342.

but, as authority has now clearly settled that the Court must undertake the trust, notwithstanding the difficulties attending it, the only subject for inquiry is, *in what manner* a trust of this kind will be executed.

Meaning of "parishioners and inhabitants."

10. The expression "parishioners and inhabitants" is, in itself, extremely vague, and has never acquired any very exact and definite meaning (*a*); but, this doubt removed, another question to be asked is, are women, children, and servants, who are parishioners and inhabitants, to be allowed to vote? It seems the extent of the terms must be taken *secundum subjectam materiam*, with reference to the nature of the privilege which the *cestuis que trust* are to exercise (*b*), and, if so, none should be admitted to vote, who, from poverty, infancy, or coverture, are presumed not to have a will of their own (*c*). In a case, where the election was given to "the inhabitants and parishioners, or the major part of the *chiefest and discreetest* of them," it was held that by *chiefest*, was to be understood those who paid the church and poor rates, and by *discreetest*, those who had attained the age of twenty-one (*d*); but Lord Hardwicke said, that, even where "parishioners and inhabitants" stood *without any restriction at all*, it was a reasonable limitation to confine the meaning to those who paid scot and lot, that is, who paid to church and poor (*e*); and so, in a previous case, it seems his Lordship had actually determined (*f*). The Court of Exchequer adopted a similar construction in the *Clerkenwell Case* (*g*), though it does not appear how far the Court was guided in its judgment by the evidence of the common usage (*h*); and Lord Eldon, in a subsequent case, restricted the election to the same class (*i*), but his Lordship's decree was possibly founded on the circumstance, that those only who paid scot and lot were admitted to the *vestry* (*j*): not that, for the purposes of election, the vestry is representative of the parish (*k*), but in one of the

"Chiefest and discreetest."

(*a*) *Attorney-General* v. *Parker*, 3 Atk. 577; *Attorney-General* v. *Forsier*, 10 Ves. 339, 342. See further as to the Clerkenwell case, *Carter* v. *Cropley*, 8 De G. M. & G. 680. By parishioners and inhabitants in *vestry* assembled are meant the persons who by the existing law constitute the vestry. *In re Hayle's estate*, 31 Beav. 139; and see *Etherington* v. *Wilson*, 20 L. R. Eq. 606, 1 Ch. Div. 160.

(*b*) See *Attorney-General* v. *Forster*, 10 Ves. 339.

(*c*) See *Fearon* v. *Webb*, 14 Ves. 27.

(*d*) *Fearon* v. *Webb*, 14 Ves. 13.

(*e*) *Attorney-General* v. *Parker*, 3 Atk. 577; *S. C.* 1 Ves. 43.

(*f*) *Attorney-General* v. *Davy*, cited ib.; *S. C.* 2 Atk. 212.

(*g*) *Attorney-General* v. *Rutter*, stated 2 Russ. 101, note.

(*h*) See *Attorney-General* v. *Forster*, 10 Ves. 345.

(*i*) *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 93.

(*j*) See ib. 110.

(*k*) *Attorney-General* v. *Parker*, 3 Atk. 578, *per* Lord Hardwicke; *Attorney-General* v. *Forster*, 10 Ves. 340, 344, *per* Lord Eldon.

oldest documents the trust was said to be for "the parishioners of the said parish *at a vestry or vestries to be from time to time holden for the said parish*" (*a*). But where the instrument creating the trust contains merely the words "parishioners and inhabitants," the Court will not confine the privilege of voting to those paying scot and lot, if it appears from constant usage that the terms are to be taken in a wider and more extensive signification, to include, for instance, all *housekeepers*, whether paying to the church and poor or not (*b*). By persons *paying* to the church and poor must be understood persons *liable to pay*, though they may not have actually paid (*c*); but it seems to be a necessary qualification that they should have been *rated* (*d*), unless, perhaps, the name has been omitted by mistake (*e*), or there is the taint of fraud (*f*). "Rate-payers."

11. With respect to the *mode* in which the votes are to be taken, it is clear that the election cannot be conducted by ballot, not only on the general principle that the ballot is a form of proceeding unknown to the common law of England (*g*), but also on the ground, that the right of voting in the election of a clerk is a privilege coupled with a *public duty*, and the trustees have a right to be satisfied that the voters, in the exercise of their right, have fairly and honestly discharged their duty; whereas in election by ballot there are no means of ascertaining for whom each particular elector voted (*h*). The choice of the candidate must therefore be determined by one of the modes known to the common law, viz. either by poll or a show of hands (*i*). However, the *cestuis que trust* may *expressly* agree among themselves that they will abide by the declaration of the result of the ballot, and will ask no questions how the individual votes were given; or such a contract may be *inferred* from long and clear antecedent Mode of electing.

(*a*) See *Edenborough* v. *Archbishop of Canterbury*, 2 *Russ.* 94.

(*b*) *Attorney-General* v. *Parker*, 3 Atk. 577; *S. C.* 1 Ves. 43. [Now that the compulsory payment of church rates has been abolished by 31 & 32 Vict. c. 109, paying such rates cannot, it is conceived, be regarded as necessary in any case for a qualification to vote.]

(*c*) See *Attorney-General* v. *Forster*, 10 Ves. 339, 346.

(*d*) *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 110.

(*e*) *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 110.

(*f*) *S. C.* ib. 111.

(*g*) *Faulkner* v. *Elger*, 4 B. & C. 449.

(*h*) *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 105, 108, 109, *per* Lord Eldon.

(*i*) See ib. 106, 110. [Some doubt has, however, been thrown upon this in the recent case of *Shaw* v. *Thompson*, 3 Ch. D. 233, in which V.C. Bacon intimated an opinion that as under the modern mode of voting by ballot papers, no objection could now be taken as in the case of *Faulkner* v. *Elger*, *ubi sup.* to a ballot on the ground that it afforded no opportunity for a scrutiny, an election by that means would be valid.]

usage (*a*). But it is said an agreement of this kind can apply only to each particular election as it occurs, for any one parishioner has a right to insist that the coming election shall be conducted on a different principle; it would be a bold thing to say, that the parish of to-day could bind the parish of to-morrow to deviate from the original and legitimate mode (*b*).

[Where an election had taken place, the Court, although of opinion that the proceedings in vestry determining the mode of election had been illegal and irregular, refused to set the election aside, in the absence of evidence that the election itself had been improperly conducted, or that any voter had been prevented from recording his vote (*c*).]

Trusts for accumulation.

12. Again, upon principles founded on the Law of Tenure, the freehold *in præsenti* must be vested in some person *in esse;* but under the system of trusts, which are wholly independent of feudal rules, a settlor may give directions for an accumulation of rents and profits, and it does not vitiate the trust that there is no ascertained owner of the equitable freehold in possession (*d*).

Trusts for accumulation must not lead to a perpetuity.

But trusts for accumulation must be confined within the limits established against perpetuities. A settlor is permitted (by analogy to the duration of a regular entail under a common law conveyance) to fetter the *alienation* of property for a life or lives in being and twenty-one years; and the power of preventing the *enjoyment* of property, by directing an accumulation of the annual proceeds, is restricted to the same period. If the trust exceed this boundary it is void *in toto,* and cannot be cut down to the legitimate extent (*e*).

Phipps *v.* Kelynge.

But no objection exists on the ground of a perpetuity, where rents, though directed to be accumulated, are applicable as a vested interest *de anno in annum.* Thus, where a testatrix devised a term which had thirty-three years to run, upon trust, from time to time, to lay out the profits in the purchase of lands to be settled upon A. for life, remainder to B. in tail, remainders over, here, inasmuch as the *cestuis que trust* could at any time call for the investment of the rents in land, and when B. attained his age, and could suffer

(*a*) See *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 105, 106, 108, 109.

(*b*) See 2 Russ. 106; [*Shaw* v. *Thompson*, 3 Ch. D. 233.]

[(*c*) *Shaw* v. *Thompson*, 3 Ch. D. 233.]

(*d*) See Fearne's C. R. by Butler, 537, note (*x*); [*Abbiss* v. *Burney*, 17 Ch. Div. 211.]

(*e*) *Marshall* v. *Holloway*, 2 Swans. 432; *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54; *Curtis* v. *Lukin*, 5 Beav. 147; *Boughton* v. *James*, 1 Coll. 26; *S. C.* on appeal, 1 H. L. C. 406; *Browne* v. *Stoughton*, 14 Sim. 369; *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187; *Turvin* v. *Newcombe*, 3 K. & J. 16; [*Cochrane* v. *Cochrane*, 11 L. R. Ir. 361, and see *post*, p. 100.]

a recovery, A. and B. were entitled to call for the assignment of the lease, it was held the trust was good (*a*). And generally, although there be an accumulation directed, which might by possibility extend beyond a life in being and twenty-one years, yet if the whole beneficial interest in the accumulations must by the terms of the settlement become vested within a life in being and twenty-one years, there is no perpetuity, for in this case the beneficiaries may immediately upon the vesting, and therefore within the allowed limits, put an end to the accumulation (*b*).

Thellusson Act.

13. The 39 & 40 Geo. 3, c. 98, commonly called the Thellusson Act, or Lord Loughborough's Act, has further restricted the period of accumulation, by limiting it to "*the life or lives of any grantor or grantors, settlor or settlors;* OR *the term of twenty-one years from the death of the grantor, settlor, devisor, or testator;* OR *during the minority, or respective minorities of any person or persons who shall be living, or in* ventre sa mere, *at the time of the death of the grantor, devisor, or testator;* OR *during the minority, or respective minorities, of any person or persons who, under the uses or trusts of the deed, surrender, will, codicil, or other assurance directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated.*"

Act embraces both simple and compound accumulation.

The following points have been resolved upon the construction of this Act—1. The statute embraces *simple* as well as *compound* accumulation. By the former is meant the collection of a principal sum by the mere addition of the annual proceeds, while the interest upon the accumulating fund either results undisposed of to the settlor or his representative, or passes to the residuary devisee or legatee. Compound accumulation is, where not only the income *de anno in annum* is added altogether, but the fund is further increased by the interest upon the income (*c*). 2. The Act applies, though the accumulating fund be from the first a vested interest, so that not the *right to the enjoyment*, but only

Applies to case of suspended enjoyment, though the *right* to the enjoyment be vested.

(*a*) *Phipps* v. *Kelynge*, 2 V. & B. 57, note (*b*). In *Curtis* v. *Lukin*, 5 Beav. 147, the accumulation was held to be void, as the respective interests of the parties could not be ascertained until the time of renewal arrived. The parties might or might not agree upon a distribution amongst themselves during the interim, but this could not affect the legal construction.

(*b*) *Oddie* v. *Brown*, 4 De G. & Jon. 179; *Bateman* v. *Hotchkin*, 10 Beav. 426; *Bacon* v. *Proctor*, T. & R. 31; and see *Briggs* v. *Earl of Oxford*, 1 De G. M. & G. 363; *Williams* v. *Lewis*, 6 H. L. Cas. 1013.

(*c*) *Shaw* v. *Rhodes*, 1 M. & Cr. 135; *S. C.* by title of *Evans* v. *Hellier*, 5 Cl. and Fin. 114.

the *actual enjoyment*, is suspended; as where a settlor directs rents to be accumulated to raise a certain sum for A., to be paid to him on the completion of the accumulation; so that A. has a vested interest in the rents as they arise (*a*). 3. An accumulation can be directed for one only of the periods allowed by the statute, and not for two or more of the periods combined (*b*). 4. The accumulation, though directed to commence not at the testator's death, but at some subsequent period, must still terminate at the expiration of twenty-one years from the testator's death (*c*), and the term of twenty-one years is to be reckoned exclusive of the day on which the testator died (*d*). 5. If the trust exceeds the limits prescribed by the statute, but not the limits allowed by the common law, the accumulation will be established to the extent permitted by the Act, and will be void for the excess only (*e*). 6. If an accumulation be not *expressed* but *implied*, as in the gift of a residue to *all* the children of A., and no life estate given to A. himself, so that the class cannot be ascertained until his death, and the fund must accumulate during the interim, it is the better opinion, as originally decided by Lord Langdale (*f*), that the prohibition of the statute was meant to apply (*g*). The late Vice-Chancellor of England observed that the statute was intended only to put an end to accumulations *expressly* directed (*h*); and in a subsequent case before him so decided (*i*). And the same view was adopted by Sir J. Romilly, Master of the Rolls (*j*). But the decision in the last case in which the Master of the Rolls so held was reversed on appeal by the Lord Chancellor and Lord Justices, and though the reversal rested upon the ground that as the will was worded, an accumulation was *expressly* directed (*k*), the Lord Chancellor felt himself called upon to say that the distinction taken by the Master of the Rolls between an accumulation *expressed* and an accumulation *implied* was untenable; and he justly remarked as to the case of infancy

Where the limit exceeded, the trust is good *pro tanto*.

(*a*) *Shaw* v. *Rhodes*, 1 M. & Cr. 135; and see *Oddie* v. *Brown*, 4 De G. & Jon. 179.

(*b*) *Wilson* v. *Wilson*, 1 Sim. N.S. 288; [*Jagger* v. *Jagger*, 25 Ch. D. 729]; see *Lady Rosslyn's Trust*, 16 Sim. 391.

(*c*) *Attorney-General* v. *Poulden*, 3 Hare, 555.

(*d*) *Gorst* v. *Lowndes*, 11 Sim. 434.

(*e*) *Griffiths* v. *Vere*, 9 Ves. 127; *Longdon* v. *Simson*, 12 Ves. 295; *Haley* v. *Bannister*, 4 Mad. 275; *Shaw* v. *Rhodes*, 1 M. & Cr. 155; *Crawley* v. *Crawley*, 7 Sim. 427; *Attorney-General* v. *Poulden*, 3 Hare, 555.

(*f*) *M'Donald* v. *Bryce*, 2 Keen, 276.

(*g*) *Morgan* v. *Morgan*, 4 De G. & Sm. 170; *Tench* v. *Cheese*, 6 De G. M. & G. 453.

(*h*) *Elborne* v. *Goode*, 14 Sim. 165.

(*i*) *Corporation of Bridgnorth* v. *Collins*, 15 Sim. 538.

(*j*) *Bryan* v. *Collins*, 16 Beav. 14; *Tench* v. *Cheese*, 19 Beav. 3.

(*k*) *Tench* v. *Cheese*, 6 De G. M. & G. 453.

(cited in support of the opposite view), that if of age, the infant, instead of spending, might accumulate the rents, and the Court did no more than exercise a discretion for the infant, which was a very different thing from creating a suspense fund to go to somebody who had no title during the accumulation.

To whom the excess shall belong.

The statute proceeds to declare, that "the produce of the property, so long as the same shall be directed to be accumulated contrary to the provisions of the Act, shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Subsequent limitations not accelerated.

14. If there be a series of limitations of *real* estate, and one of them be upon trust to accumulate the rents beyond the limits allowed by the Act, the subsequent limitations are in general not accelerated; but the interim limitation, which is void under the Act, will result for the benefit of the heir-at-law (*a*); and if the resulting trust be a *chattel interest*, carved out of real estate, it will devolve, on the death of the heir, on the personal representative of the heir (*b*); and if the resulting interest be an estate *pur autre vie*, it is the better opinion that it also goes to the heir's personal representative (*c*). But under the Wills Act, 1 Vict. c. 26, s. 25, if the will contain a residuary devise, and there is no evidence of a contrary intention on the face of the will, the void accumulations will go to the residuary devisee.

In personal estate.

15. In *personal* estate, if there be a residuary legatee, the excess beyond the allowed period of accumulation will fall into the residue (*d*), [the will being construed as if, independently of the Thellusson Act, the testator had directed that the accumulation should cease at the end of twenty-one years (*e*),] and where

(*a*) *Eyre* v. *Marsden*, 2 Keen, 564; *Nettleton* v. *Stephenson*, 3 De G. & Sm. 366; *Edwards* v. *Tuck*, 3 De G. M. & G. 40; *Re Drakeley's Estate*, 19 Beav. 395; *Green* v. *Gascoyne*, 11 Jur. N. S. 145; *S. C.* 4 De G. J. & S. 565; *Smith* v. *Lomas*, 10 Jur. N. S. 743; *Talbot* v. *Jevers*, 20 L. R. Eq. 255; and see *Griffiths* v. *Vere*, 9 Ves. 127. In *Trickey* v. *Trickey*, 3 M. & K. 560, the testator's daughter was held entitled to the excess of the accumulations, but *semble* not as a tenant for life, but as the testator's heiress-at-law. In *Shaw* v. *Rhodes*, 1 M. & Cr. 135; *S. C.* by the title of *Evans* v. *Hellier*, 5 Cl. & Fin. 114, Thomas, the devisee subject to the accumulations, took the excess beyond the limits of the statute; but James Shaw was probably the testator's heir, and as James had died before the institution of the suit, Thomas, it is likely, thereupon became the heir of the testator, and took in that character. But see *Re Clulow's Trust*, 1 J. & H. 648.

(*b*) *Sewell* v. *Denny*, 10 Beav. 315.

(*c*) *Barrett* v. *Buck*, 12 Jur. 771; see *Halford* v. *Stains*, 16 Sim. 488, *contra*.

(*d*) *Haley* v. *Bannister*, 4 Mad. 275; *O'Neill* v. *Lucas*, 2 Keen, 313; *Webb* v. *Wibb*, 2 Beav. 493; *Attorney-General* v. *Poulden*, 3 Hare, 555; *Jones* v. *Maggs*, 9 Hare, 605; *Re Drakeley's Estate*, 19 Beav. 395; [*Re Parry*, 60 L. T. N.S. 489.]

[(*e*) *Re Parry*, 60 L. T. N.S. 489, 491; *Weatherall* v. *Thornburgh*, 8 Ch. Div. 261, 268.]

the residue is settled on A. for life, remainder to B., will form part of the capital (*a*).

Residue.

16. If the subject of the accumulation be the income of the residue itself, the void accumulation will, according to the nature of the residue, *i.e.*, *real or personal*, result to the heir-at-law or to the next of kin (*b*).

Charge.

17. If an estate be devised *subject* to a void direction to accumulate in such terms that the void accumulation, if valid, would have been construed a mere *charge*, it will, like any other charge which fails (*c*), sink for the benefit of the devisee (*d*).

Exceptions from the Act.

18. Lastly, the statute provides, that "nothing in the Act contained shall extend to any provision for *payment of debts* (*e*) of any grantor, settlor, or devisor, or other person or persons, or for *raising portions* for any child of the settlor or devisor, or any person *taking an interest* under the settlement or devise, or to any direction touching the produce of *timber or wood*." The words "any other person or persons" authorise a grantor, settlor, or devisor to provide for the debts of any stranger whomsoever (*f*); and the exception in the statute extends to *liabilities* of a testator though no *debt* had actually accrued at the time of his death (*g*). By children must, of course, be understood exclusively legitimate children (*h*). And the accumulation to be protected by the clause must be a provision for raising *portions* out of the *corpus*, not an accumulation of the *corpus* itself, for the purpose of making a gift of the aggregate fund (*i*), and must be a provision for children certain, and not a chance limitation in favour of any child that may happen to survive certain persons not necessarily standing in the relation of parent and child, but

(*a*) *Crawley* v. *Crawley*, 7 Sim. 427.

(*b*) *M'Donald* v. *Bryce*, 2 Keen, 276; *Eyre* v. *Marsden*, 2 Keen, 564; *Pride* v. *Fooks*, 2 Beav. 430; *Elborne* v. *Goode*, 14 Sim. 165; *Bourne* v. *Buckton*, 2 Sim. N. S. 91; *Edwards* v. *Tuck*, 3 De G. M. & G. 40; *Mathews* v. *Keble*, 4 L. R. Eq. 467; 3 L. R. Ch. App. 691; *Simmons* v. *Pitt*, 8 L. R. Ch. App. 978; *Talbot* v. *Jevers*, 20 L. R. Eq. 255. [*Weatherall* v. *Thornburgh*, 8 Ch. Div. 261.]

(*c*) See *Tucker* v. *Kayess*, 4 K. & J. 339.

(*d*) *Re Clulow's Trust*, 1 J. & H. 639; *Combe* v. *Hughes*, 34 Beav. 12; 2 De G. J. & S. 657.

(*e*) *Bateman* v. *Hotchkin*, 10 Beav. 426.

(*f*) See *Barrington* v. *Liddell*, 2 De G. M. & G. 497; 10 Hare, 415.

(*g*) *Varlo* v. *Faden*, 27 Beav. 255: 1 De G. F. & J. 211.

(*h*) *Shaw* v. *Rhodes*, 1 M. & Cr. 135, see 159.

(*i*) *Eyre* v. *Marsden*, 2 Keen, 564; *Bourne* v. *Buckton*, 2 Sim. N. S. 91; *Edwards* v. *Tuck*, 3 De G. M. & G. 40; *Jones* v. *Maggs*, 9 Hare, 605; *Wildes* v. *Davies*, 1 Sm. & Gif. 475; *Watt* v. *Wood*, 2 Dr. & Sm. 56; [*Re Walker*, 54 L. T. N.S. 792;] and see *Beech* v. *St. Vincent*, 3 De G. & Sm. 678. In *Burt* v. *Sturt*, 10 Hare, 427, this was said to be "a shadowy distinction."

uncles or aunts, &c. (*a*). By "taking an interest under the devise" is meant *a substantial* interest. A small annuity, for instance, to the parent, would not justify an accumulation of the residue of the rents beyond the limits of the Act for raising portions for the children (*b*); and it was once considered that it was necessary that an interest should be taken not merely under the *will* generally, but under the *particular* gift, devise or bequest, which contained the provision for accumulation (*c*); but this view has been since overruled, so that now, if the person take a substantial interest in any property, under the will, it is sufficient (*d*). The portions intended by the Act are not necessarily portions *created* by the deed or will directing the accumulation, but may be portions pre-existing (*e*).

[19. A direction by will to pay out of the income of the testator's property the premiums on a policy of assurance effected on the life of another person by the testator in his lifetime, or to be effected after his death on the life of a person *in esse* at his death is not an accumulation within the Act, and may be continued after the expiration of 21 years from the testator's death (*f*). And a discretionary trust for application of surplus income during the life of an annuitant in improving a landed estate and maintaining houses thereon is not an accumulation within the Act (*g*).] [Direction to keep up a policy.

20. Scotland was expressly excepted from the Act; but it has since been extended to that country by 11 & 12 Vict. c. 36, s. 41. Scotland and Ireland.

As the statute was passed a short time before the union with Ireland, Irish estates are not affected by it (*h*). But where the rents of Irish property belonging to a domiciled Englishman were directed to be accumulated and become part of the personal estate, it was held that although the rents themselves might be invested for more than twenty-one years, the income arising from their

(*a*) *Burt* v. *Sturt*, 10 Hare, 415.

(*b*) *Shaw* v. *Rhodes*, 1 M. & Cr. 159; and see *Bourne* v. *Buckton*, 2 Sim. N. S. 91; but see *Evans* v. *Hellier*, 5 Cl. & Fin. 127; *Barrington* v. *Liddell*, 2 De G. M. & G. 500; *Edwards* v. *Tuck*, 3 De G. M. & G. 63.

(*c*) *Bourne* v. *Buckton*, 2 Sim. N. S. 91, see 101; *Morgan* v. *Morgan*, 4 De G. & Sm. 164.

(*d*) *Barrington* v. *Liddell*, 10 Hare, 415; 2 De G. M. & G. 500; *Edwards* v. *Tuck*, 3 De G. M. & G. 40; *Burt* v. *Sturt*, 10 Hare, 415; and see *Watt* v. *Wood*, 2 Dr. & Sm. 60.

(*e*) *Halford* v. *Stains*, 16 Sim. 488; *Barrington* v. *Liddell*, 2 De G. M. & G. 498; *Middleton* v. *Losh*, 1 Sm. & Gif. 61; and see *Burt* v. *Sturt*, 10 Hare, 415.

[(*f*) *Bassil* v. *Lister*, 9 Hare, 177; *Re Vaughan*, W. N. 1883, p. 89.]

[(*g*) *Vine* v. *Raleigh*, 63 L. T. N.S. 573.]

(*h*) *Ellis* v. *Maxwell*, 12 Beav. 104; *Heywood* v. *Heywood*, 29 Beav. 9.

investment could not be accumulated (*a*); and the Act applies to an accumulation of rents of leaseholds in England, but belonging to a testator domiciled in Ireland (*b*).

SECTION II.

ON UNLAWFUL TRUSTS.

Trusts against the policy of law.

1. THE COURT will not permit the system of trusts to be directed to any object that contravenes the *policy* of the law (*c*). Thus, if the trust of a *chattel* be limited to A. and his *heirs*, it will nevertheless be personal estate, and vest in the executors (*d*), for to hold the contrary would shake the first principles of law and confound the great landmarks of property. So the trust of a chattel cannot be entailed, as if it be limited to A. and the heirs of his body, with remainder to B., the absolute interest vests in A., and the remainder to B. is a nullity (*e*). But trusts of terms attendant upon the inheritance, while they existed, were always excepted from the rule; for these, partly to protect the estate from secret incumbrances, and partly to keep the property in the right channel (*f*), were made in equity to follow, as shadows, the devolution of the freehold (*g*).

Illegitimate children.

2. Again, a person cannot settle property upon trust for illegitimate children *to be thereafter born*, since this tends to immorality, but the declaration of trust is void, and the beneficial interest results to the settlor (*h*). [*Primâ facie* a gift to children includes only legitimate children (*i*),] but illegitimate children

(*a*) *Ellis* v. *Maxwell*, 12 Beav. 104.

(*b*) *Freke* v. *Lord Carbery*, 16 L. R. Eq. 461.

(*c*) See *Attorney-General* v. *Pearson*, 3 Mer. 399; *Hamilton* v. *Waring*, 2 Bligh, 209; *Earl of Kingston* v. *Lady Pierepoint*, 1 Vern. 5.

(*d*) *Duke of Norfolk's case*, 3 Ch. Ca. 9, 11; *S. C.* 1 Vern. 164, *per* Lord Guildford; *Hunt* v. *Baker*, 2 Freem. 62; *Attorney-General* v. *Sands*, Nels. 133.

(*e*) *Duke of Norfolk's Case*, 3 Ch. Ca. 9, 11; *Hunt* v. *Baker*, 2 Freem. 62.

(*f*) See *Willoughby* v. *Willoughby*, 1 T. R. 765.

(*g*) For the law upon this subject, see Sugd. Vend. & Purch.

(*h*) *Medworth* v. *Pope*, 27 Beav. 71; and see *Hill* v. *Crook*, 6 L. R. H. L. 265; *Dorin* v. *Dorin*, 7 L. R. H. L. 568; *In re Ayles' Trusts*, 1 Ch. D. 282; *Wilkinson* v. *Wilkinson*, 1 Y. & C. Ch. Ca. 657; *Pratt* v. *Mathew*, 22 Beav. 328; *Howarth* v. *Mills*, 2 L R. Eq. 389. The case of *Occleston* v. *Fullalove*, 42 L. J. N.S. Ch. 514, has since been reversed, 9 L. R. Ch. App. 147; 43 L. J. N.S. Ch. 297; and the law on the subject has, by the decisions of L.JJ. James and Mellish, against the opinion of Lord Selborne, been considerably modified: see and consider the judgments of the L.JJ., and more particularly that of Lord Selborne.

(*i*) [See *Wilkinson* v. *Adam*, 1 V. & B. 472; Jarm. on Wills, vol. ii. p. 217; Vaizey on Settlements, 1088.]

born at the date of the settlement may take under the description of children if there were no legitimate children at the time (*a*), or the illegitimate children are otherwise identified as *personæ designatæ* (*b*). But a gift to A. for life, with remainder to his child or children, will not be taken to designate an illegitimate child of A. born previously to the date of the will, though A. had no legitimate child at the date of the will, and was 57 years old, and so unlikely to have legitimate children (*c*).

Trusts for Corporations.

3. So a trust of real estate cannot be declared in favour of a *corporation* without a licence from the Crown, for the same mischief would follow from putting equitable, as in putting legal, estates into mortmain (*d*).

Trusts for alien.

4. Where a trust of real estate was, before the late Act (*e*), declared in favour of an *alien*, the Crown might have claimed the benefit of it by suit in equity, without the form of a previous inquisition, for the subject was sufficiently protected by the decree of the Court (*f*).

[Trust for charity.]

[5. By the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), repealing several previous statutes (*g*) and consolidating the law, every *assurance* (*h*) (which expression includes testamentary disposition (*i*)) of land (*j*), or any estate or interest in land (*k*), or of personal estate to be laid out in the purchase of land to or for the benefit of any *charitable uses*, is void (*l*) unless

(*a*) *Gabb* v. *Prendergast*, 3 Eq. Rep. 648; *Clifton* v. *Goodbun*, 6 L. R. Eq. 278; *Savage* v. *Robertson*, 7 L. R. Eq. 176; *Lepine* v. *Bean*, 10 L. R. Eq. 160; *Wilson* v. *Atkinson*, 4 De G. J. & S. 455; *Milne* v. *Wood*, 42 L. J. N.S. Ch. 545; *In re Brown's Trust*, 16 L. R. Eq. 239; *Occleston* v. *Fullalove*, 9 L. R. Ch. App. 147; *In re Goodwin's Trust*, 17 L. R. Eq. 345; [*Re Hastie's Trusts*, 35 Ch. D. 728; *Re Horner*, 37 Ch. D. 695.]

(*b*) *Holt* v. *Sindrey*, 7 L. R. Eq. 170; *Crook* v. *Hill*, 6 L. R. Ch. App. 311, *S. C. nom. Hill* v. *Crook*, 6 L. R. H. L. 265; *Dorin* v. *Dorin*, 17 L. R. Eq. 463; [*Re Humphries*, 24 Ch. D. 691.]

(*c*) *Paul* v. *Children*, 12 L. R. Eq. 16.

(*d*) See Shep. Touch. 509; Sand. on Uses, 339, note E. 15 Ric. 2. c. 5.

(*e*) 33 Vict. c. 14.

(*f*) See *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. Rep. 92; Vin. Ab. Alien, A, 8; *Godfrey and Dixon's Case*, Godb. 275; Br. Feff. al Uses, 389; *King* v. *Holland*, Al. 16; Styl. 21; *Burney* v. *Macdonald*, 15 Sim. 6; *Burgess* v. *Wheate*, 1 Eden, 187; *Barrow* v. *Wadkin*, 24 Beav. 1; see now 33 Vict. c. 14.

[(*g*) Ex. gr. 2 Geo. 2. c. 36 (commonly called the Mortmain Act); 9 Geo. 4. c. 85; 24 & 25 Vict. c. 9; 25 & 26 Vict. c. 17; 27 & 28 Vict. c. 13; 29 & 30 Vict. c. 57; 31 & 32 Vict. c. 44; 34 & 35 Vict. c. 13; and 35 & 36 Vict. c. 24.]

[(*h*) Sec. 4, sub-sec. 1.]

[(*i*) Sec. 10.]

[(*j*) *I.e.*, in England. The Act does not extend to Scotland or Ireland, see sec. 11.]

[(*k*) See sec. 10.]

[(*l*) *I.e.*, not merely as to the charitable trusts sought to be created, but as to the legal estate expressed to be conveyed; *Churcher* v. *Martin*, 42 Ch. D. 312; disapproving form in Seton, p. 587, providing for conveyance of legal estate, followed in *Re Taylor*, 58 L. T. N.S. 538.]

made in accordance with the requirements of the Act. These requirements, shortly stated, are that the assurance must take effect in possession immediately from the making thereof (*a*), and must be without any power of revocation, reservation, condition, or provision for the benefit of the assuror or any person claiming under him (*b*), except the following, viz., a grant or reservation of a peppercorn or other *nominal rent*, or of *mines*, minerals, or any *easement, covenants* or provisions as to *buildings*, streets, drainage, or nuisances, a *right of entry* on nonpayment of rent, and stipulations of a like nature (*c*); but the same benefits must be reserved to persons claiming under the assuror as to the assuror himself. If the assurance is of land or personal estate, other than stock in the public funds, it must be enrolled in the Central Office of the Supreme Court of Judicature within six months after its execution (*d*), and must also, except in the case of copyholds, be by deed executed in the presence of at least two witnesses (*e*). Where the uses are declared by a separate instrument, that instrument, and not the assurance, must be enrolled, but the enrolment must in that case be within six months after the making of the assurance (*f*).

If the assurance is made in good faith for full and valuable consideration, which consideration may consist wholly or partly of a rent, rent-charge, or other annual payment, with or without a right of re-entry for nonpayment (*g*), the above are the only requirements; but in other cases it is further required that the assurance, if of land or personal estate other than stock in the public funds, must be made at least twelve months before the death of the assuror (*h*), and if of stock in the public funds, must be by transfer at least six months before such death (*i*). The Act also contains provisions under which the omission to enrol an instrument within the requisite time may be remedied, if such omission has arisen from ignorance or inadvertence, or through the destruction or loss of the instrument by time or accident, and if also the assurance to be validated was made in

[(*a*) Sec. 4, sub-sec. 2. See *Limbrey* v. *Gurr*, 6 Mad. 151. And as to demises for terms of years, see 26 & 27 Vict. c. 106.]

[(*b*) Sec. 4, sub-sec. 3. See *Attorney-General* v. *Manby*, 1 Mer. 327, 343.]

[(*c*) Sec. 4, sub-sec. 4.]

[(*d*) Sec. 4, sub-sec. 9.]

[(*e*) Sec. 4, sub-sec. 6. By sec. 10 assurances by a registered disposition under the Land Transfer Act, 1875, are exempt from the provisions as to enrolment and attestation.]

[(*f*) Sec. 4, sub-sec. 9. See *Doe* v. *Munro*, 12 M. & W. 845.]

[(*g*) Sec. 4, sub-sec. 5; and sec. 10. And see *Doe* v. *Hawthorne*, 2 B. & Ald. 96.]

[(*h*) Sec. 4, sub-sec. 7.]

[(*i*) Sec. 4, sub-sec. 8.]

good faith, for full and valuable consideration, to take effect in possession without any power of revocation, etc., except such as is authorised, and possession or enjoyment is held under such assurance (*a*).]

Secret trust for assuror.

6. Where lands were conveyed to trustees for a charity by a deed duly enrolled, and without any reservation upon the face of it to the grantor, but upon a secret trust that the deed should not operate until after the settlor's death, the deed was upon bill filed, declared void, and decreed to be set aside (*b*). But such a secret trust must be proved, and retention of possession of the deed by the settlor during his life, though a circumstance of evidence, does not necessarily imply a previous fraudulent agreement (*c*).

[Parks, schools, and museums.]

[7. The recent Act exempts from its operation assurances for the purposes only of a "public park," a "schoolhouse" for an "elementary school," or a "public museum" as therein defined; but gifts by will and voluntary assurances must be executed not less than twelve months before the death of the testator or assuror, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator, or in case of a deed, the execution of the deed, and the quantity of land assured by will must not exceed twenty acres for a park, or two acres for a museum, or one acre for a school (*d*).

[Universities, colleges, and religious and other societies.]

8. Assurances to or in trust for any of the universities of Oxford, Cambridge, London, and Durham, the Victoria University, or any of the colleges or houses of learning within those universities, or the colleges of Eton, Winchester, and Westminster, for the better support or maintenance of the scholars only upon the foundations of the last-mentioned colleges, or the warden, council, and scholars of Keble College, and also assurances (otherwise than by will) made in good faith for full and valuable consideration to trustees on behalf of any society or body of persons associated together for religious purposes, or for the promotion of education, art, literature, science, or other like purposes, of land not exceeding two acres for the erection thereon of a building for such purposes, or any of them, are also exempted from the operation of the Act (*e*).

[(*a*) Sec. 5, practically re-enacting 24 & 25 Vict. c. 9; 27 Vict. c. 13, s. 3; 29 & 30 Vict. c. 57, ss. 1, 2; and 35 & 36 Vict. c. 24, s. 13.]

(*b*) *Way* v. *East*, 2 Drew. 44.

(*c*) *Fisher* v. *Brierley*, 1 De G. F. & J. 643; 10 H. L. C. 159.

[(*d*) Sec. 6, substantially re-enacting 34 and 35 Vict. c. 13.]

[(*e*) Sec. 7 extending 9 Geo. 2. c. 36, and continuing 31 & 32 Vict. c. 44.]

[Recreation grounds, churches, etc.]

9. The Act, while repealing previous statutes, only deals in a partial manner with the existing exemptions from the operation of the repealed statutes. There are numerous statutes left unrepealed by the Act which contain such exemptions. Thus, for instance, the Act of 22 Vict. c. 27 exempts any grant or conveyance of land to trustees for open public grounds or recreation of adults or playgrounds for children. So also numerous exemptions are contained in the Church Building Acts and other Acts (*a*). The effect of the recent Act apparently is to continue these exemptions (*b*).]

Perpetuities.

10. A *perpetuity* will no more be tolerated under cover of a trust, than when it displays itself undisguised in a settlement of the legal estate (*c*). "If in equity," said Lord Guildford, "you could come nearer to a perpetuity than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of Chancery, but would be destructive to the commonwealth" (*d*). Thus, if an estate be limited to trustees for 500 years upon the trusts thereinafter declared, and subject thereto in strict settlement, and then the trusts are declared to be to enter and manage the estate during the minority of any tenant for life or in tail, the trusts are void, for the tenant in tail cannot bar them, and they might last for centuries (*e*). [So if real estate be devised to trustees upon trust to retain a yearly sum out of the rents and profits, and subject thereto the estate is devised in strict settlement, and the trustees are directed during the continuance of the limitations to accumulate the yearly sum, the trust is void (*f*).]

[(*a*) Ex. gr. 43 Geo. 3. c. 108; 51 Geo. 3. c. 115; 55 Geo. 3. c. 147; 58 Geo. 3. c. 45; 59 Geo. 3. c. 134; 3 Geo. 4. c. 72 (for promoting building of churches); 1 & 2 Wm. 4. c. 38; 1 & 2 Vict. c. 107; 3 & 4 Vict. c. 60; 4 & 5 Vict. c. 38; 6 & 7 Vict. c. 37; 28 & 29 Vict. c. 42; 36 & 37 Vict. c. 50; 33 & 34 Vict. c. 75, s. 30 (as to school boards); 41 & 42 Vict. c. 68 (as to endowment of bishoprics).]

[(*b*) Secs. 8, 13, sub-sec. 1 (*a*).]

(*c*) See *Duke of Norfolk's case*, 3 Ch. Ca. 20, 28, 35, 48.

(*d*) *S. C.* 1 Vern. 164.

(*e*) *Floyer* v. *Bankes*, 8 L. R. Eq. 115; and see *Sykes* v. *Sykes*, 13 L. R. Eq. 56, and the cases there cited. [As to the principle of construction to be adopted in order to determine whether a gift is obnoxious to the rule against perpetuity, see *Pearks* v. *Moseley*, 5 App. Cas. 714, 719.]

[(*f*) *Cochrane* v. *Cochrane*, 11 L. R. Ir. 361; *Browne* v. *Stoughton*, 14 Sim. 369; and see *Longfield* v. *Buntry*, 15 L. R. Ir. 101. The limitation of contingent remainders is further controlled by the rule of law which prevents an estate given to an unborn person for life from being followed by any estate in remainder to a child of such unborn person; and contingent remainders obnoxious to this rule will be void, though they might not transgress the

So, again, if a power of appointment amongst the issue be contained in a marriage settlement, the donee of the power cannot appoint to the daughters for their sole and separate use *without power of anticipation*, for this would tie up the estate beyond the legal limits. While the appointment, therefore, to the daughters is good, the condition in restraint of alienation is void (*a*). Restraint on anticipation.

11. Should a testator devise his real estate in strict settlement, and then bequeath his personal estate to *such tenant in tail* as should first attain twenty-one, then, if the tenant in tail at the testator's death be not adult, the event might not occur for a century, and the trust would be void (*b*). But should a testator bequeath his personal estate upon such trusts as would correspond to the limitations of his real estate, with a proviso that it should not vest absolutely in any tenant in tail unless he attained twenty-one, the trust would be good, for as personal estate cannot descend, the testator must by a tenant in tail have meant a tenant in tail by *purchase* (*c*). Strict settlement of chattels.

12. The question often arises in practice whether the trust of one estate to *indemnify* another estate against a perpetual outgoing be not void for perpetuity, but it has been held in Ireland that such a trust is good, and that the Statute of Limitations does not apply to it (*d*). Trust for indemnity.

13. Trusts cannot be created with a proviso that the interest of the *cestui que trust* shall not be *alienated* (*e*), or shall not be made subject to the claims of *creditors* (*f*). And if it can only be ascertained that the *cestui que trust* was intended to take a vested interest, the *mode* in which, or the *time* when, the *cestui que trust* was to reap the benefit, is perfectly immaterial, and Restriction on alienation.

rule commonly known as the rule against perpetuities. *Whitby* v. *Mitchell*, 42 Ch. D. 494; 44 Ch. Div. 85; and see *Re Frost*, 43 Ch. D. 246; but this rule is, of course, inapplicable to equitable limitations.]

(*a*) See *Armitage* v. *Coates*, 35 Beav. 1, and the cases there cited; and *Re Cunynghame's Settlement*, 11 L. R. Eq. 324; *Re Teague's Settlement*, 10 L. R. Eq. 564; [*Re Ridley*, 11 Ch. D. 645; *Herbert* v. *Webster*, 15 Ch. D. 610; *Cooper* v. *Laroche*, 17 Ch. D. 368; *Re Errington*, W. N. (1887), p. 23.]

(*b*) *Gosling* v. *Gosling*, 1 De G. J. & S. 17, *per* L. C.

(*c*) *Gosling* v. *Gosling*, 1 De G. J. & S. 1.

(*d*) *Massy* v. *O'Dell*, 10 Ir. Ch. Rep. 22.

(*e*) *Snowdon* v. *Dales*, 6 Sim. 524; *Green* v. *Spicer*, 1 R. & M. 395; *Graves* v. *Dolphin*, 1 Sim. 66; *Brandon* v. *Robinson*, 18 Ves. 429; *Ware* v. *Cann*, 10 B. & Cr. 433; *Bradley* v. *Peixoto*, 3 Ves. 324; *Hood* v. *Oglander*, 34 Beav. 513; *Re Jones's Will*, W. N. 1870, p. 14; [*Hunt-Foulston* v. *Furber*, 3 Ch. D. 285; *Re Wolstenholme*, 29 W. R. 414; 43 L. T. N.S. 752; *Re Dugdale*, 38 Ch. D. 176 (where the cases are considered by Kay, J.); *Re Mabbett* (1891), 1 Ch. 707.]

(*f*) *Graves* v. *Dolphin*, *Snowdon* v. *Dales*, *Brandon* v. *Robinson*, *ubi suprà*; *Bird* v. *Johnson*, 18 Jur. 976.

the entire interest may either be disposed of by the act of the *cestui que trust*, or may enure for the benefit of his creditors by operation of law on his bankruptcy. Thus, if the trust be to apply a fund for a person's "support, clothing and maintenance" (*a*), or to pay the interest of a fund to a person for life "at such times and in such manner as the trustees shall think proper" (*b*), or "from time to time as and when it shall become due and payable" (*c*), or "in such smaller or larger portions, at such times immediate or remote, and in such way and manner as the trustees shall think best" (*d*), the discretion of the trustees is determined by the bankruptcy of the *cestui que trust*, and the entirety of the life estate enures for the benefit of the creditors. Even where the trustees were directed to pay the interest of a sum "to A. for life, or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise," and so that A. should not have any right, title, claim, or demand other than the trustees should think proper; and after A.'s decease, to pay the interest to his widow for her life, and after her decease to assign the principal and "all *savings or accumulations* of interest, if any," to the children, the Court thought, that, taking the whole instrument together, the trustees had no power to withhold and accumulate any portion of the interest during the life of A., and therefore, on his bankruptcy, the assignees became absolutely entitled (*e*). The question to be asked in these cases is, On the decease of the *cestui que trust* would his executor have a right to call upon the trustees retrospectively to account for the arrears? (*f*). If he would, then the creditors are prospectively entitled to the payments in *futuro*

Discretionary trust for A., whether determined by A.'s bankruptcy.

Trusts for maintenance, etc.

14. But where a trust is not exclusively for the benefit of the bankrupt, but of the bankrupt and another person, the creditors will, of course, take only so much as was intended for the bankrupt. Thus where real and personal estate was vested by a marriage settlement in trustees upon trust to apply the annual produce thereof "for the *maintenance* and *support* of A. B., his *wife and children*, if any, or otherwise, if they thought proper, to permit the same to be received by A. B. for his life," and A. B. became bankrupt, leaving a wife but no children, the Master of the Rolls said, "There could be no doubt of the intention of the settlement, that the wife should be supported out of the

(*a*) *Younghusband* v. *Gisborne*, 1 Coll. 400.
(*b*) *Green* v. *Spicer*, 1 R. & M. 395.
(*c*) *Graves* v. *Dolphin*, 1 Sim. 66.
(*d*) *Piercy* v. *Roberts*, 1 M. & K. 4.
(*e*) *Snowdon* v. *Dales*, 6 Sim. 524.
(*f*) See *Re Sanderson's Trust*, 3 K. & J. 497.

property, and" he was "of opinion that so long as the wife and children were maintained by A. B., the trustees had a discretion to give him the whole income, but that it was their duty to see that the wife and children were maintained; that the assignees took everything, subject to what was proper to be allowed for the maintenance of the wife and children, and that it must be referred to the Master to settle a proper allowance" (*a*). And where trustees have an arbitrary power of applying or not applying a fund for the benefit of the bankrupt, or of applying the fund in the alternative either for the benefit of the bankrupt or of another person, the bankruptcy will have no effect upon the power (*b*). Thus, where a fund was given to trustees upon trust to apply the whole or *such part* of the interest as they should think fit during the life of A., for his *support and maintenance*, and for no other purpose, it was held that nothing passed to the assignees (*c*). So where freehold and leasehold property was vested in trustees upon trust for A. B. for life; but if he became bankrupt or insolvent the trustees were, during his life, to apply the annual produce "in and towards the *maintenance, clothing, lodging, and support* of A. B. and his then present or any future *wife and his children*, or *any of them* as the trustees should at their discretion think proper," and A. B. became insolvent, having a wife and children, it was argued that the power in the trustees was destroyed by the insolvency, and that the life estate vested in the assignee; but Vice-Chancellor Knight Bruce held that the trustees had a right under the power to appoint in favour of the insolvent, his wife and children, or any of them in exclusion of any other of them, but that any benefit which the insolvent might take would belong to the assignee (*d*). And even if the trust be for the maintenance of the bankrupt *and* his wife *and* his children in such manner as the trustees may think fit, it seems that the trustees may so exercise the power that there shall be nothing tangible for the

(*a*) *Page* v. *Way*, 3 Beav. 20.

[(*b*) See *Chambers* v. *Smith*, 3 App. Cas. 795, 808, where Lord O'Hagan observed, "If the debtor have a vested property and an absolute claim they will of course pass from him; but if the property and the claim are subject to conditions and liable to be affected by the discretionary action of other people, the creditor cannot escape the fulfilment of the conditions or deny the effect of that exercise of the discretion which would have bound the debtor."]

(*c*) *Twopeny* v. *Peyton*, 10 Sim. 487; [*Re Bullock*, W. N. (1891), p. 62; 39 W. R. 472, where the gift was in trust to pay to or apply for the benefit of the bankrupt;] and see *Re Sanderson's Trust*, 3 K. & J. 497; [*Re Stanger*, 39 W. R. 455.]

(*d*) *Lord* v. *Bunn*, 2 Y & C. C. C. 98; *Holmes* v. *Penney*, 3 K. & J. 90.

creditors to lay hold of. Thus where a residuary personal estate was given to the testator's son for life, but if he did any act whereby the interest vested in him would become forfeited to others, the trustees were to apply the annual produce "for the *maintenance* and *support* of the son, and *any wife and child or children* he might have, as the trustees should in their discretion think fit," and the son became bankrupt, having a wife and children, the Vice-Chancellor of England said, "That nothing was of necessity to be *paid*, but the property was to be *applied;* and there might be a maintenance of the son, and of the wife and children without their receiving any money at all: that the trustees might take a house for their lodging, and give directions to tradesmen to supply the son and the wife and children with all that was necessary for maintenance, and if so the assignees were not entitled to anything" (*a*), [and though the trust is to pay to or apply the income for the benefit of the son only, and not of his wife and children, the trustees may exercise their discretion as to the application, and only the overplus remaining unapplied will pass under the gift over (*b*). In such cases the assignee of the son will be entitled only to such money or property, if any, as may be paid or delivered, or appropriated for payment (*c*), or delivered by the trustees to the son; but the trustees will be accountable in respect of payments made to him after they have received notice of bankruptcy or assignment (*d*).] If there be a power not arbitrary but imperative to apply for the benefit of the bankrupt and another, and the trustees refuse to exercise the power, so that a simple trust arises, the creditors will take a moiety (*e*), and if by the death of the other person the bankrupt becomes the only object of the power, the creditors will take the whole (*f*).

Limitation over on alienation.

15. But though a person cannot put a restraint upon alienation, or exclude the rights of creditors, he may settle property upon A. *until* alienation, bankruptcy, or insolvency, with a limitation over to B. on the happening of either of those events (*g*); or he

(*a*) *Godden* v. *Crowhurst*, 10 Sim. 642; and see *Kearsley* v. *Woodcock*, 3 Hare, 185; *Wallace* v. *Anderson*, 16 Beav. 533; *In re Landon's Trusts*, 40 L. J. N.S. Ch. 370; [*Re Coleman*, 39 Ch. D. 443; *Re Bullock*, W. N. (1891), p. 62; 39 W. R. 472.]

[(*b*) *Re Bullock*, W. N. (1891), p. 62; 39 W. R. 472.]

[(*c*) *Re Coleman*, 39 Ch. Div. 443, 449.]

[(*d*) *Re Neil*; *Hemming* v. *Neil*, 62 L. T. N.S. 649; *Re Bullock*, W. N. (1891), p. 62; 39 W. R. 472.]

(*e*) *Rippon* v. *Norton*, 2 Beav. 63.

(*f*) *Wallace* v. *Anderson*, 16 Beav. 533.

(*g*) *Lockyer* v. *Savage*, 2 Stra. 947; *Ex parte Hinton*, 14 Ves. 598; *Oldham* v. *Oldham*, 3 L. R. Eq. 404; *Montefiore* v. *Behrens*, 35 Beav. 95; [*Hatton* v. *May*, 3 Ch. D. 148; *Joel*

may give real or personal estate to A. for *life* (*a*), with a *proviso* that on alienation, bankruptcy, or insolvency (*b*), it shall shift over to B.; [and where property was by an instrument dated in 1862, limited to A. for life or until he should be outlawed or declared bankrupt or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors, his interest was held to cease on the presentation of a petition for liquidation under the Bankruptcy Act, 1869, by a firm of which he was a member followed by acceptance by the creditors of a composition (*c*).] And if the trust be for A. for life, remainder to B. for life, or until bankruptcy, and B. becomes bankrupt in the lifetime of A., the clause takes effect (*d*). [And if the trust be for A. for life and the proviso that on his charging or encumbering the property or becoming bankrupt, the gift to him shall be absolutely forfeited, and the subsequent gifts accelerated, the proviso will be good, although there is no person capable of taking under the subsequent gifts (*e*). But a gift of real estate to A. her heirs and assigns, subject to a proviso determining her estate, in the event of her bankruptcy, and limiting the estate over, in that event, to other persons is an absolute gift to A., and the proviso is void for repugnancy (*f*). The general opinion (*g*) has until recently been that real or personal estate might be given to a person absolutely with a partial restraint on the power of alienation, as for instance a condition against alienation within a particular period, but in a late case Pearson, J., in a carefully considered judgment, held such a condition to be void (*h*).]

16. But a clause divesting the property on bankruptcy is not

Limitation over on alienation.

v. *Mills*, 3 K. & J. 458;] and see *Sharp* v. *Cosserat*, 20 Beav. 470.

(*a*) *Shee* v. *Hale*, 13 Ves. 404; *Cooper* v. *Wyatt*, 5 Mad. 482; *Yarnold* v. *Moorhouse*, 1 R. & M. 364; *Stephens* v. *James*, 4 Sim. 499; *Lewes* v. *Lewes*, 6 Sim. 304; *Ex parte Oxley*, 1 B. & B. 257; *Stanton* v. *Hall*, 2 R. & M. 175; *Hammonds* v. *Barrett*, 21 L. T. N.S. 321; 17 W. R. 1078; *Billson* v. *Crofts*, 15 L. R. Eq. 314; *Re Aylwin's Trusts*, 16 L. R. Eq. 585; and see *Rochford* v. *Hackman*, 9 Hare, 475; *Sharp* v. *Cosserat*, 20 Beav. 470; [*Re Bedson's Trusts*, 28 Ch. Div. 523.]

(*b*) As to what is insolvency, see *Re Muggeridge's Trusts*, Johns. 625; [and as to the effect of a person becoming bankrupt or insolvent in one of the colonies, see *Re Levy's Trusts*, 30 Ch. D. 119.]

[(*c*) *Nixon* v. *Verry*, 29 Ch. D. 196.]

(*d*) *Re Muggeridge's Trusts*, John. 625.

[(*e*) *Hurst* v. *Hurst*, 21 Ch. Div. 278; *Doe* v. *Eyre*, 5 C. B. 713; *Robinson* v. *Wood*, 27 L. J. N.S. Ch. 726; *Donohoe* v. *Mooney*, 27 L. R. Ir. 26.]

[(*f*) *Re Machu*, 21 Ch. D. 838.]

[(*g*) *Large's case*, 2 Leon. 82; *Churchill* v. *Marks*, 1 Coll. 441; *Kearsley* v. *Woodcock*, 3 Hare, 185; Co. Lit. 223a; Shep. Touch. 129; *Re Macleay*, 20 L. R. Eq. 186, and cases there cited; Jarm. on Wills, 4th ed. vol. 2, p. 18; Williams on Settlements, 134; Vaizey on Settlements, 949; Tudor's Real Prop. Cases, 3rd ed. 972, &c.]

[(*h*) *Re Rosher*, 26 Ch. Div. 801.]

brought into operation by a deed of inspectorship (*a*), and a like clause on "alienation" (*b*) will extend only to a disposition by the act of the party, and not to a transfer by operation of law, as *bankruptcy* (*c*), unless it can be collected from the context that the term was intended by the settlor to have so wide a signification (*d*); and a warrant of attorney to enter up a judgment which is followed by a charging order will not be an act of alienation, unless the charge was immediately in the contemplation of the parties at the time of giving the warrant (*e*); and [even under the law prior to the Married Women's Property Act, 1882] the marriage of a *feme* was not an alienation of a *chose en action* to the extent of her equity to a settlement out of it (*f*); but where real estate was held in trust for A. and her assigns for her life, with remainder over, with a proviso, that, if she did anything whereby she might lose the control over the income, the life estate should "cease as fully as it would by her actual decease," and she married, so that the husband obtained the control over the income, the limitation over to the remainderman took effect (*g*). Where the forfeiture is to arise on bankruptcy, no forfeiture is incurred by a bankruptcy which is afterwards annulled, provided the annulment be effected before any beneficial interest could have come to the hands of the assignee (*h*); and where the clause was against "anticipating or otherwise assigning or encumbering" the annual proceeds, and the *cestui que trust* assigned, so far as he lawfully could without a forfeiture, the arrears already accrued, but not the

(*a*) *Montefiore* v. *Enthoven*, 5 L. R. Eq. 35.

[(*b*) Since the Act 33 & 34 Vict. c. 23 (see *ante*, p. 26) a conviction for felony does not operate as an alienation; *Re Dash*, 57 L. T. N.S. 219.]

(*c*) *Lear* v. *Leggett*, 2 Sim. 479; *S. C.* 1 R. & M. 690; *Whitfield* v. *Prickett*, 2 Keen, 608; *Wilkinson* v. *Wilkinson*, Sir Geo. Coop. R. 259; and see *S. C.* 3 Sw. 528. [But as to a bankruptcy on the debtor's own petition, see *Re Amherst's Trusts*, 13 L. R. Eq. 464.]

(*d*) *Dommett* v. *Bedford*, 6 T. R. 684; *Cooper* v. *Wyatt*, 5 Mad. 482; [see *Ex parte Eyston*, 7 Ch. Div. 145.]

(*e*) *Avison* v. *Holmes*, 1 J. & H. 530; and see *Barnett* v. *Blake*, 2 Dr. & Sm. 117; *Montefiore* v. *Behrens*, 35 Beav. 95; [*Re Kelly's Settlement*; *West* v. *Turner*, 59 L. T. N.S. 497.]

(*f*) *Bonfield* v. *Hassell*, 32 Beav. 217.

(*g*) *Craven* v. *Brady*, 4 L. R. Ch. App. 296. [But see now 45 & 46 Vict. c. 75.]

(*h*) *White* v. *Chitty*, 1 L. R. Eq. 372. This case went to the verge, but in *Lloyd* v. *Lloyd*, 2 L. R. Eq. 722, the Court went even further. See also *Re Parnham's Trust*, 13 L. R. Eq. 413 [as decided by Lord Romilly, M. R.; and the same case subsequently brought before Sir G. Jessel, M. R. 46 L. J. N.S. Ch. 80, when he came to a decision directly opposed to that of Lord Romilly;] *Trappes* v. *Meredith*, 9 L. R. Eq. 229; [*Samuel* v. *Samuel*, 12 Ch. D. 152; *Ancona* v. *Waddell*, 10 Ch. D. 157; *Hurst* v. *Hurst*, 21 Ch. Div. 278; *Robertson* v. *Richardson*, 30 Ch. D. 623; *Re Broughton*, 57 L. T. N.S. 8; *Metcalfe* v. *Metcalfe*, 43 Ch. D. 633.]

future income, it was held that the assignment being confined to the arrears was valid (*a*); and a power of attorney to receive the income and a charge upon the income will not be a forfeiture, unless it can be proved that the power of attorney and charge were meant to be applied to future income, and not to be confined to arrears already accrued (*b*); and an assignment in *general* words will not comprise a property which if attempted to be assigned would become forfeited (*c*). [Where, however, there was a residuary gift to A. for life, with remainder to B., with a general provision against alienation by B. in A.'s life-time, and a mortgage was made by B., "subject nevertheless, to the said proviso or condition in the will contained," it was held by the late M. R. that there was no forfeiture inasmuch as the restriction meant in substance "I charge if I can charge, and I do not if I cannot charge," and consequently as B. had no power to charge the property was never charged at all (*d*). But if a memorandum of charge be made and accepted by the person in whose favour it is made, it will be effectual to create a forfeiture although no claim is made under it, and a disclaimer of the charge after it has once been accepted will not avail to prevent the forfeiture (*e*).

An assignment of the assignor's life estate to trustees for the benefit of the assignor, until he otherwise directs, has been held not to create a forfeiture so long as no direction is given by the assignor inconsistent with his actual enjoyment of the life estate (*f*).

Where the forfeiture of an annuity was to arise on the annuitant doing or suffering anything which would deprive him of the right to receive the annuity, a garnishee order served on the trustees was held to create a forfeiture (*g*), and where the gift was to a married woman for life for her separate use with restraint on anticipation, and from and after her decease, or "on her anticipating" the income, then over, it was held that anticipating could not be read as "attempting to anticipate," and therefore an assignment of the life interest being wholly ineffectual did not cause a forfeiture (*h*).]

17. *Insolvency*, while it existed, was not a process *in invitum*, Insolvency.

(*a*) *Re Stulz's Trusts*, 4 De G. M. & G. 404; *S. C.* 1 Eq. Rep. 334.

(*b*) *Cox* v. *Bockett*, 35 Beav. 48.

(*c*) *Re Waley's Trust*, 3 Eq. Rep. 380; and see *Fausset* v. *Carpenter*, 2 Dow & Cl. 232; 5 Bligh, N.S. 75; St. Leonard's H. L. Cases 76.

[(*d*) *Samuel* v. *Samuel*, 12 Ch. D. 152.]

[(*e*) *Hurst* v. *Hurst*, 21 Ch. Div. 278.]

[(*f*) *Lockwood* v. *Sikes*, 51 L. T. N.S. 562.]

[(*g*) *Bates* v. *Bates*, W. N. 1884, p. 129.]

[(*h*) *Re Wormald*, 43 Ch. D. 631.]

but the act of the insolvent himself (except it was on the petition of a creditor (*a*)), and therefore came within the meaning of a restraint against "alienation" (*b*). But a mere declaration of insolvency to lay a foundation for a bankruptcy was not an alienation or attempt at alienation (*c*). Under the Bankruptcy Act, 1869, a petition for liquidation was a voluntary parting with the bankrupt's interest (*d*); [and a debtor's petition under The Bankruptcy Act, 1883, will it is conceived have the same effect.]

Limitation over on bankruptcy of settlor himself.

18. A person cannot settle *his own* property on *himself*, with a limitation over in the event of his own bankruptcy (*e*). But a husband may on his marriage thus settle a fund of his own to the extent of the wife's fortune received by him, for this, though apparently a settlement by him, is in substance a settlement of the money advanced by the wife (*f*); and, indeed, a person may on marriage, without regard to the wife's fortune, limit his own property to himself for life or until *alienation*, [either voluntary (*g*) or involuntary by operation of law in favour of a particular creditor (*h*),] and then over in favour of the wife or children, for they are purchasers for value and there is no fraud upon any one.

Direction to purchase presentation for a particular person.

19. It is not unusual to find a clause in a *will* directory to trustees to purchase a *presentation* in favour of some particular object; but, it seems, if the purchase be made with the *intention* of presenting the *cestui que trust*, though the patron himself was ignorant of the purpose in view (*i*), it falls within the enactment against simony (*j*). A patron is forbidden to present for money,

(*a*) 1 & 2 Vict. c. 110, s. 36; see *Pym* v. *Lockyer*, 12 Sim. 394.

(*b*) *Shee* v. *Hale*, 13 Ves. 404; *Brandon* v. *Aston*, 2 Y. & C. C. Ca. 24; *Churchill* v. *Marks*, 1 Coll. 441; *Martin* v. *Margham*, 14 Sim. 230; *Townsend* v. *Early*, 34 Beav. 23.

(*c*) *Graham* v. *Lee*, 23, Beav. 388.

(*d*) *Re Amherst's Trusts*, 13 L. R. Eq. 464.

(*e*) *Higinbotham* v. *Holme*, 19 Ves. 88; *Ex parte Hill*, 1 Cooke's Bank. Law, 251; *Ex parte Bennet*, ib. 253; *In re Murphy*, 1 Sch. & Lef. 44; *In re Meaghan*, ib. 179; *Ex parte Hodgson*, 19 Ves. 206; *Re Casey's Trust*, 3 Ir. Ch. Rep. 419, 4 Ir. Ch. Rep. 247; *Clarke* v. *Chambers*, 8 Ir. Ch. Rep. 26; *Murphy* v. *Abraham*, 15 Ir. Ch. Rep. 371; [*Ex parte Stephens*, 3 Ch. D. 807.]

(*f*) *Ex parte Cooke*, 8 Ves. 353; *Higginson* v. *Kelly*, 1 B. & B. 252; *Ex parte Verner*, ib. 260; *In re Meaghan*, 1 Sch. and Lef. 179; *Ex parte Hodgson*, 19 Ves. 206; [*Corr* v. *Corr*, 3 L. R. Ir. 435, 438; *Re Callan's Estate*, 7 L. R. Ir. 102.] But see *Ex parte Hill*, 1 Cooke's Bank. Law, 291, and compare *Ex parte Hodgson*, 19 Ves. 208.

(*g*) *Knight* v. *Browne*, 7 Jur. N. S. 894; *Brooke* v. *Pearson*, 27 Beav. 181; and see *Phipps* v. *Lord Ennismore*, 4 Russ. 131; *Synge* v. *Synge*, 4. Ir. Ch. Rep. 337; [*Re Callan's Estate*, 7 L. R. Ir. 102.]

[(*h*) *Re Detmold*, 40 Ch. D. 585.]

(*i*) *King* v. *Trussel*, 1 Sid. 329.

(*j*) *Kitchen* v. *Calvert*, Lane, 102, *per* Baron Snig; *Whinchcombe* v. *Pulleston*, Noy, 25, *per* Lord Hobart; Godbolt, 390; and see Fearne's P. W.

either *directly* or *indirectly;* and, the object being determined upon at the time of the purchase, the construction put upon the transaction by the Court is, that the patron presents *indirectly* by selling to a person who purchases with the sole intention of presenting.

Purchase of Advowson.

20. The purchase of an *advowson* upon the footing that immediate possession shall be given is clearly simoniacal; and yet, notwithstanding the stringent words of the Acts against simony, and of the declaration to be made by the clerical purchaser, such transactions are of too frequent occurrence. As any stipulation for the resignation of the present incumbent would be illegal and could not be enforced, the purchaser is obliged to rely upon the honour of the vendor, the purchase money in the meantime being impounded in the hands of trustees, to be paid over upon the intentions of the parties being carried into effect.

Insurances for life.

21. It has been ruled that the statute relating to *insurances* on lives does not prohibit an insurance on the life of A. in the name of B. *upon trust for A.* when both names appear upon the policy (*a*). But an insurance on the life of A. by B. a creditor, not on his own account, but as a trustee for C., who has no interest in the life, would, it is considered, be void.

Income tax.

22. The income tax Act (*b*) avoids all contracts or agreements by which one person undertakes to pay the *income tax* of another; but this does not prevent a settlor from vesting an estate in trustees upon trust to pay "all taxes affecting the lease" (meaning inclusively the income tax), and subject thereto for A. for life (*c*).

Splitting votes

23. Fictitious, fraudulent, or collusive conveyances for the purpose of *creating votes* for members of parliament, as when the conveyance is in form only, and there is a private arrangement between the parties that no interest shall pass, are null and void; but if A., *bonâ fide* and without any secret understanding in derogation of the deed, though for the purpose of multiplying votes, convey to B. in trust for a number of persons as tenants in common, that they may thereby acquire a qualification, the deed is unimpeachable (*d*).

404; but see *Fox* v. *Bishop of Chester*, 6 Bing. 1; *Cowper* v. *Mantell*, 22 Beav. 231; *Id. qu.*

(*a*) *Collett* v. *Morrison*, 9 Hare, 162.

(*b*) 5 & 6 Vict. c. 35, s. 73.

(*c*) *Lord Lovat* v. *Duchess of Leeds* (No. 1), 2 Dr. & Sm. 62; *Festing* v. *Taylor*, 32 L. J. N.S., Q. B. 41; 3 B. & S. 217; [*Re Bannerman's Estate*, 21 Ch. D. 105.]

(*d*) *Thorniley* v. *Aspland*, 2 C. B. 160; *Alexander* v. *Newman*, 2 C. B. 122; *May* v. *May*, 33 Beav. 81; and see *Childers* v. *Childers*, 3 K. & J. 310; 1 De G. & J. 482; *Ashworth* v. *Hopper*, 1 C. P. D. 178.

Immoral trusts.

24. Trusts adverse to the foundation of all *religion* and subversive of all *morality* are, of course, void, and not enforceable by the Court (*a*).

[Superstitious purposes.]

[25. Trusts for superstitious purposes, as for saying masses or requiems for the souls of the dead, are void (*b*).]

Consequences to the settlor of creating a trust with an unlawful purpose.

26. Where a trust is created for an unlawful and fraudulent purpose, the Court will neither enforce the trust in favour of the parties intended to be benefited, nor will assist the settlor to recover the estate (*c*).

Property settled with an unlawful purpose may be recovered by persons claiming under the settlor.

27. But a distinction was taken by Lord Eldon between a bill filed by the author of the fraud himself, and by a person taking through him, but not a party to the fraud (*d*), and this distinction is supported by other authority (*e*). And the settlor himself may take proceedings for recovering the property, where the illegal trust failed to take effect, so that no trust arose, and, the trustees having paid no consideration, the equitable interest resulted (*f*).

[Existence of *cestui que trust*.]

28. [A trust may take effect and be recognised by the Court although there is no ascertained person who can, as *cestui qui trust*, enforce the execution of it. Thus a devise on trust for the maintenance of the testator's horses and dogs was held valid, although it was not a charity, and, as the Court observed, the

(*a*) See *Thornton* v. *Howe*, 31 Beav. 14; [and see *Smith* v. *White*, L. R. 1 Eq. 626.]

[(*b*) *West* v. *Shuttleworth*, 2 My. & K. 684; *Heath* v. *Chapman*, 2 Drew. 417; *Re Blundell's Trusts*, 30 Beav. 360: *Re Fleetwood*, 15 Ch. D. 594; *Re Elliott*, 39 W. R. 297; and see *Re Michel's Trust*, 28 Beav. 39; but in Ireland a bequest for masses is not illegal, though it may be void for perpetuity; *Bradshaw* v. *Jackman*, 21 L. R. Ir. 12, 15; *Perry* v. *Tuomey*, ib. 480: *Dorrian* v. *Gilmore*, 15 L. R. Ir. 69; *Small* v. *Torley*, 27 L. R. Ir. 388.]

(*c*) *Cottington* v. *Fletcher*, 2 Atk. 155; see Lord Eldon's remarks in *Muckleston* v. *Brown*, 6 Ves. 68; and see *Chaplin* v. *Chaplin*, 3 P. W. 233; *Hamilton* v. *Ball*, 2 Ir. Eq. Rep. 191; *Groves* v. *Groves*, 3 Y. & Jer. 163; *Ottley* v. *Browne*, 1 B. & B. 350; *Davies* v. *Otty* (No. 2), 35 Beav. 208; *Haigh* v. *Kaye*, 7 L. R. Ch. App. 473; *Barton* v. *Muir*, 6 L. R. P. C. 134; [*Re Great Berlin Steamboat Company*, 26 Ch. D. 616.] In *Wilkinson* v. *Wilkinson*, 1 Y. & C. C. C. 657, the words "*all other the children he might thereafter have by her*," were probably held to mean legitimate children in case the settlor married the person named, who, it is presumed, had died before the suit.

(*d*) *Muckleston* v. *Brown*, 6 Ves. 68.

(*e*) *Matthew* v. *Hanbury*, 2 Vern. 187; *Brackenbury* v. *Brackenbury*, 2 J. & W. 391; *Joy* v. *Campbell*, 1 Sch. & Lef. 328, see 335, 339; *Miles* v. *Durnford*, 2 De G. M. & G. 643; and see *Phillpotts* v. *Phillpotts*, 10 C. B. 85; *Groves* v. *Groves*, 3 Y. & Jer. 163; *Childers* v. *Childers*, 3 K. & J. 310, 1 De G. & J. 482. See a classification of the cases in reference to cohabitation bonds, 3 Mac. & G. note (*c*) page 100.

(*f*) *Symes* v. *Hughes*, 9 L. R. Eq. 475; *Manning* v. *Gill*, 13 L. R. Eq. 485; *Haigh* v. *Kaye*, 7 L. R. Ch. App. 469; *Dawson* v. *Small*, 18 L. R. Eq. 114; *Taylor* v. *Bowers*, 1 Q. B. D. 291.

execution of it could not be enforced by any one (*a*). So, as we have seen, where there is a discretionary trust to apply money for the benefit of a particular person, though the *cestui que trust* cannot enforce the payment of any part of the money to him, yet the trustee can so apply it, and the persons interested in remainder are entitled only to the unapplied surplus (*b*). And although a trust for keeping up family tombs is in general void as tending to a perpetuity (*c*), yet a direction to an executor to apply a sum of money in erecting a monument to a person already deceased may be valid (*d*), although it is difficult to say who would be the *cestui que trust* to enforce it (*e*), and] a trust for keeping in repair a painted window or monument in a church is valid as a charitable gift, for it is for the interest of the public that the ornaments of the church should not be allowed to fall into decay (*f*). [So a trust for repairing and keeping in repair a parish churchyard has also been upheld as a good charitable gift (*g*).]

Personalty bequeathed to a charity.

29. If a testator bequeath his personalty generally to such charitable purposes as the trustees should think proper, the trustees can exercise the *power* as to the *pure personalty* (*h*). [But the trustees cannot under the power apply the impure per-

[(*a*) *Re Dean; Cooper-Dean* v. *Stephens*, 41 Ch. D. 552, 556, *per* North, J.; *Mitford* v. *Reynolds*, 16 Sim. 105; *Pettingall* v. *Pettingall*, 11 L. J. Ch. 176. In the last edition of this work it was stated that "a trust must be for the benefit of some person or persons, and if this ingredient be wanting, as in a trust for keeping up family tombs, the trust is void." The cases cited in support of this proposition were those in note (*c*) *infra*, which do not, it must be admitted, bear it out, as they turned on the question of perpetuity. But it nevertheless may be open to doubt whether there can be any trust for a mere private purpose, which does not concern any human being. In *Cooper-Dean* v. *Stephens*, it is to be noticed that the testator bequeathed his horses and dogs to the trustees themselves, so that it could not be contended that the trust was enforceable against them by the owner of the horses and dogs. They held upon a trust for the maintenance of particular chattels belonging to themselves, but upon a resulting trust as to unapplied surplus. But it is conceived that if in such a case the unapplied surplus were given to the trustees beneficially, the trust for the maintenance of the chattels, whether animate or inanimate, would be nugatory.]

[(*b*) *Re Bullock*, W. N. (1891), p. 62; *Re Coleman*, 39 Ch. Div. 443, and other cases, *ante* pp. 104, 105.]

(*c*) *Rickard* v. *Robson*, 31 Beav. 244; *Lloyd* v. *Lloyd*, 2 Sim. N.S. 255; *Thomson* v. *Shakespeare*, Johns 612, 1 De G. F. & J. 399; *Fowler* v. *Fowler*, 33 Beav. 616; *Fisk* v. *Attorney-General*, 4 L. R. Eq. 521; *Hunter* v. *Bullock*, 14 L. R. Eq. 45; *Dawson* v. *Small*, 18 L. R Eq. 114; [*Re Williams*, 5 Ch. D. 735; *Re Birkett*, 9 Ch. D. 576; *Re Vaughan*, 33 Ch. D. 187; see *Gott* v. *Nairne*, 3 Ch. D. 278.]

[(*d*) *Mussett* v. *Bingle*, W. N. 1876, p. 170.]

[(*e*) *Re Dean*, *sup.* at p. 557, *per* North, J.]

(*f*) *Ware* v. *Osborne*, 1 L. R. Eq. 585; *Re Rigley's Trust*, 15 W. R. 190; [*Re Vaughan*, 33 Ch. D. 187.]

[(*g*) *Re Vaughan*, 33 Ch. D. 187.]

[(*h*) *Lewis* v. *Allenby*, 10 L. R. Eq. 668; [*Re Clark*, 52 L. T. N.S. 406; 54 L. J. N.S. Ch. 1080.]

sonalty to charitable institutions authorised to hold property of that description, unless the testator has indicated in the will that charities of that nature are among the objects intended to be benefited (*a*).

[Trust partly for a lawful and partly for an unlawful purpose.]

[30. If property be given upon trust to apply part thereof for an unlawful purpose, and to hold or apply the residue for a lawful purpose, then, if the amount intended to be applied for the unlawful purpose cannot be so far ascertained as to make it clear that there would be a residue applicable to the lawful purpose, the whole gift will fail (*b*); but the mere fact that the amount to be applied for the unlawful purpose has not been *expressly* stated in the gift will not make the whole gift void, and the Court will, if it be practicable, ascertain the amount which would have satisfied the unlawful purpose, and thus uphold the gift (*c*). And it appears to be established by the current of authority (at all events in cases where the lawful purpose is charitable) that the whole of the property is available for the lawful purpose (*d*).]

[(*a*) *Re Clark*, 52 L. T.N.S. 406; *Lewis* v. *Allenby*, 10 L. R. Eq. 668.]

[(*b*) *Chapman* v. *Brown*, 6 Ves. 404; *Re Birkett*, 9 Ch. D. 576; *Limbrey* v. *Gurr*, 6 Mad. 151; *Cramp* v. *Playfoot*, 4 K. & J. 479; *Fowler* v. *Fowler*, 33 Beav. 616; *Re Taylor*, W. N. (1888), p. 32; 58 L. T. N.S. 538. But see *Re Williams*, 5 Ch. D. 735.]

[(*c*) *Mitford* v. *Reynolds*, 1 Ph. 185; *Re Rigley's Trust*, 15 W. R. 190; *Fisk* v. *Attorney-General*, 4 L. R. Eq. 521; *The Magistrates of Dundee* v. *Morris*, 3 Macq. 134; *Re Vaughan*, 33 Ch. D. 187; and see *Dawson* v. *Small*, 18 L. R. Eq. 114; *Hunter* v. *Bullock*, 14 L. R. Eq. 45; *Re Williams*, 5 Ch. D. 735; *Champney* v. *Davy*, 11 Ch. D. 949; *Re Birkett*, 9 Ch. D. 576.]

[(*d*) *Fisk* v. *Attorney-General*, *Dawson* v. *Small*, *Hunter* v. *Bullock*, *Re Williams*, *Re Birkett*, *Re Vaughan*, *ubi sup.*, all of which were cases of trusts for the maintenance of family tombs out of the income of a fund and for the application of the surplus for a charitable purpose. It is difficult to see upon what principles these cases rest; and in *Re Birkett*, the late M. R., Sir G. Jessel, sitting as a judge of first instance, intimated that had the case been unfettered by authority, he should have arrived at a different conclusion. In *Fisk* v. *Attorney-General*, the case was argued on the footing that the whole fund was given for the lawful purpose *charged* with a portion for an unlawful purpose, and the charge failing, the gift of the whole for the lawful purpose was good; and this would seem to have been the view adopted by V. C. Wood, for he observed, p. 527: "I think I ought, in this instance (if the gift of the residue had been exclusive of the amount required for the repair of the grave), to have ascertained the amount required for the void purpose, but the better construction is, that the whole of the gift is to be taken by the rector and churchwardens."

So again in *Hunter* v. *Bullock* and *Dawson* v. *Small*, both before V. C. Bacon, the trust for keeping up the tombs was treated as being merely honorary: that is, "an obligation either to be performed or not, as the persons to whom the custody of the money was given thought fit," and the gift for the lawful purpose was held to be "certain in amount" (*i.e.*, of the whole income), "subject only to the fulfilment of the honorary trust."

In *Re Williams*, *Re Birkett*, and *Re Vaughan*, V. C. Malins, the M. R., and North, J. followed the previous decisions.]

CHAPTER VIII.

IN WHAT LANGUAGE A TRUST MUST BE DECLARED.

A PERSON may declare a trust either directly or indirectly: the former by creating a trust *eo nomine*, in the form and terms of a trust; the latter, without affecting to create a trust in words, by evincing an intention, which the Court will effectuate through the medium of an implied trust (1).

SECTION I.

OF DIRECT OR EXPRESS DECLARATIONS OF TRUST.

General rule.

1. In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word "heirs," and an equitable entail without the words "heirs of the body" (*a*), provided words be used which though not technical

(*a*) See Shep. Touch. by Preston, 106.

Distinction between implied trusts, Trusts by operation of law, and Constructive trusts.

(1) The Terms *Implied Trusts*, *Trusts by Operation of Law*, and *Constructive Trusts*, appear from the books to be almost synonymous expressions; but for the purposes of the present work the following distinctions, as considered the most accurate, will be observed:—An *implied* trust is one declared by a party not directly, but only by implication; as where a testator devises an estate to A. and his heirs, *not doubting* that he will thereout pay an annuity of £20 per annum to B. for his life, in which case A. is a trustee for B. to the extent of the annuity. *Trusts by operation of law* are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity, and are either—1. *Resulting* trusts, as where an estate is devised to A. and his heirs, upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; or, 2. *Constructive* trusts, which the Court elicits by a construction put upon certain *acts* of parties, as when a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease.

are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument.

Equitable fee may be devised without the word heirs applied to it.

2. If an estate be *devised* unto and to the use of A. *and his heirs,* upon trust for B. without any words of limitation, B. takes the equitable fee; for the whole estate passed to the trustees, and whatever interest they took was given in trust for B. (*a*). But if

Case of a deed.

an estate be conveyed by *deed* unto and to the use of a trustee and his heirs, in trust for the settlor for life, and after his death upon trust for his children simply, without the word *heirs,* [or, in deeds executed since the 31st December, 1881, the words "in fee simple" or "in tail" (*b*)], the children by analogy to legal limitations take an estate for life only (*c*). Should *renewable leaseholds for lives* be conveyed by deed to trustees and their heirs upon trust for A., it has been held that from the nature of an estate *pur autre vie,* A. takes the absolute interest (*d*).

Force of technical terms.

3. But though technical terms be not absolutely necessary, yet where technical terms are employed they shall be taken in their legal and technical sense (*e*). Lord Hardwicke indeed once added the qualification, "*unless the intention of the testator or author of the trust plainly appeared to the contrary* (*f*)." But this position has since been repeatedly and expressly overruled, and at the present day it must be considered a clear and settled canon that a limitation in a trust, perfected and declared by the settlor, must have the same construction as in the case of a legal estate executed (*g*).

Rule in Shelley's case applicable to trusts.

4. As the *rule in Shelley's case* is not one of construction, that is, of intention, but of law, and was established to remedy certain mischiefs, which, if heirs were allowed to take as purchasers,

(*a*) *Moore* v. *Cleghorn*, 10 Beav. 423; affirmed on appeal, 12 Jurist, 591; *Knight* v. *Selby*, 3 Man. & Gr. 92; *Challenger* v. *Sheppard*, 8 T. R. 597; *Yarrow* v. *Knightly*, 8 Ch. Div. 736; and see *Doe* v. *Cafe*, 7 Exch. 675; *Watkins* v. *Weston*, 32 Beav. 238; 3 De G. J. & Sm. 434; *Ryan* v. *Keogh*, 4 Ir. R. Eq. 357; *Hodson* v. *Ball*, 14 Sim. 558.

[(*b*) 44 & 45 Vict. c. 41, s. 51.]

(*c*) *Holliday* v. *Overton*, 14 Beav. 467; 15 Beav. 480; 16 Jur. 751; *Lucas* v. *Brandreth* (No. 2), 28 Beav. 274; *Tatham* v. *Vernon*, 29 Beav. 604; [*Lysaght* v. *M'Grath*, 11 L. R. Ir. 142; *Meyler* v. *Meyler*, 11 L. R. Ir. 522;] *Middleton* v. *Barker*, 29 L. T. N.S. 643.

(*d*) *M'Clintock* v. *Irvine*, 10 Ir. Ch. Rep. 481; *Brenan* v. *Boyne*, 16 Ir. Ch. Rep. 87; *Betty* v. *Elliott*, Ib. 110, note; *Re Bayley*, 16 Ir. Ch. Rep. 215; [*Currin* v. *Doyle*, 3 L. R. Ir. 265;] and see *post*, chap. xxvii. s. 1.

(*e*) *Wright* v. *Pearson*, 1 Eden, 125, *per* Lord Henley; *Austen* v. *Taylor*, 1 Eden, 367, *per eundem*; *Synge* v. *Hales*, 2 B. & B. 507, *per* Lord Manners; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 571, *per* Lord Eldon; *Lord Glenorchy* v. *Bosville*, Cas. *t.* Talb. 19, *per* Lord Talbot; *Bale* v. *Coleman*, 8 Vin. 268, *per* Lord Harcourt; [*Meyler* v. *Meyler* 11 L. R. Ir. 522.]

(*f*) *Garth* v. *Baldwin*, 2 Ves. 655.

(*g*) *Wright* v. *Pearson*, 1 Eden, 125; *Austen* v. *Taylor*, Ib. 367; and see *Brydges* v. *Brydges*, 3 Ves. 125; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 571.

would be introduced into feudal tenures; it might be thought, that, as trusts are wholly independent of tenure, they ought not to be affected by the operation of the rule; and the cases of *Withers* v. *Allgood* (*a*), and *Bagshaw* v. *Spencer* (*b*), seem to lend some countenance to the doctrine. But not to mention that Lord Hardwicke himself appears in *Garth* v. *Baldwin* (*c*) to have doubted the position advanced by him in *Bagshaw* v. *Spencer*, other subsequent authorities have now established the principle, that although the rule may not be equally *applicable* to trusts, it shall be equally *applied* (*d*).

But in order to vest the fee in the ancestor under this rule, the word "heir" must be used, not in the sense of *persona designata*, *i.e.* a particular individual, but as a term of succession so as to transmit the estate to the heir for the time being for ever. If, therefore, land be devised to a trustee in trust for A. for life, and after his decease in trust for the person who shall then be his heir or heiress and his or her heirs, in this case A. takes a life estate only, and the heir or heiress takes the fee simple by purchase (*e*); and of course the rule does not apply, if the legal estate be vested in trustees for the life of A. *in trust* for him, and the *legal remainder* after the death of A. be limited to the heirs of A.'s body, for here, as the life estate and the remainder are of different qualities (viz., one equitable and the other legal), they cannot unite (*f*).

(*a*) Cited in *Bagshaw* v. *Spencer*, 1 Ves. sen. 150; 1 Coll. Jur. 403.

(*b*) 1 Ves. sen. 142; 1 Coll. Jur. 378.

(*c*) 2 Ves. 646.

(*d*) *Wright* v. *Pearson*, 1 Eden, 128; *Brydges* v. *Brydges*, 3 Ves. 120; *Jones* v. *Morgan*, 1 B. C. C. 206; *Webb* v. *Earl of Shaftesbury*, 3 M. & K. 599; *Roberts* v. *Dixwell*, 1 Atk. 610; West, 536; *Britton* v. *Twining*, 3 Mer. 176; *Spence* v. *Spence*, 12 C. B. N.S. 199; *Cooper* v. *Kynock*, 7 L. R. Ch. App. 398; *Collier* v. *Walters*, 17 L. R. Eq. 252; *Hervey* v. *Hervey*, W. N. 1874, p. 41; *Drew* v. *Maslen*, W. N. 1874, p. 65; *Batteste* v. *Maunsell*, 10 Ir. R. Eq. 97, on App. 314 [*Re White and Hindle's Contract*, 7 Ch. D. 201.] *Coape* v. *Arnold*, 2 Sm. & Gif. 311, may appear to militate against the general rule, but the true ground of the decision was this: The codicil was made for a particular purpose, viz., for securing the jointure, and as it confirmed the will in all other respects, the testator's intention evidently was, that after securing the jointure, the trustees of the codicil should convey the estate to the uses declared by the will. It was therefore, an executory trust, and the question was not whether in mere equitable estates a life interest resulting to the heir-at-law would unite with a limitation to the heirs of his body, but whether according to the true construction of the will the settlement was not meant to be executed in such a form as to make the heirs of his body purchasers. In this light the question was one of intention, and not of legal operation. The case was subsequently affirmed on appeal by Lord Cranworth, and it is conceived substantially, though not in terms, upon the ground above indicated as the true principle: see 4 De G. M. & G. 574.

(*e*) *Greaves* v. *Simpson*, 10 Jur. N.S. 609.

(*f*) *Collier* v. *M'Bean*, 34 Beav. 426.

Trusts executed and trusts executory distinguished.

5. We have said, that if technical words be employed, they must be taken in their legal and technical sense; but as to this a distinction must be drawn between trusts *executed*, and trusts that are only *executory;* for to trusts executed the position is strictly applicable, but in the case of trusts that are executory it must be received with considerable allowance.

A trust *executed* is where the limitations of the equitable interest are complete and final; in the *executory* trust, the limitations of the equitable interest are intended to serve merely as minutes or instructions for perfecting the settlement at some future period (*a*).

The two confounded by Lord Hardwicke in Bagshaw *v.* Spencer.

The distinction we are considering was very early established, and was recognized successively by Lord Cowper (*b*), Lord King (*c*), Lord Talbot (*d*), and by no one more frequently than by Lord Hardwicke himself (*e*): yet in *Bagshaw* v. *Spencer* (*f*) Lord Hardwicke almost denied that any such distinction existed. But in a subsequent case (*g*) his Lordship felt himself called upon to offer some explanation. "He did not mean," he said, "in *Bagshaw* v. *Spencer*, that no weight was to be laid on the distinction, but that, if it had come recently before him, he should then have thought there was little weight in it, although he should have had that deference for his predecessors, as not to lay it out of the case, not intending to say that all which his predecessors did was wrong founded, which he desired might be remembered."

The distinction now established.

But whatever doubts may formerly have existed upon the subject, they have long since been dispelled by the authority of succeeding judges. "The words executory trust," said Lord Northington, "seem to me to have no fixed signification. Lord King describes an executory trust to be, where the party must come to this Court to have the benefit of the will. But that is the case of every trust. The true criterion is this. Wherever the assistance of this Court is necessary to complete a limitation, in that case, the limitation in the will not being complete, that

(*a*) See *Egerton* v. *Earl Brownlow*, 4 H. L. Cases, 210; *Tatham* v. *Vernon*, 29 Beav. 604.

(*b*) *Bale* v. *Coleman*, 8 Vin. 267; *Earl of Stamford* v. *Sir John Hobart*, 3 B. P. C. 33.

(*c*) *Papillon* v. *Voice*, 2 P. W. 471.

(*d*) *Lord Glenorchy* v. *Bosville*, Cas. *t.* Talb. 3.

(*e*) *Gower* v. *Grosvenor*, Barnard, 62; *Roberts* v. *Dixwell*, 1 Atk. 607; *Baskerville* v. *Baskerville*, 2 Atk. 279; *Marryat* v. *Townley*, 1 Ves. 102; *Read* v. *Snell*, 2 Atk. 648; *Woodhouse* v. *Hoskins*, 3 Atk. 24.

(*f*) 1 Ves. 152; and see *Hopkins* v. *Hopkins*, 1 Atk. 594.

(*g*) *Exel* v. *Wallace*, 2 Ves. 323. And Lord Henley once said, he believed Lord Hardwicke had at last renounced his opinion, *Bastard* v. *Proby*, 2 Cox, 8.

is sufficient evidence of the testator's intention that the Court should model the limitations; but where the trusts and limitations are already expressly declared, the Court has no authority to interfere, and make them different from what they would be at law" (*a*). And Lord Eldon observed, "Where there is an executory trust, that is, where the testator has directed something to be done, and has not himself completed the devise, the Court has been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection with respect to the execution of that intention, the Court inquires what it is itself to do, and it will mould what remains to be done, so as to carry that intention into execution" (*b*). [And in a recent case the late M. R. observed "It is called an executory trust, where the testator instead of expressing exactly what he means, that is, filling up the terms of the trust, tells the trustees to do their best to carry out his intention. In that way it is executory, that if he has not put into words the precise nature of the limitations, he has said in effect, 'Now there are my intentions, do your best to carry them out'" (*c*).]

Executory trusts in marriage articles distinguished from the like trusts in wills.

6. We proceed to the inquiry to what extent in executory trusts a latitude of construction is admissible; and to draw the line correctly, we must again distinguish between executory trusts in *marriage articles*, where the Court has a clue to the intention from the very nature of the contract, and executory trusts in *wills*, where the Court knows nothing of the object in view *à priori*, but in collecting the intention must be guided solely by the language of the instrument.

Occasionally confounded.

This distinction was at first but very imperfectly understood. Because executory trusts under wills admitted a degree of latitude, it was held by some, they were to be treated precisely on the same footing as executory trusts in marriage articles; while, because trusts under wills did not admit an equal latitude of construction, it was held by others that they were not to be distinguished from trusts executed (*d*). Even Lord Eldon once observed, "There is no difference in the execution of an executory trust created by will, and of a covenant in marriage articles; such a distinction would shake to their foundation the rules of equity" (*e*). But Lord Manners said he could not assent to this

(*a*) *Austen* v. *Taylor*, 1 Eden, 366, 368; and see *Stanley* v. *Lennard*, 1b. 95; *Wright* v. *Pearson*, 1b. 125.

(*b*) *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 570; and see *Coape* v. *Arnold*, 4 De G. M. & G. 585.

[(*c*) *Miles* v. *Harford*, 12 Ch. D. 691, 699.]

(*d*) See *Bale* v. *Coleman*, 8 Vin. 267.

(*e*) *Countess of Lincoln* v. *Duke of*

doctrine (*a*); and Lord Eldon some time after took an opportunity of correcting himself (*b*).

Distinction drawn by Sir W. Grant.

The distinction we are considering has been put in a very clear light by Sir W. Grant. "I know of no difference," he said, "between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. Where the object is to make a provision by the settlement for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the *agreement* be to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention. But if a *will* directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement" (*c*).

"Heirs of the body" in articles construed first and other sons.

7. To apply the foregoing distinction to the cases that have occurred: if in *marriage articles* the real estate of the husband or wife be limited to the *heirs of the body*, or the *issue* (*d*) of the contracting parties, or either of them, or to the heirs of the body, or issue and their heirs (*e*), so that heirs of the body, or issue, if taken in their ordinary legal sense, would enable one or other of the parents to defeat the provision intended for the children, these words will then be construed in equity to mean first and other sons; and the settlement will be made upon them successively in tail, as purchasers (*f*).

Distinction where the settlement was after the marriage, and where before it.

If the settlement has been already made, then, provided the execution of it was after the marriage, it will be rectified by the articles (*g*); but if the execution of it was prior to the

Newcastle, 12 Ves. 227, 230; and see *Turner* v. *Sargent*, 17 Beav. 519.

(*a*) *Stratford* v. *Powell*, 1 B. & B. 25; *Synge* v. *Hales*, 2 B. & B. 508.

(*b*) *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 574.

(*c*) *Blackburn* v. *Stables*, 2 V. & B. 369; and see *Maguire* v. *Scully*, 2 Hog, 113; *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 173; 2 Drur. & War. 18; 4 Ir. Eq. Rep. 375; *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 543; *Scarisbrick* v. *Lord Skelmersdale*, 4 Y. & C. 117.

(*d*) *Dod* v. *Dod*, Amb. 274; *Grier* v. *Grier*, 5 L. R. H. L. 688.

(*e*) *Phillips* v. *James*, 2 Drew. & Sm. 404.

(*f*) *Handick* v. *Wilkes*, 1 Eq. Ca. Ab. 393; *Trevor* v. *Trevor*, 1 P. W. 622; *Jones* v. *Langton*, 1 Eq. Ca. Ab. 392; *Cusack* v. *Cusack*, 5 B. P. C. 116; *Griffith* v. *Buckle*, 2 Vern. 13; *Stonor* v. *Curwen*, 5 Sim. 269, *per* Sir L. Shadwell; *Davies* v. *Davies*, 4 Beav. 54; *Rochford* v. *Fitzmaurice*, *ubi suprà*.

(*g*) *Streatfield* v. *Streatfield*, Cas. *t.* Talb. 176; *Warrick* v. *Warrick*, 3 Atk. 293, *per* Lord Hardwicke; *Legg* v. *Goldwire*, Cas. *t.* Talb. 20, *per* Lord Talbot; *Burton* v. *Hastings*, Gilb. Eq. Rep. 113; *S. C.* 1 Eq. Ca. Ab. 393, overruled.

marriage, the Court will presume the parties to have entered into a different agreement (*a*), unless the settlement expressly state itself to be made in pursuance of the articles, when that presumption will be rebutted, and the settlement will be rectified (*b*), or unless it can be otherwise shown that the settlement was intended to be in conformity with the articles, and there is clear and satisfactory evidence that the discrepancy has arisen from mistake (*c*).

Limitation of the husband's property to the heirs of the body of the wife.

Under the law as it stood prior to the Fines and Recoveries Act (*d*), a strict settlement was not decreed, where the property of the *husband* was limited to the heirs of the body of the *wife;* for this created an entail which neither husband nor wife could bar without the concurrence of the other, and the intent might have been, that the husband and the wife *jointly* should have the power of destroying the entail (*e*); but it is conceived, that as to articles executed subsequently to the Act referred to, the case would be otherwise (*f*).

Where the settlement also contains a limitation to the parent for life, with remainder to first and other sons in tail.

Nor will the Court read heirs of the body as first and other sons, where such a construction is negatived by anything in the articles themselves: as if one part of an estate be limited to the husband for life, remainder to the wife for life, remainder to the first and other sons in tail, and another part be given to the husband for life, remainder to the heirs male of his body; for, as it appears the parties knew how a strict settlement should be framed, the limitation of part of the estate in a different mode could only have proceeded from a different intention (*g*).

Heirs female.

8. It was formerly argued, that *daughters* in marriage articles were not entitled to the same consideration as sons, on the ground that they do not, like sons, continue the name of the family, and are generally provided for, not by the estate itself, but by portions out of the estate; but it is now clearly settled, that, as they are purchasers under the marriage, and are entitled to

(*a*) *Legg* v. *Goldwire*, Cas. *t.* Talbot, 20; and see *Warrick* v. *Warrick*, 3 Atk. 291.

(*b*) *Honor* v. *Honor*, 1 P. W. 123; *Roberts* v. *Kingsley*, 1 Ves. 238; *West* v. *Errissey*, 2 P. W. 349; but not it seems against a purchaser, *Warrick* v. *Warrick*, 2 Atk. 291.

(*c*) *Bold* v. *Hutchinson*, 5 De G. M. & G. 565.

(*d*) See 3 & 4 W. 4. c. 74, ss. 16, 17.

(*e*) *Howel* v. *Howel*, 2 Ves. Sen. 358; *Whateley* v. *Kemp*, cited ib.; *Honor* v. *Honor*, 1 P. W. 123; *Green* v. *Ekins*, 2 Atk. 477, *per* Lord Hardwicke; *Highway* v. *Banner*, 1 B. C. C. 587, *per* Sir L. Kenyon; *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 555, *per* Lord Hatherley.

(*f*) *Rochford* v. *Fitzmaurice*, 2 Drur. & War. 19.

(*g*) *Howel* v. *Howel*, 2 Ves. Sen. 359; and see *Powell* v. *Price*, 2 P. W. 535; *Chambers* v. *Chambers*, Fitzgib. Rep. 127; *S. C.* 2 Eq. Ca. Ab. 35; *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 174.

some provision, the Court will in their favour construe heirs female to mean daughters (*a*); and unless the articles themselves make an express provision for them by way of portion, &c. (*b*), will hold daughters, as well as sons, to be included under the general term of heirs of the body (*c*), or issue (*d*). And the settlement will be executed on the daughters, in default of sons, as tenants in common in tail general, with cross remainders between them (*e*).

Limitation of chattels to heirs of the body.

9. If *chattels* be articled to be settled on the parents for life, and then on the *heirs of the body* of either, or both, it seems the chattels will not vest absolutely in the parents, but in the eldest son as the heir, though taking by purchase, and if there be no son, in the daughters as co-heiresses (*f*); and for the son or daughters to take, it is not necessary that they should survive the parents and become the actual heir (*g*), unless there be words in the articles to give it to the heirs of the body living at the death of the surviving parent, as "if the parent die without *leaving* heirs of the body" (*h*).

Articles to settle chattels on same trusts as real estate.

10. Again, if in *marriage articles*, a party covenant to settle *personal estate* upon the trusts, and for the intents and purposes, upon and for which the freeholds are settled, the Court will not apply the limitations to the personal estate literally, the effect of which would be to vest the absolute interest in remainder in the first son on his birth, but will insert a proviso that will have the effect, at least to a certain extent, of making the personal estate follow the course of the real.

Limitations over on dying under 21, or under 21 without issue.

Sir Joseph Jekyll said, the practice of conveyancers was to insert a limitation over on "dying under 21" (*i*): but *Lord Hardwicke* conceived the common limitation over to be on "dying under 21 without issue" (*j*). In *The Duke of Newcastle* v. *The Countess of Lincoln* (*k*), leaseholds were articled to be settled to the same uses as the realty, viz. to A. for life, remainder

(*a*) *West* v. *Errissey*, 2 P. W. 349.
(*b*) *Powell* v. *Price*, 2 P. W. 535; and see Mr. Fearne's observations, Conting. Rem. 103.
(*c*) *Burton* v. *Hastings*, Gilb. Eq. Rep. 113; *S. C.* 1 Eq. Ca. Ab. 393, *per* Lord Cowper.
(*d*) *Hart* v. *Middlehurst*, 3 Atk. 371; and see *Maguire* v. *Scully*, 2 Hog. 113; *S. C.* 1 Beat. 370.
(*e*) *Marryat* v. *Townly*, 1 Ves. 106; *Phillips* v. *James*, 4 Drew. & Sm. 404.
(*f*) *Hodgeson* v. *Bussey*, 2 Atk. 89: *S. C.* Barn. 195. See *Bartlett* v. *Green*, 13 Sim. 218.
(*g*) *Theebridge* v. *Kilburne*, 2 Ves. 233.
(*h*) *Read* v. *Snell*, 2 Atk. 642.
(*i*) *Stanley* v. *Leigh*, 2 P. W. 690.
(*j*) *Gower* v. *Grosvenor*, Barn. 63; *S. C.* 5 Mad. 348.
(*k*) 3 Ves. 387, see the observations pp. 394, 397; and see *Scarsdale* v. *Curzon*, 1 J. & H. 51, 54.

to A.'s first and other sons in tail male, remainder to B. for life, remainder to B.'s first and other sons in tail male, remainders over. A. died, having had a son who lived only nine months. Lord Loughborough held that the leaseholds had not vested absolutely in the deceased son of A., and ordered a proviso to be inserted in the settlement, that they should not vest absolutely in any son of B. who should not attain 21 or *die under that age leaving issue male.* From this decision an appeal was carried to the House of Lords (*a*); but before the cause could be heard, a son of B. having attained 21, the decree was, that the son of B. had become absolutely entitled. Thus the House of Lords decided that the absolute interest had not vested in the first tenant in tail on his birth; but what proviso ought to have been inserted, whether a limitation over "on dying under 21," or "on dying under 21 without issue male," the House in the event was not called upon to determine. The order of the House of Lords in this case was made with the approbation of Lord Ellenborough and Lord Erskine (who took part in the debate), and also of Lord Thurlow (*b*). But Lord Eldon denied before the House that there was any distinction between articles and wills, and therefore relying upon *Foley* v. *Burnell* and *Vaughan* v. *Burslem,* two cases upon wills decided by Lord Thurlow, he said, had the cause come originally before him, he should have decreed the absolute interest to have vested in the eldest child upon birth; that assignments had been made of leasehold property under a notion that a son when born would take an absolute interest; and, were the House to sanction the decree of Lord Loughborough, it would shake a very large property (*c*). However, his Lordship conceived that Lord Hardwicke's doctrine was originally the best, and therefore, recollecting the opinion of that great Judge, the opinion of Sir Joseph Jekyll, and the decision of the Court below, and knowing the concurrent opinions of Lord Ellenborough and Lord Erskine, and also the opinion of Lord Thurlow (whose present sentiments, however, he could not reconcile with the cases of *Foley* v. *Burnell* and *Vaughan* v. *Burslem,* formerly decided by his Lordship) (*d*), he bowed to all these authorities; and, though he was in some degree dissatisfied with the determination, he nevertheless would not move an amendment (*e*).

(*a*) 12 Ves. 218.
(*b*) 12 Ves. 237.
(*c*) 12 Ves. 236, 237.
(*d*) Lord Eldon could not reconcile Lord Thurlow's opinion with these cases, because his Lordship refused to admit the distinction between articles and wills.
(*e*) *The Countess of Lincoln* v. *The Duke of Newcastle,* 12 Ves. 237, and

Personalty cannot be knit to realty entirely.

It must be observed that a settlement of the personalty cannot be made exactly analogous to a settlement of the realty, whether the limitation adopted be "on dying under 21," or "on dying under 21 without issue." For if the former be supposed, then, the object of the articles being to knit the personal estate to the freehold, if the son die under age leaving issue who will succeed to the freehold, the two estates will go in different directions. But if the limitation over be "on dying under 21 without issue," then, if the son die leaving issue, such issue may die under age and unmarried, when the personality will go to the son's personal representative, while the freeholds will devolve on the second son (*a*).

Joint-tenancy in articles construed tenancy in common.

11. Again, in *marriage articles*, as *joint tenancy* is an inconvenient mode of settlement on the children of the marriage (for, during their minorities no use can be made of their portions, as the joint tenancy cannot be severed) (*b*), the Court will rectify the articles by the presumed intent of the contract, and will permit words that would be construed a joint tenancy at law to create in equity a tenancy in common (*c*).

Words supplied in articles.

12. In other cases the Court has varied the literal construction by supplying words, as where the agreement was to lay out 200*l.* in the purchase of 30*l.* a year, to be settled on the husband and wife for their lives, remainder to the heirs of their bodies, remainder to the husband in fee, and, until the settlement should be made, the 200*l.* was to be applied to the separate use of the wife; and, if no settlement were executed during their joint lives, the 200*l.* was to go to the wife, if living, but, if she died before her husband, then to her brother and sister; and the wife died before her husband, but left issue; it was held the brother and sister had no claim to the fund, the words "if she died before her husband" intending plainly if she so died "without leaving issue" (*d*). [The Court has also in a *modern* settlement supplied a hotchpot clause (*e*).]

see *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 543.

(*a*) *Countess of Lincoln* v. *Duke of Newcastle*, 12 Ves. 228, 229.

(*b*) *Taggart* v. *Taggart*, 1 Sch. & Lef. 88, *per* Lord Redesdale; and see *Rigden* v. *Vallier*, 3 Atk. 734, and *Marryat* v. *Townly*, 1 Ves. 103. [But it would seem that an instrument executed by an infant, though voidable, severs the joint tenancy until it is avoided; but that if the infant when of age avoids the instrument the joint tenancy will arise again; *Burnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D. 416; *Whittingham's* Case, 8 Rep. 42b; Coke on Litt. 337a, 337b; but see *May* v. *Hook*, Coke on Litt. 246a, note (1), and Simpson on Infants, 2nd ed. p. 24.]

(*c*) *Taggart* v. *Taggart*, 1 Sch. & Lef. 84; *Mayn* v. *Mayn*, 5 L. R. Eq. 150.

(*d*) *Kentish* v. *Newman*, 1 P. W. 234; and see *Targus* v. *Puget*, 2 Ves. 194; *Master* v. *De Croismar*, 11 Beav. 184; *Martin* v. *Martin*, 2 R. & M. 507.

[(*e*) *Milller* v. *Gulson*, 13 L. R. Ir.

13. It has been held in marriage articles that a trust to *provide suitably* for the settlor's younger children is not too vague to be executed, but the Court will direct an enquiry what the provision should be (*a*). Vague provision.

14. Next as to *wills;* and here, as no presumption arises *à priori*, that "*heirs of the body*" were intended as words of purchase, if the executory trust of real estate be to "A. and the heirs of his body" (*b*), or to "A. and the heirs of his body and their heirs" (*c*), or to "A. for life, and after his decease to the heirs of his body" (*d*), the legal and ordinary construction will be adopted, and A. will be tenant in tail. So, where the estate was directed to be settled on the testator's "daughter and her children, and, if she died without issue," the remainder over, the Court said, that, by an immediate devise of the land in the words of the will, the daughter would have been tenant in tail, and in the case of a voluntary devise the Court must take it as they found it, though upon the like words in marriage articles it might have been otherwise (*e*). How "heirs of the body" construed in executory trusts in wills.

And where a testator directed lands to be settled on his "nephew for life, remainder to the heirs male of his body, and the heirs male of the body of every such heir male, severally and successively one after another as they should be in seniority of age and priority of birth, every elder and the heirs male of his body to be preferred before every younger," Lord Cowper said, the nephew took by a voluntary devise, and, although executory, it was to be taken in the very words of the will as a devise, and was not to be supported or carried further in a Court of Equity than the same words would operate at law in a voluntary conveyance (*f*). The decision that the nephew was tenant in tail went apparently upon the ground that the words "and the heirs male of the body of every such heir male, severally and successively, &c.," were all included in the notion of an entail, and *expressio eorum, quæ tacite insunt, nihil operatur.* "A. for life, and heirs male of his body, and their heirs male successively."

And in a more recent case, where the executory trust was for A. generally, with a direction that the trustees should not give up their trust till "a *proper entail* was made to the heir "Proper entail on the heir male."

408, 428, distinguishing *Lees* v. *Lees*, 5 Ir. R. Eq. 549.]

(*a*) *Brenan* v. *Brenan*, 2 Ir. R. Eq. 266.

(*b*) *Harrison* v. *Naylor*, 2 Cox, 274; *Bagshaw* v. *Spencer*, 1 Ves. 151, *per* Lord Hardwicke; *Marshall* v. *Bousfield*, 2 Mad. 166.

(*c*) *Marryat* v. *Townly*, 1 Ves. 104, *per* Lord Hardwicke.

(*d*) *Blackburn* v. *Stables*, 2 V. & B. 370, *per* Sir W. Grant; *Seale* v. *Seale*, 1 P. W. 290; *Meure* v. *Meure*, 2 Atk. 266, *per* Sir J. Jekyll.

(*e*) *Sweetapple* v. *Bindon*, 2 Vern. 536.

(*f*) *Legatt* v. *Sewell*, 2 Vern. 551.

male by him," it was determined that A. took an estate tail (*a*). However, in another case, where the devise was extremely similar, viz., to A. with a direction that the estate should be *entailed* on his heir male, Lord Eldon, on the assumption that it was an executory trust, and not a legal devise, considered the entail so doubtful that he would not compel a purchaser to accept a title under it (*b*).

Heirs of the body construed to mean sons, even in wills, where any expression of intention to that effect.

15. But "heirs of the body" will in the case of executory trusts in wills as well as in articles be read first and other sons, provided the testator expressly manifest such an intention, as if he direct a settlement on A. for life "without impeachment of waste" (*c*), or with a limitation to preserve contingent remainders (*d*), or if he desire that "care be taken in the settlement that the tenant for life shall not bar the entail" (*e*), or otherwise show that the direction to settle on A. and the heirs of his body, was not meant to give him a power of disposition over the estate (*f*); and in one case "heirs of the body" was so construed, where a testator had devised to the separate use of a *feme covert* for life, so as she alone should receive the rent, and the husband should not intermeddle therewith, and *after her decease* in trust for the heirs of her body; for, from the limitation to the heirs immediately after the wife's decease, coupled with the direction that the husband should not intermeddle with the estate, the Court collected the intention of excluding the husband's curtesy, an object which could only be accomplished by giving to "heirs of the body" the construction of words of purchase (*g*).

"A. and the heirs of his body, as counsel shall advise," etc.

And a direction to settle on A. and the heirs of his body "as

(*a*) *Blackburn* v. *Stables*, 2 V. & B. 367; recognised in *Marshall* v. *Bousfield*, 2 Mad. 166; and see *Dodson* v. *Hay*, 3 B. C. C. 405.

(*b*) *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559; and see *Woolmore* v. *Burrows*, 1 Sim. 512; *Sealey* v. *Stawell*, 9 Ir. R. Eq. 499.

(*c*) *Lord Glenorchy* v. *Bosville*, Cas. *t.* Talbot, 3.

(*d*) *Papillon* v. *Voice*, 2 P. W. 471; and see *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 158.

(*e*) *Leonard* v. *Lord Sussex*, 2 Vern. 526.

(*f*) *Thompson* v. *Fisher*, 10 L. R. Eq. 207. It is presumed that the Court attributed an intention to this effect, for if the Court directed a strict settlement, merely on the ground that the trust was executory, it would conflict with the authorities, and with the canon laid down in the House of Lords, that in the case of a *will* or a *deed of gift* the intention that the very words mentioned in the instrument as proper for the *more complete conveyance* are not to be used, must be plainly manifested by the *first* instrument, and will not be assumed *merely because the trust is executory*. *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 555, *per* L.C.; and see *Duncan* v. *Bluett*, 4 Ir. R. Eq. 469.

(*g*) *Roberts* v. *Dixwell*, 1 Atk. 607; *S. C.* West's Rep. *t.* Lord Hardwicke, 536.

counsel shall advise" (*a*), or "as the executors shall think fit" (*b*), is strong collateral evidence, that something more was intended than a simple estate tail.

Rule in Shelley's case not applicable where the life estate is to the separate use.

Sir L. Shadwell thought that if a testator directed an estate to be settled on a *feme covert* for life, for her *separate use*, and at her death on her *issue*, the feme would not be tenant in tail, for the separate use requiring the life estate to be vested in trustees (*c*), the equitable estate in the feme could not unite with the legal estate in the issue, and therefore the rule in Shelley's case would not apply (*d*).

Trevor *v.* Trevor.

Where the trust was to settle on A. for life, *without impeachment of waste*, with remainder to his issue in tail male in *strict settlement*, the Court directed the estates to be settled on A. for life, without impeachment of waste, with remainder to his sons successively in tail male, with remainder to the daughters, as tenants in common in tail male, with cross remainders in tail male, and proper limitations to trustees were inserted to preserve contingent remainders (*e*). But where a testator devised an estate to C. for life, and on her death to be "strictly entailed on her eldest son J.," the Court directed a settlement on C. for life, with remainder to J. for life, with remainder to his first and other sons successively in tail general, with remainder to his daughters as tenants in common in tail general, &c. (*f*).

"Heirs of the body" and "issue" not of the same import.

16. We may here remark that "*heirs of the body*" and "*issue*" are far from being synonymous expressions. The former are properly words of limitation, whereas the latter term is in its primary sense a word of purchase. In several cases the Court appears to have ordered a strict settlement from the use of the term "issue," where, had the expression been "heirs of the body," the estate would probably have been construed an estate tail (*g*).

Daughters included in "heirs of the body" and "issue."

17. Of course, *daughters* as well as sons will be included under "heirs of the body" (*h*), or "issue" (*i*); for they equally answer

(*a*) *White* v. *Carter*, 2 Eden, 366; reheard, Amb. 670.

(*b*) *Read* v. *Snell*, 2 Atk. 642.

[(*c*) See now 45 & 46 Vict. c. 75, s. 1.]

(*d*) See *Stonor* v. *Curwen*, 5 Sim. 268; *Earl of Verulam* v. *Bathurst*, 13 Sim. 386; *Coape* v. *Arnold*, 2 Sm. & Gif. 311. 4 De G. M. & G. 574.

(*e*) *Trevor* v. *Trevor*, 13 Sim. 108; affirmed on this point, 1 H. of L. Ca. 239; and see *Coape* v. *Arnold*, 2 Sm. & Gif. 311; 4 De G. M. & G. 574.

(*f*) *Sealey* v. *Stawell*, 9 I. R. Eq. 499.

(*g*) *Ashton* v. *Ashton*, cited in *Bagshaw* v. *Spencer*, 1 Coll. Jur. 402; *Meure* v. *Meure*, 2 Atk. 265; and see *Horne* v. *Barton*, G. Coop, 257; *Dodson* v. *Hay*, 3 B. C. C. 405; *Stonor* v. *Curwen*, 5 Sim. 264; *Crozier* v. *Crozier*, 2 Conn. & Laws. 311; *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws, 158; *Bastard* v. *Proby*, 2 Cox, 6; *Haddesley* v. *Adams*, 22 Beav. 276.

(*h*) *Bastard* v. *Proby*, 2 Cox, 6.

(*i*) *Meure* v. *Meure*, 2 Atk. 265;

the description, and are equally objects of bounty; and where these words are construed as words of purchase the settlement will be made upon the daughters in default of sons, as tenants in common in tail, with cross remainders between or amongst them (*a*).

Waste.

18. In executing a strict settlement the Court, unless there be some special words which point to the contrary, will not make the tenant for life dispunishable for *waste* (*b*), and a direction to settle to the separate use without power of anticipation is inconsistent with a life estate without impeachment of waste (*c*).

Limitation to preserve contingent remainders.

Before 8 & 9 Vict. c. 106, the Court took care that proper limitations to *trustees* should be inserted after the life estates for the preservation of contingent remainders (*d*); and although, by the effect of the Act referred to, contingent remainders are no longer destructible by the *forfeiture, merger, or surrender of the previous life estate,* the limitations to trustees to preserve may still, it is conceived, be properly interposed, with the view of affording a convenient means of protecting the interests of contingent remaindermen in the event of wilful waste or destruction being committed by the tenant for life before any remainderman comes *in esse* (*e*).

First freehold in trustees.

19. In a case occurring before the Fines and Recoveries Act (3 & 4 W. 4. c. 74), where the testator had shown an anxious wish that the power of defeating the entail should be as much restricted as possible, the Court, instead of giving the first freehold to the tenant for life, which would have enabled him to make a tenant to the præcipe, ordered the freehold during his life to be vested in *trustees* in trust for him (*f*).

Protector.

However, in a case occurring after the Fines and Recoveries Act, where an estate was vested in a trustee upon trust to execute a strict settlement on Lady Le Despencer and her family, and the Master, to whom a reference was directed, approved of a settlement on Lady Le Despencer for life, &c., but refused to

Ashton v. *Ashton* cited in *Bagshaw* v. *Spencer,* 1 Coll. Jur. 402; *Trevor* v. *Trevor,* 13 Sim. 108.

(*a*) *Meure* v. *Meure,* 2 Atk. 265; *Bastard* v. *Proby,* 2 Cox, 6; *Ashton* v. *Ashton,* and *Trevor* v. *Trevor, ubi suprà; Marryat* v. *Townly,* 1 Ves. sen. 105.

(*b*) *Stanley* v. *Coulthurst,* 10 L. R. Eq. 259; *Davenport* v. *Davenport,* 1 H. & M. 779.

(*c*) *Clive* v. *Clive,* 7 L. R. Ch. App. 433.

(*d*) *Harrison* v. *Naylor,* 2 Cox, 247; *S. C.* 3 B. C. C. 108; *Woolmore* v. *Burrows,* 1 Sim. 512; *Baskerville* v. *Baskerville,* 2 Atk. 279; *Trevor* v. *Trevor,* 13 Sim. 108; *Stamford* v. *Hobart,* 3 B. P. C. 31; and see *Hopkins* v. *Hopkins,* 1 Atk. 593.

(*e*) *Garth* v. *Cotton,* 1 Ves. 554.

(*f*) *Woolmore* v. *Burrows,* 1 Sim. 512, see 527.

appoint a *protector* under the 32nd section of the Act, the Court held that, though in certain cases it might be advisable to appoint a protector, there should be special circumstances to warrant it; that the trustee was the "settlor" within the meaning of the 32nd section, and had the power to appoint a protector; and as he did not desire it, the Court, unless there were good reasons to the contrary, would not control his discretion; that a protector under the Act was an irresponsible person, and was at liberty to act from caprice, ill-will, or any bad motive, and might even take a bribe for consenting to bar the entail, without being amenable to the Court, and therefore, on the whole, it was better not to clog the settlement with a protector (*a*).

Gavelkind lands.

20. Where *gavelkind* lands are the subject of the executory trust, the circumstance of the custom will not prevent the settlement being made upon the first and other sons successively, for the heirs take not by custom, but under the construction of a Court of Equity, which must be guided by the rules of the Common Law (*b*).

Where the testator directs a settlement, but formally declares the limitations.

21. Where the Court enlarges and rectifies the will it does so on the ground of the limitations having been imperfectly declared; but if a testator direct a settlement, and be *his own conveyancer*, that is, declare the limitations himself, intending them to be *final*, the hands of the Court are bound, and the words must be taken in their natural sense (*c*). Thus where a testator devised to A. for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A., remainders over, and then directed the residue of his personal estate to be laid out in the purchase of lands, and declared that the lands when purchased "should remain and continue to, for, and upon such and the like estate or estates, uses, trusts, intents, and purposes, and under and subject to the like charges, restrictions, and limitations, as were by him before limited and declared of and concerning his lands and premises thereinbefore devised, or as near thereto as might be, and the deaths of parties would admit," Lord Northington said that the testator had referred no settlement to his trustees to complete, but had declared his own uses and trusts, which being declared, there was no instance where the Court had proceeded

(*a*) *Bankes* v. *Le Despencer*, 11 Sim. 508.
(*b*) *Roberts* v. *Dixwell*, 1 Atk. 607.
(*c*) *Franks* v. *Price*, 3 Beav. 182; and see *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 173; 2 Drur. & War. 21; *Doncaster* v. *Doncaster*, 3 K & J. 26.

so far as to alter or change them (*a*). However, the decision to which his Lordship came seems not to have met with the entire approbation of Lord Eldon (*b*).

Executory trusts of chattels in wills.

22. In the cases relating to executory trusts of *chattels* in wills, the bequest, instead of being direct, has generally been by way of reference to a previous strict settlement of realty.

The law upon this subject was for a long time in a very unsatisfactory state, but the result of the cases (*c*) at the present day appears to be that where a testator devises land in strict settlement, and then bequeaths heir-looms to be held by or in trust for the parties entitled under the limitations of the real estate, or without making any bequest, directs or expresses a desire that the heir-looms shall be held upon the like trusts, even though the testator should add the words "as far as the rules of law and equity will permit," the use of the heir-looms will belong to the tenant for life of the real estate for his life, and the property of the heir-looms will vest absolutely in the first tenant in tail immediately on his birth, though he afterwards die an infant. The Court, in these cases, either regards the trusts as executed, and not of a directory character, or if the trusts be executory, the Court considers it has no authority in making a settlement to insert a limitation over on the tenant in tail dying under 21. However, there is no unlawfulness in such a limitation, so that if a bequest of heir-looms in a will be clearly executory, and the testator manifests a distinct intention that a settlement shall be made of the heir-looms, and that such clauses shall be inserted as will render them inalienable for as long a period as the law will permit, the Court would no doubt execute the intention by settling the heir-looms, and inserting a limitation, by which the absolute interest in the first tenant in tail should by his death under 21, or by his death under 21 without issue, be carried over to the person next entitled in remainder (*d*). But if heir-looms be assigned or bequeathed to trustees, not upon trust simply for the persons entitled under

(*a*) *Austen* v. *Taylor*, 1 Eden, 368.

(*b*) See *Green* v. *Stephens*, 17 Ves. 76; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 572.

(*c*) *Scarsdale* v. *Curzon*, 1 Johns. & Hem. 40, and the cases there cited and commented upon; and see *Stratford* v. *Powell*, 1 B. & B. 1; *Doncaster* v. *Doncaster*, 3 K. & J. 26; *Christie* v. *Gosling*, 1 L. R. H. L. 279; *Harrington* v. *Harrington*, 3 L. R. Ch. App. 564; 5 L. R. H. L. 87.

(*d*) See the observations of Lord Loughborough in *Foley* v. *Burnell*, 1 B. C. C. 284, and of Lord Thurlow in *Vaughan* v. *Burslem*, 3 B. C. C. p. 106; and of V. C. Wood in *Scarsdale* v. *Curzon*, 1 J. & H. 40; *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 543.

the limitations of the real estates, which, notwithstanding the words "so far as the rules of law and equity will permit," would vest them absolutely in the first tenant in tail who came into being, but upon trust, "as far as the rules of law and equity will permit," for the persons successively entitled to the *actual freehold* (in the sense of the *freehold in possession*), with a proviso that no *child* of a person made tenant for life shall take absolutely unless he attained 21, here, though the trust be executed and not executory, the absolute vesting is coupled with the *possession*, and is therefore suspended until the death of the tenant for life, and will then vest in the child who, after his death, shall first fulfil the requisite of being tenant in tail in possession and attaining the age of 21 years (*a*).

In one case a testator gave certain jewels to his nephew John, "to be held as heir-looms by him, and by his eldest son on his decease, and to descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law and equity would permit." John died in 1866, leaving an eldest son, the plaintiff (born in testator's lifetime), and the Court [held that a valid executory trust was created and] declared that the jewels were in trust for John for life, and on his death for plaintiff for his life, and on his death for his eldest son, to be vested at 21, and if he died in the life-time of plaintiff, or after his death but under 21, leaving an eldest son born before the death of plaintiff, then in trust for such eldest son, to be vested at 21 (*b*), with an ultimate trust in favour of John (*c*).

Where freeholds and chattels real were devised to trustees in trust for the testator's son for life, with a direction that, if he married, the trustees should settle and secure the premises as a *jointure to the wife* for her life, and to the *issue* share and share alike; and the son died, having *married twice*, but having had issue by the first wife, viz. three daughters, the Court directed a settlement of the whole on the second wife for life by way of jointure, with remainder to the three daughters as to the freeholds as tenants in common in tail, with cross remainders between them, and as to the chattels real, as tenants in common absolutely (*d*). [And where a testator directed that the shares of

(*a*) *Scarsdale* v. *Curzon*, 1 J. & H. 40, and cases there considered; *Christie* v. *Gosling*, 1 L. R. H. L. 279; *Harrington* v. *Harrington*, 3 L. R. Ch. App. 564; 5 L. R. H. L. 87; [*Re Johnston, Cockerell* v. *Essex*, 26 Ch. D. 538.]

(*b*) *Shelley* v. *Shelley*, 6 L. R. Eq. 540.

(*c*) *S. C.* 6 L. R. Eq. 550.

(*d*) *Mason* v. *Mason*, 5 Ir. R. Eq. 288.

his daughters in his personal estate, in case of their respective marriages, should be assigned to trustees for the benefit of the daughter or daughters so marrying for life, and after her or their deceases for the use of her or their intended husband or husbands for his or their life or lives, and after their decease respectively for the children of such marriage or respective marriages, with a gift over in the event of a daughter dying "without leaving any issue her surviving," it was held that, as the gift over showed an intention on the part of the testator to include children of a future marriage, so the executory trust authorized a settlement of a daughter's share on her for life with remainder to *any* husband, and that a *second husband* was accordingly entitled to a life interest (*a*).

Where freeholds were settled by will in strict settlement with a shifting clause in certain events, and the testator gave leaseholds to trustees "upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes and directions as, regard being had to the difference in the tenure of the premises respectively, would best and most nearly correspond with the uses, trusts, powers, provisoes, and directions in the will declared and contained concerning the freeholds," it was held that the trust as to the leaseholds was executory, and that assuming the shifting clause, if applied verbatim to the leaseholds, to be bad for remoteness, it ought to be so modified as to render it free from that objection (*b*).]

Trust to correspond with limitations of peerage.

In another case (*c*) a testatrix devised real and personal estate to trustees in trust to A. for life, with remainders over in tail. A peerage was afterwards granted to A. for life with remainder to B., her second son, in tail male; and then the testatrix, by a codicil directed the trustees to settle the real and personal estate "in a course of entail to correspond as nearly as might be with the limitations of the barony, in such manner and form and with such powers as the trustees should consider proper or their counsel should advise," and it was held that the object of making provision for the holders of a peerage, and the object of making provision for the children of a marriage, appeared so analogous, that it was the duty of the Court, in the former as well as the latter case, to prevent, as far as possible, the defeat of the object;

[(*a*) *Nash* v. *Allen*, 42 Ch. D. 54.]

[(*b*) *Miles* v. *Harford*, 12 Ch. D. 691. The shifting clause was, in this case, held to be divisible, and, in the events which had happened, not void.]

(*c*) *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 543; reversing *West* v. *Viscount Holmesdale*, 3 L. R. Eq. 474.

and accordingly the real estate was directed to be settled on A.'s second son for life, without impeachment of waste, with remainders to his first and other sons in tail male, &c., with power to the tenant for life of jointuring and charging portions; and the personal estate was directed to be settled so as to go along with the real estate in the nature of heir-looms, so far as the rules of law and equity would allow, but so as not to vest in any tenant in tail by purchase who died under 21 without leaving issue inheritable under the entail.

[A bequest of chattels to a peer and his successors, or to a peer and his successors "to be enjoyed with and to go with the title," is not sufficient to create an executory trust, or any binding obligation affecting the legatee (*a*). So under a bequest of chattels to trustees "upon trust to permit and suffer the property to go, and be held and enjoyed with the title and honours of Exmouth, so far as the rules of law and equity will admit, by the person for the time being actually possessed of the title in the nature of heir-looms," the first person who succeeds to the honours takes the chattels absolutely (*b*). But in *Montagu* v. *Lord Inchiquin* (*c*), where there was a gift of family diamonds to Lucius Baron Inchiquin, and the testatrix added "and I direct the said diamonds to be delivered to Lord Inchiquin free of duty and I make the above bequest to Lord Inchiquin as head of the existing family, and so far as I lawfully can, I direct that the said diamonds shall be deemed heir-looms in the family of Inchiquin, and shall be held and enjoyed by the person for the time being bearing the title of Baron Inchiquin," V. C. Hall held that the clause was not executory, that the gift did not lapse by the death of Lucius Baron Inchiquin in the lifetime of the testatrix, but took effect in favour of the person who should be baron at the death of the testatrix, and that a disposition of chattels to follow a dignity is good where there is no rule against perpetuities transgressed. But a gift to trustees of the contents of a house "upon trust to select and set aside a collection of the best paintings, &c., for the Earl of E. and his successors *to be held and settled* as heir-looms and to go with the title," is clearly executory and confers life interests only on persons *in esse* at the death of the testator (*d*).]

[(*a*) *Re Johnston*, 26 Ch. D. 538.]
[(*b*) *Re Viscount Exmouth*, 23 Ch. D. 158; *Tollemache* v. *Earl of Coventry*, 2 Cl. & Fin. 611.]
[(*c*) *Montagu* v. *Lord Inchiquin*, 23 W. R. 592; 32 L. T. N.S. 427.]
[(*d*) *Re Johnston*, 26 Ch. D. 538.]

Whether joint-tenancy in executory trusts in wills to be construed as tenancy in common.

23. Again in *wills*, if the words taken in their usual sense would create a *joint-tenancy*, the Court has no authority, as it has in articles, to execute the trust by giving a tenancy in common; but, where the testator has shown a desire of providing for his children (*a*), or putting himself *in loco parentis* for his grandchildren (*b*), the Court has adopted the same construction as in articles: however, in the cases which have occurred, there has always been some accompanying circumstance to denote a tenancy in common, as the estate really intended.

Settlement on a feme "*strictly*."

24. If personalty be directed by a will to be settled on a female "*strictly*," it will be settled upon her (if married) for her sole and separate use without power of anticipation, with a limitation to her absolutely, if she survive her husband, and should she predecease him, then for such intents and purposes as she may by will appoint, and in default of appointment for her next of kin (*c*).

If a testator bequeath a fund in trust for a *feme*, and direct that, in case of her marriage, it shall be so settled that she may enjoy the same for her life, the Court will settle it with a *clause against anticipation* (*d*).

[If personal estate be bequeathed for the benefit of a *feme sole* "to be paid upon her marriage and to be settled upon her by her settlement," the Court will upon her marriage settle it on the usual trusts for her and *her children* (*e*). And when a legacy is directed to be settled upon a married woman for her life and at her death to be divided equally among her children, a clause in restraint of anticipation of her life interest will be introduced, and the trust for the children will be for such as being sons attain 21, or being daughters attain that age or marry, but without any power of appointment among the children being reserved to the mother (*f*).]

Post-nuptial settlements.

25. Executory trusts in *post-nuptial* settlements, whether voluntary or founded on a valuable consideration, will be construed in the same manner as executory trusts in wills (*g*).

Of powers in executory trusts.

26. We shall conclude this branch of our subject with a few observations upon the powers to be introduced in the execution of settlements, where the trust is executory.

(*a*) *Marryat* v. *Townly*, 1 Ves. 102.
(*b*) *Synge* v. *Hales*, 2 B. & B. 499.
(*c*) *Loch* v. *Bagley*, 4 L. R. Eq. 122.
(*d*) *In re Dunnill's Trust*, 6 Ir. R. Eq. 322; and see *Turner* v. *Sargent*, 17 Beav. 515; *Stanley* v. *Jackman*, 23 Beav. 450.
[(*e*) *Duckett* v. *Thompson*, 11 L. R. Ir. 424.]
[(*f*) *Re Parrott*, 33 Ch. Div. 274; see this case as to the form of the settlement generally.]
(*g*) *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws, 158.

Powers not inserted without a direction.

If the testator or contracting parties give no directions as to the insertion of powers, the Court cannot, upon the ground of implied intention, order a power to be introduced (*a*), except possibly a power of *leasing*, which differs from all other powers in being an almost necessary adjunct for the preservation of the estate itself (*b*). If the authority be expressed in general terms, as "to insert all *usual* powers," the trustees may then introduce powers of leasing for 21 years (*c*), of sale and exchange (*d*), of maintenance and advancement (*e*), of varying securities (*f*), and of appointment of new trustees (*g*); and, it seems, where the property is joint, or contains mines, or is fit for building, they may also insert powers of partition, of leasing mines, and of granting building leases (*h*). "But there is a palpable distinction," said Sir Launcelot Shadwell, "between powers for the *management* and better enjoyment of the settled estate, as powers of leasing, of sale and exchange, &c., which are beneficial to all parties, and powers which confer *personal privileges* on particular parties, such as powers to jointure, to charge portions, to raise money for any particular purpose, &c." (*i*). The latter, therefore, may not be introduced under a direction to insert *usual* powers, for they have the effect of diminishing the *corpus* of the settled estate, and the Court has no rule by which to determine the *quantum* of the charge (*j*). But where an estate was directed to be settled so as to go along with a peerage, and the trustees were

"Usual powers."

(*a*) *Wheate* v. *Hall*, 17 Ves. 80, see 85; and see *Brewster* v. *Angell*, 1 J. & W. 628. In a recent case, however, where a will had simply directed a settlement without authorizing any powers expressly, the M. R. held a tacit intention to be implied that powers of leasing, sale and exchange, and appointment of new trustees, and of signing receipts, with provisions for maintenance, education, and advancement, should be inserted, *Turner* v. *Sargent*, 17 Beav. 515. [And in a subsequent case, Fry, J., approved of and followed the decision in *Turner* v. *Sargent*, and said that the case of *Wheate* v. *Hall* did not appear to him to conflict with that view, that there the direction was that the trustees should secure the property in a particular manner, which was so fully detailed in the will that the Court thought it could not, although the trusts were in terms executory, insert a power of sale. *Wise* v. *Piper*, 13 Ch. D. 848, 853.] And see *Scott* v. *Steward*, 27 Beav. 367; *Charlton* v. *Rendall*, 11 Hare, 296.

(*b*) See Fearne's P. W. 310; *Woolmore* v *Burrows*, 1 Sim. 518.

(*c*) See *Hill* v. *Hill*, 6 Sim. 144; *The Duke of Bedford* v. *The Marquis of Abercorn*, 1 Myl. & Cr. 312.

(*d*) *Hill* v. *Hill*, 6 Sim. 136; *Peake* v. *Penlington*, 2 V. & B. 311; and see *Williams* v. *Carter*, Append. to Sugd. Treat. on Powers, p. 945, 8th Ed.

(*e*) *Mayn* v. *Mayn*, 5 L. R. Eq. 150.

(*f*) *Sampayo* v. *Gould*, 12 Sim. 426.

(*g*) *Lindow* v. *Fleetwood*, 6 Sim. 152; *Brewster* v. *Angell*, 1 J. & W. 628, *per* Lord Eldon; *Sampayo* v. *Gould*, 12 Sim. 426.

(*h*) See *Hill* v. *Hill*, 6 Sim. 145; *The Duke of Bedford* v. *The Marquis of Abercorn*, 1 Myl. & Cr. 312.

(*i*) *Hill* v. *Hill*, 6 Sim. 144.

(*j*) *Higginson* v. *Barneby*, 2 S. & S. 516, see 518; *In re Grier's Estate*, 6 Ir. R. Eq. 1.

to insert all such powers as they should "consider proper or their counsel should advise," it was ruled that powers of jointuring and charging portions were for the honour of the whole settlement, and not a favour to the first tenant for life only, in contradistinction to his successors, and therefore ought to be inserted (*a*). If the will or articles direct the insertion of some particular powers by name, then, as *expressio unius exclusio alterius*, the meaning of the words "usual powers" will be materially qualified. Thus, where it was stipulated that the settlement should contain a power of leasing for 21 years in possession, a power of sale and exchange, of appointment of new trustees, and *other usual powers*, it was held that a power of granting building leases could not be inserted (*b*). So, if the trustees be authorized to insert a power of sale and exchange of estates in the county of Hereford, and *all other usual powers*, they would not be justified in extending the power of sale and exchange to estates lying in a different county (*c*). And where a testator directed that the settlement should contain all proper powers for making leases, and *otherwise according to circumstances*, and that provision should also be made for the appointment of new trustees, and the Court was asked to insert a power of sale and exchange, Lord Eldon said, "It was held by Sir W. Grant, that unless the insertion of a power were authorized by the direction to make a settlement, it could not be introduced; and if where nothing is expressed, nothing can be implied, it is impossible where something is expressed, I can imply more than is expressed; and particularly where the will notices what powers are to be given" (*d*). But, where a testator directed the insertion of powers of leasing, and sale or exchange or partition, and then added, "And my will is, that in such intended settlement shall be inserted all such other proper and reasonable powers as are *usually* inserted in settlements of the like nature," and the question was raised, whether, under these words, a power of appointment of new trustees might be introduced, Lord Cottenham, then M. R., said, "He had referred to the will, and as he found that those general words were in a separate and distinct sentence, he was of opinion that they would authorize the insertion of the power" (*e*).

"Proper powers." A testator had directed the insertion of *proper* powers for

(*a*) *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 543.
(*b*) *Pearse* v. *Baron*, Jac. 158.
(*c*) *Hill* v. *Hill*, 6 Sim. 141, *per* Sir L. Shadwell.
(*d*) *Brewster* v. *Angell*, 1 J. & W. 625; and see *Horne* v. *Barton*, Jac. 439.
(*e*) *Lindow* v. *Fleetwood*, 6 Sim. 152.

making leases or otherwise to be reserved to the *tenants for life*, while qualified to exercise them, and, whenever disqualified, to the *trustees*. In the execution of the settlement, a power of sale and exchange was introduced, and was *limited to the trustees with the consent of the tenant for life;* but it was held by Lord Eldon, that the insertion of the power in that mode was not in conformity with the instructions (*a*). It was afterwards debated, before Sir T. Plumer, whether a power of sale and exchange could, in any form, be admitted, when his Honour said, that "The first point to be considered was, in whom the powers were to be vested; and it was clear that they were to be given to the tenants for life, if qualified, but if they should not be able to act, to the trustees. Now, if the power of sale and exchange was to be given to the tenant for life without check or control, he could not say that it was a proper power; on the contrary, it might be very dangerous, as the tenant for life might for many reasons be induced to sell, when it might not be for the benefit of the remaindermen; nor was it usual to give him this power without the check of requiring the assent of the trustees. Take it the other way: if the tenant for life was disqualified, as by infancy, could the Court say it was a proper power to be given exclusively to the trustees?" And therefore his Honour thought the power of sale and exchange could not be introduced (*b*).

[27. Now by the Settled Land Act, 1882 (*c*), the tenant for life (*d*), under the settlement is empowered to sell, exchange, enfranchise and concur in partitioning the settled land, (*e*) and to grant building, mining and other leases; and by the Conveyancing and Law of Property Act, 1881 (*f*), the trustees of settlements made after the 31st Dec. 1881, are empowered (subject to any contrary intention expressed in the settlement), during the minority of any person beneficially entitled to the possession of the settled land, to manage the property and apply any income for the maintenance, education or benefit of the infant; and consequently powers for these purposes are not now usually inserted in settlements, and it is conceived that the Court would [Settled Land Act.]

(*a*) *Brewster* v. *Angell*, 1 J. & W. 625.

(*b*) *Horne* v. *Barton*, Jac. 437.

[(*c*) 45 & 46 Vict. c. 38, ss. 3, 4, 6, *et seq.*]

[(*d*) The tenant for life under the Act is the person *beneficially* entitled to possession, which includes receipt of the rents and profits; and by s. 58 the powers of a tenant for life are exercisable by various other limited owners therein enumerated.]

[(*e*) By the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 5, on an exchange or partition any easement may be reserved, granted, or exchanged.]

[(*f*) 44 & 45 Vict. c. 41, s. 42.]

not insert any of them in a settlement under a direction to insert "usual" or "proper" powers; but would in the absence of special directions allow the statutory powers to take effect without variation.

[Conveyancing Act.] 28. It may further be observed that by the Conveyancing and Law of Property Act, 1881 (*a*), "it is declared that the powers given by the Act to any person, and the covenants, provisions, stipulations and words which under the Act are to be deemed included or implied in any instrument, shall be deemed *proper* powers, covenants, provisions, stipulations and words to be given by or to be contained in any such instrument," and all persons in a fiduciary position and their solicitor are exempted from any obligation to exclude the operation of the Act where such exclusion is possible.]

Powers of sale. 29. If a settlement of stock with a power of varying securities contain a covenant to settle real estate upon the like trusts, and with the like powers, a power of sale and exchange is implied, as corresponding to the power of *varying securities* (*b*).

Multiplication of charges. 30. Trusts are often created by words of reference to other trusts, and where this is the case, there should be a proviso, where such is the intention, that charges on the estate shall not be increased or multiplied. Should the clause, however, be omitted, the Court will exercise its judgment on the question whether the duplication of charges was or not intended by the parties; and as a general rule a referential trust ought not to be so read as to create a duplication (*c*).

SECTION II.

OF IMPLIED TRUSTS.

General rule. 1. WHEREVER a person, having a power of disposition over property, manifests any intention with respect to it in favour of another, the Court, *where there is sufficient consideration, or in a will where consideration is implied,* will execute that intention, through the medium of a trust, however informal the language in which it happens to be expressed.

[(*a*) 44 & 45 Vict. c. 41, s. 66.]

(*b*) *Williams* v. *Carter*, Append. to Sug. Treat. on Powers, p. 945, 8th ed.; *Elton* v. *Elton* (No. 2), 27 Beav. 634; [*Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595;] and see *Horne* v. *Barton*, Jac. 440.

(*c*) *Hindle* v. *Taylor*, 5 De G. M. & G. 577; *Boyd* v. *Boyd*, 9 L. T. N.S. 166.

Words precatory.

2. A frequent case of implied trust arises where a testator employs words *precatory*, or *recommendatory*, or *expressing a belief* (*a*). Thus if he "desire" (*b*), "will" (*c*), "request" (*d*), "will and desire" (*e*), "will and declare" (*f*), "wish and request" (*g*), "wish and desire" (*h*), "entreat" (*i*), "most heartily beseech" (*j*), "order and direct" (*k*), "authorize and empower" (*l*), "recommend" (*m*), "beg" (*n*), "hope" (*o*), "do not doubt" (*p*), "be well assured" (*q*), "confide" (*r*), "have the fullest confidence" (*s*), "trust" (*t*), "trust and confide" (*u*), "have full

(*a*) *Cary* v. *Cary*, 2 Sch. & Lef. 189, *per* Lord Redesdale; *Paul* v. *Compton*, 8 Ves. 380, *per* Lord Eldon.

(*b*) *Harding* v. *Glyn*, 1 Atk. 469; *Mason* v. *Limbury*, cited *Vernon* v. *Vernon*, Amb. 4; [distinguished in *Re Diggles*, 39 Ch. Div. 953] *Trot* v. *Vernon*, 8, Vin. 72; *Pushman* v. *Filliter*, 3 Ves. 7; *Brest* v. *Offley*, 1 Ch. Rep. 246; *Bonser* v. *Kinnear*, 2 Giff. 195; *Cary* v. *Cary*, 2 Sch. & Lef. 189; *Cruwys* v. *Colman*, 9 Ves. 319; and see *Shaw* v. *Lawless*, Ll. & G. *temp.* Sugden, 154; *C. S.* 5 Cl. & Fin. 129; *S. C.* Ll. & G. *temp.* Plunket, 559.

(*c*) *Eales* v. *England*, Pr. Ch. 200; *Clowdsley* v. *Pelham*, 1 Vern. 411.

(*d*) *Pierson* v. *Garnet*, 2 B. C. C. 38; *S. C.* affirmed, id. 226; *Eade* v. *Eade*, 5 Mad. 118; *Moriarty* v. *Martin*, 3 Ir. Ch. Rep. 26; *Bernard* v. *Minshull*, Johns. 276; and see *House* v. *House*, 31 L. T. N.S. 427; 23 W. R. 22.

(*e*) *Birch* v. *Wade*, 3 V. & B. 198; *Forbes* v. *Ball*, 3 Mer. 437.

(*f*) *Gray* v. *Gray*, 11 Ir. Ch. Rep. 218. The devise was "to A. and B. in the most *absolute* manner, and willing and declaring an intention." But the decision turned also on other grounds.

(*g*) *Foley* v. *Parry*, 5 Sim. 138; affirmed 2 M. & K. 138.

(*h*) *Liddard* v. *Liddard*, 28 Beav. 266.

(*i*) *Prevost* v. *Clarke*, 2 Mad. 458; *Meredith* v. *Heneage*, 1 Sim. 553, 555, *per* Chief Baron Wood; and see *Taylor* v. *George*, 2 V. & B. 378.

(*j*) *Meredith* v. *Heneage*, 1 Sim. 553, *per* Chief Baron Wood.

(*k*) *Cary* v. *Cary*, 2 Sch. & Lef. 189; *White* v. *Briggs*, 2 Phill. 583.

(*l*) *Brown* v. *Higgs*, 4 Ves. 708; 5 id. 495; affirmed 8 Ves. 561; and in D. P. 18 Ves. 192.

(*m*) *Tibbits* v. *Tibbets*, Jac. 317; *S. C.* affirmed 19 Ves. 656; *Horwood* v. *West*, 1 S. & S. 387; *Paul* v. *Compton*, 8 Ves. 380, *per* Lord Eldon; *Malim* v. *Keighley*, 2 Ves. jun. 333; *S. C.* ib. 529: *Malim* v. *Barker*, 3 Ves. 150; *Meredith* v. *Heneage*, 1 Sim. 553, *per* Chief Baron Wood; *Kingston* v. *Lorton*, 2 Hog. 166; *Cholmondeley* v. *Cholmondeley*, 14 Sim. 590; *Hart* v. *Tribe*, 18 Beav. 215; and see *Meggison* v. *Moore*, 2 Ves. jun. 630; *Sale* v. *Moore*, 1 Sim. 534; *Ex parte Payne*, 2 Y. & C. 636; *Randal* v. *Hearle*, 1 Anst. 124; *Lefroy* v. *Flood*, 4 Ir. Ch. Rep. 1. As to *Cunliffe* v. *Cunliffe*, Amb. 686, see *Pierson* v. *Garnet*, 2 B. C. C. 46; *Malim* v. *Keighley*, 2 Ves. jun. 532; *Pushman* v. *Filliter*, 3 Ves. 9.

(*n*) *Corbet* v. *Corbet*, 7 Ir. R. Eq. 456.

(*o*) *Harland* v. *Trigg*, 1 B. C. C. 142; and see *Paul* v. *Compton*, 8 Ves. 380.

(*p*) *Parsons* v. *Baker*, 18 Ves. 476; *Taylor* v. *George*, 2 V. & B. 378; *Malone* v. *O'Connor*, Ll. & G. *temp.* Plunket, 465; and see *Sale* v. *Moore*, 1 Sim. 534.

(*q*) *Macey* v. *Shurmer*, 1 Atk. 389; *S. C.* Amb. 520. See *Ray* v. *Adams*, 3 M. & K. 237.

(*r*) *Griffiths* v. *Evan*, 5 Beav. 241; and see *Shepherd* v. *Nottidge*, 2 J. & H. 766.

(*s*) See *Shovelton* v. *Shovelton*, 32 Beav. 143; *Wright* v. *Atkyns*, 17 Ves. 255, 19 Ves. 299, G. Coop. 111, T. & R. 143; *Webb* v. *Wools*, 2 Sim. N. S. 267; *Palmer* v. *Simmonds*, 2 Drew. 225; *Curnick* v. *Tucker*, 17 L. R. Eq. 320; *Le Marchant* v. *Le Marchant*, 18 L. R. Eq. 414.

(*t*) *Irvine* v. *Sullivan*, 8 L. R. Eq. 673.

(*u*) *Wood* v. *Cox*, 1 Keen, 317; *S. C.* 2 M. & C. 684; *Pilkington* v. *Boughey*, 12 Sim. 114.

assurance and confident hope" (*a*), be "under the firm conviction" (*b*), "in the full belief" (*c*), "well know" (*d*), or use such expressions as "of course the legatee will give" (*e*), "in consideration the legatee has promised to give" (*f*), ["to be applied as I have requested him to do" (*g*),] &c.; in these and similar cases, the intention of the testator is considered imperative, and the devisee or legatee is bound, and may be compelled to give effect to the injunction (*h*). And though instances of this kind generally occur upon the construction of wills, the doctrine does not apply to wills exclusively, but has been extended also to settlements *inter vivos* (*i*).

No trust raised where there is uncertainty.

3. But precatory words will be held to express a wish only, and not a command, if it be impracticable for the Court to deal with it as a trust; as if a testator devise a house to his wife and express a wish that his sister should live with her, for here no interest in the house is given to the sister, and how can the Court compel the widow and sister to live together (*j*)? and the like construction will prevail where either the objects intended to be benefited are imperfectly described (*k*), or the amount of the property to which the trust should attach is not sufficiently defined (*l*); for the difficulty that would attend the execution of such imperfect trusts is converted by the Court into an argu-

(*a*) *Macnab* v. *Whitbread*, 17 Beav. 299.

(*b*) *Barnes* v. *Grant*, 2 Jur. N. S. 1127.

(*c*) *Fordham* v. *Speight*, 23 W. R. 782.

(*d*) *Bardswell* v. *Bardswell*, 9 Sim. 323; *Nowlan* v. *Nelligan*, 1 B. C. C. 489; *Briggs* v. *Penny*, 3 Mac. & Gord. 546, 3 De G. & Sm. 525; [but see the observations on *Briggs* v. *Penny* in *Stead* v. *Mellor*, 5 Ch. D. 225.]

(*e*) *Robinson* v. *Smith*, 6 Mad. 194; but see *Lechmere* v. *Lavie*, 2 M. & K. 198.

(*f*) *Clifton* v. *Lombe*, Amb. 519.

[(*g*) *Re Fleetwood*, 15 Ch. D. 594.]

[(*h*) A precatory trust in favour of a class of children at the death of the legatee may be executed by limiting the interests of females to their separate use, for such a limitation effectually carries out the intention, *Willis* v. *Kymer*, 7 Ch. D. 181.]

(*i*) *Liddard* v. *Liddard*, 28 Beav. 266.

(*j*) *Graves* v. *Graves*, 13 Ir. Ch. Rep. 182; and see *Hood* v. *Oglander*, 34 Beav. 513.

(*k*) *Harland* v. *Trigg*, 1 B. C. C. 142; *Tibbits* v. *Tibbits*, 19 Ves. 664, *per* Lord Eldon; *Richardson* v. *Chapman*, 1 Burn's Eccles. Law, 245; *Pierson* v. *Garnet*, 2 B. C. C. 45, *per* Lord Kenyon; *S. C.* ib. 230, *per* Lord Thurlow; *Knight* v. *Knight*, 3 Beav. 173, *per* Lord Langdale; *Sale* v. *Moore*, 1 Sim. 534; *Cary* v. *Cary*, 2 Sch. & Lef. 189, *per* Lord Redesdale; *Meredith* v. *Heneage*, 1 Sim. 542, see 558, 559, 565; *Ex parte Payne*, 2 Y. & C. 636; *Reid* v. *Atkinson*, 5 Ir. R. Eq. 162, 373.

(*l*) *Lechmere* v. *Lavie*, 2 M. & K. 197; *Knight* v. *Knight*, 3 Beav. 148; *Meredith* v. *Heneage*, 1 Sim. 556; *Buggins* v. *Yates*, 9 Mod. 122; *Sale* v. *Moore*, 1 Sim. 534; *Anon. Case*, 8 Vin. 72; *Tibbits* v. *Tibbits*, 19 Ves. 664, *per* Lord Eldon; *Wynne* v. *Hawkins*, 1 B. C. C. 179; *Pierson* v. *Garnet*, 2 B. C. C. 45, *per* Lord Kenyon; *S. C.* ib. 230; *per* Lord Thurlow; *Bland* v. *Bland*, 2 Cox, 349; *Le Maitre* v. *Bannister*, cited in note to *Eales* v. *England*, Pr. Ch. 200; *Sprange* v. *Barnard*, 2 B. C. C. 585; *Pushman* v. *Filliter*, 3 Ves. 7; *Attorney-General* v. *Hall*,

ment that no trust was really intended (*a*). The rule as laid down by Lord Alvanley, and since recognised as the correct principle, is, that a trust is created in those cases only "where a testator points out *the objects, the property, and the way in which it shall go*" (*b*).

Secus, where the uncertainty arises from want of evidence.

4. But although uncertainty in the object will unquestionably furnish a reason for holding no trust to have been intended by precatory words, it will be otherwise where the uncertainty arises from the circumstance that the Court has not before it for its guidance the *whole intention* of the testator in reference to the object: and in such a case the Court will make a declaration that the devisee or legatee is a trustee for objects unascertainable, and (unless the trust was by way of charge upon the estate of the devisee or legatee) will decree a resulting trust for the benefit of the heir-at-law or next of kin, according to the nature of the property (*c*).

Uncertainty of the objects.

"Family."

5. The *objects* have been held to be uncertain where *personal estate* was given to A., with a hope "that he would continue it in the *family*" (*d*); but, as regards personal estate, the word family has been sometimes construed as equivalent to relations, that is next of kin (*e*); and where *freeholds* were so devised, it was held that by "family" was to be understood the worthiest member of it, viz., the heir-at-law (*f*). But the designation was

Fitzg. 314; *Wilson* v. *Major*, 11 Ves. 205; *Eade* v. *Eade*, 5 Mad. 118; *Curtis* v. *Rippon*, 5 Mad. 434; *Russell* v. *Jackson*, 10 Hare, 213.

(*a*) *Morice* v. *Bishop of Durham*, 10 Ves. 536, *per* Lord Eldon.

(*b*) *Malim* v. *Keighley*, 2 Ves. jun. 335. See *Knight* v. *Boughton*, 11 Cl. & Fin. 548, 551; *Briggs* v. *Penny*, 3 Mac. & G. 546; *Greene* v. *Greene*, 3 Ir. R. Eq. 631; [*Stead* v. *Mellor*, 5 Ch. D. 225. *Re Douglas*, 35 Ch. Div. 472; and see *Wilkinson* v. *Wilkinson*, 62 L. T. N.S. 735, where a gift to testator's father "for his own use and benefit, and at his discretion for the further use and benefit" of the testator's infant daughter, was held an express and not a precatory trust, the father and daughter taking as joint tenants, with discretion in him as to application of her share during minority.]

(*c*) *Corporation of Gloucester* v. *Wood*, 3 Hare, 131; *Briggs* v. *Penny*, 3 Mac. & G. 546; *Bernard* v. *Minshull*, Johns. 276; see and consider the observations of V. C. Wood, Ib. 286.

(*d*) *Harland* v. *Trigg*, 1 B. C. C. 142. See *Wright* v. *Atkyns*, G. Coop. 121; *Woods* v. *Woods*, 1 Myl. & Cr. 401; *Re Parkinson's Trust*, 1 Sim. N.S. 242; *Williams* v. *Williams*, 1 Sim. N.S. 358; *Lambe* v. *Eames*, 10 L. R. Eq. 267; 6 L. R. Ch. App. 597; but see *White* v. *Briggs*, 2 Phil. 583; and *Liley* v. *Hey*, 1 Hare, 580.

(*e*) *Cruwys* v. *Colman*, 9 Ves. 319; *Grant* v. *Lynam*, 4 Russ. 292. [But the primary meaning of the word "family" in a will is "children," and any other meaning must be supplied by the context, *Pigg* v. *Clarke*, 3 Ch. D. 672; and under a testamentary gift by a married man to his family, his widow takes no interest; see *Re Hutchinson and Tenant*, 8 Ch. D. 540. As to the meaning of the word "family," when occurring in a power of selection, see *Sinnott* v. *Walsh*, 3 L. R. Ir. 12; 5 L. R. Ir. 27.]

(*f*) *Atkyns* v. *Wright*, 17 Ves. 255; *S. C.* 19 Ves. 299; *S. C.* G. Coop. 111; and see *S. C.* T. & R. 143; *Ma-*

held to be too uncertain as to freeholds, where the request was to distribute "*amongst* such members of the person's family" as he should think most deserving (*a*).

"Heirs." In another case *both real and personal estate* were blended together, and given to A., in full confidence that she would devise the whole of the estate to "such of the heirs of the testator's father as she might think best deserved a preference," and the Court could not determine whether heirs were intended, or next of kin, or both (*b*).

"Relations." Again, a residuary estate was bequeathed to A., with a recommendation that she would "consider the testator's *relations*." Sir A. Hart asked, Who were the objects of the trust? Did the testator mean relations at his own death, or at A.'s death? Did he mean that she should have the liberty of executing the trust the day after his death? And his Honour was of opinion that no trust could attach (*c*). But there can be no uncertainty of the objects where such a trust is to be executed by *will*, for then those who answer the description at the death of the donee of the power must be the parties contemplated (*d*).

Uncertainty of the subject matter. 6. The Court has refused to establish the trust from the uncertainty of the *subject* (that is, of the property claimed to be bound by the trust), where the recommendation was to "consider certain persons" (*e*), "to be kind to them" (*f*), "to remember them" (*g*), "to do justice to them" (*h*), "to make ample provision for them" (*i*), ["to take care of his nephew as might seem best in the future" (*j*),] "to use the property for herself and her children, and to remember the Church of God and the poor" (*k*) "to give what should remain at his death, or what he should die seised or possessed of" (*l*), "to finally appropriate as he

lone v. *O'Connor*, Ll. & G. *temp.* Plunket, 465; *Griffiths* v. *Evans*, 5 Beav. 241; *White* v. *Briggs*, 2 Phil. 583; *Green* v. *Marsden*, 1 Drew. 646.

(*a*) *Green* v. *Marsden*, 1 Drew. 646.

(*b*) *Meredith* v. *Heneage*, 1 Sim. 542, see 558, 559, 565; but see *Wright* v. *Atkyns*, G. Coop. 119.

(*c*) *Sale* v. *Moore*, 1 Sim. 534, see 540; and see *Macnab* v. *Whitbread*, 17 Beav. 299; but see *Wright* v. *Atkyns*, G. Coop. 119-123.

(*d*) *Pierson* v. *Garnet*, 2 B.C.C. 38; *S. C.* id. 226; *Atkyns* v. *Wright*, 17 Ves. 255; *S. C.* 19 Ves. 299; *S. C.* G. Coop. 111; and see *S. C.* T. & R. 162; *Knight* v. *Knight*, 3 Beav. 173; *Meredith* v. *Heneage*, 1 Sim. 558.

(*e*) *Sale* v. *Moore*, 1 Sim. 534; and see *Hoy* v. *Master*, 6 Sim. 568.

(*f*) *Buggins* v. *Yates*, 9 Mod. 122.

(*g*) *Bardswell* v. *Bardswell*, 9 Sim. 319.

(*h*) *Le Maitre* v. *Bannister*, Pr. Ch. 200, note (1); *Pope* v. *Pope*, 10 Sim. 1; *Ellis* v. *Ellis*, 44 L. J. N.S. Ch. 225; [*Cole* v. *Hawes*, 4 Ch. D. 238.]

(*i*) *Winch* v. *Brutton*, 14 Sim. 379; *Fox* v. *Fox*, 27 Beav. 301.

[(*j*) *Re Moore*, 55 L. J. N.S. Ch. 418; 54 L. T. N.S. 231; 34 W. R. 343.]

(*k*) *Curtis* v. *Rippon*, 5 Mad. 434.

(*l*) *Sprange* v. *Barnard*, 2 B. C. C. 585; *Green* v. *Marsden*, 1 Drew. 646; *Pushman* v. *Filliter*, 3 Ves. 7; *Wilson* v. *Major*, 11 Ves. 205; *Eade* v. *Eade*,

pleased," with a recommendation to divide amongst certain persons (*a*), to divide and dispose of the savings (*b*), or the bulk of the property (*c*), or where the donee of the property had power to dispose of any part he pleased, whether expressly given him, or arising from implication, or from the nature of the subject (*d*). [So, where the testator gave all his property to his wife and expressed his "wish that whatever property his wife might possess at her death should be equally divided between his children," the wife was held to be absolutely entitled (*e*).] But where the recommendation was that the legatee, in case she married again, should settle what she possessed under the testator's will to her separate use, and should bequeath what she should die possessed of under the will in favour of certain, persons, it was held that the *whole* personal estate was overreached by the trust (*f*).

Whether trust or power, is a question of intention, not of grammatical import.

7. Where both objects and property are certain, yet no trust will arise, if the testator expressly declare that the language is not to be deemed imperative, or the construing it a trust would be a contradiction to the terms in which the preceding bequest is given (*g*); or if, all circumstances considered, it is more probable that the testator meant to communicate a mere discretion (*h*); or if a testator give an estate to a feme covert to be her sole and separate property, "with *power* to appoint to her husband or children" (*i*); or the testator at the same time declare that the estate shall be "unfettered and unlimited," (*j*); or, "in the legatee's entire power" (*k*); or be "left to his entire judgment"

5 Mad. 118; *Wynne* v. *Hawkins*, 1 B. C. C. 179; *Lechmere* v. *Lavie*, 2 M. & K. 197; *Bland* v. *Bland*, 2 Cox, 349; *Attorney-General* v. *Hall*, Fitzg. 314; and see *Meredith* v. *Heneage*, 1 Sim. 556; *Tibbits* v. *Tibbits*, 19 Ves. 664; *Pope* v. *Pope*, 10 Sim. 1.

(*a*) *White* v. *Briggs*, 15 Sim. 33.

(*b*) *Cowman* v. *Harrison*, 10 Hare, 234.

(*c*) *Palmer* v. *Simmonds*, 2 Drew. 221.

(*d*) *Malim* v. *Keighley*, 2 Ves. jun. 531, *per* Lord Loughborough; and see *Knight* v. *Knight*, 3 Beav, 174; 11 Cl. & Fin. 513; *Huskisson* v. *Bridge*, 4 De G. & Sm. 245.

[(*e*) *Parnall* v. *Parnall*, 9 Ch. D. 96.]

(*f*) *Horwood* v. *West*, 1 S. & S. 387.

(*g*) *Webb* v. *Wools*, 2 Sim. N.S. 267; *Huskisson* v. *Bridge*, 4 De G. & Sm. 245.

(*h*) *Bull* v. *Vardy*, 1 Ves. jun. 270; *Knott* v. *Cottee*, 2 Phill. 192; *Knight* v. *Knight*, 3 Beav. 148; *Meggison* v. *Moore*, 2 Ves. jun. 630; *Hill* v. *Bishop of London*, 1 Atk. 618; *House* v. *House*, W. N. 1874, p. 189; and see *Paul* v. *Compton*, 8 Ves. 380; *Knight* v. *Knight*, 3 Beav. 174; 11 Cl. & Fin. 513; *Lefroy* v. *Flood* 4 Ir. Ch. Rep. 1; *Shepherd* v. *Nottidge*, 2 J. & H. 766; *Eaton* v. *Watts*, 2 W. R. 108.

(*i*) *Brook* v. *Brook*, 3 Sm. & Gif. 280; and see *Paul* v. *Compton*, 8 Ves. 380; *Howorth* v. *Dewell*, 29 Beav. 18; [*Ahearne* v. *Ahearne*, 9 L. R. Ir. 144.]

(*j*) *Meredith* v. *Heneage*, 1 Sim. 542; *S. C.* 10 Price, 230; *Hoy* v. *Master*, 6 Sim. 568.

(*k*) *Eaton* v. *Watts*, 4 L. R. Eq. 151.

(*a*); or if he "recommend but do not absolutely enjoin" (*b*); or if a testator give the property to his wife, "well knowing her *sense of justice and love to her family*, and feeling perfect confidence that she will manage the same to the best advantage for the benefit of her children" (*c*); [or "to be used by her in such ways and means as she may *consider best* for her own benefit and that of my three children" (*d*); or "feeling confident that she will act justly to our children in dividing the same when no longer required by her" (*e*); or "in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime, or by will after her decease" (*f*);] or "to be at her disposal in any way she may think best for the benefit of herself and family" (*g*); [or "to his wife absolutely, with full power for her to dispose of the same as she may think fit for the benefit of his family, having full confidence that she will do so" (*h*); or if he give the residue of his property to legatees "his desire being that they shall distribute such residue as they *think* will be most agreeable to his wishes" (*i*), or if he "desires" that his legatee "will allow an annuity" to A. (*j*).]

The construction of the words we are considering never turns on their grammatical import: they may be imperative, but are not necessarily so (*k*). In *Shaw* v. *Lawless* (*l*), the trustees were recommended to employ a receiver, and Lord Cottenham, alluding to that case, observed, "It was there laid down as a rule which I have since acted upon, that though 'recommendation' may in some cases amount to a direction and create a trust, yet, that being a *flexible* term, if such a construction of it be inconsistent with any *positive* provision in the will, it is to be considered as a recommendation and nothing more. In that case the interest supposed to be given to the party recommended was inconsistent with the other powers which the trustees were to exercise, and those powers being given in unambiguous terms, it was held

(*a*) *McCormick* v. *Grogan*, 1 Ir. R. Eq. 313.

(*b*) *Young* v. *Martin*, 2 Y. & C. Ch. Ca. 582.

(*c*) *Greene* v. *Greene*, 3 Ir. R. Eq. 90, 629.

[(*d*) *M'Alinden* v. *M'Alinden*, 11 Ir. R. Eq. 219.]

[(*e*) *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321; 9 L. R. Ind. App. 70.]

[(*f*) *Re Adams and the Kensington Vestry*, 24 Ch. D. 199; 27 Ch. Div. 394.]

(*g*) *Lambe* v. *Eames*, 10 L. R. Eq. 267; 6 L. R. Ch. App. 597.

[(*h*) *Re Hutchinson and Tenant*, 8 Ch. D. 540.]

[(*i*) *Stead* v. *Mellor*, 5 Ch. D. 225.]

[(*j*) *Re Diggles*, 39 Ch. Div. 253.]

(*k*) *Meggison* v. *Moore*, 2 Ves. jun. 632, *per* Lord Loughborough; and see *Johnston* v. *Rowlands*, 2 De G. & Sm. 385.

(*l*) Ll. & G. *t.* Sugden, 154; 5 Cl. & Fin. 129; Ll. & G. *t.* Plunket, 559.

that as the two provisions could not stand together, the flexible term was to give way to the inflexible term" (*a*).

Trustees of this kind not always so strictly bound as in a common trust.

8. If a trust be created, it does not follow that it shall be equally restrictive, as in the case of a clear ordinary trust. Thus, an estate was devised to A. and her heirs, "in the fullest confidence" that after her decease she would devise the property to the family of the testator; and Lord Eldon asked, if there were any case in which the doctrine had been carried so far, that the tenant in fee was not at liberty, with respect to *timber and mines*, to treat the estate in the same husbandlike manner as another tenant in fee? and his Lordship said he should hesitate a long time before he held that the person bound by the trust was not entitled to cut timber in the ordinary management of the property (*b*). And so it was afterwards decided by the House of Lords on appeal (*c*).

Case of trustee taking no beneficial interest.

9. On the other hand, the settlement may be so specially worded that the person bound by the trust takes for life only, with remainder to the children (*d*), or is not even tenant for life and takes no beneficial interest at all. Thus, where a testator devised to his wife in fee, "under the firm conviction that she would dispose of and manage the same for the benefit of her children," the widow claimed to be tenant for life, but the Court held that she was merely a trustee (*e*).

Where the words raise a partial trust, the surplus does not result.

10. Where the words are construed in equity to raise a partial trust, the devisee or legatee is treated as beneficial owner, subject to the charge, and the *surplus* will not result to the heir or next of kin, but will belong to the devisee or legatee (*f*).

Implied trusts now rather discouraged.

11. The current of decisions has of late years set against the doctrine of converting the devisee or legatee into a trustee; [and the Court now refuses to extend the doctrine, or to regard the mere use of particular words (*g*), and will not imply a trust, unless it appears from the will that such was the intention of the testator (*h*).]

(*a*) *Knott* v. *Cottee*, 2 Phill. 192.

(*b*) *Wright* v. *Atkyns*, T. & R. 157, 163.

(*c*) See *Lawless* v. *Shaw*, Ll. & G. *t.* Sugden, 164.

(*d*) *Wace* v. *Mallard*, 21 L. J. N.S. Ch. 355.

(*e*) *Barnes* v. *Grant*, 26 L. J. N.S. Ch. 92, *S. C.* 2 Jur. N.S. 1127; and see *Greene* v. *Greene*, 3 Ir. R. Eq. 98, 629; *Corbet* v. *Corbet*, 7 Ir. R. Eq. 456.

(*f*) *Wood* v. *Cox*, 1 Keen, 317; 2 Myl. & Cr. 684; *Irvine* v. *Sullivan*, 8 L. R. Eq. 673.

[(*g*) *Re Adams and the Kensington Vestry*, 27 Ch. Div. 394, 410; *Re Diggles*, 39 Ch. Div. 253; *Re Downing's Residuary Estate*, 60 L. T. N.S. 140.]

(*h*) *Sale* v. *Moore*, 1 Sim. 540; and see *Meredith* v. *Heneage*, id. 566; *Lawless* v. *Shaw*, Ll. & G. *t.* Sugden, 164; *Knight* v. *Knight*, 3 Beav. 148; *Williams* v. *Williams*, 1 Sim. N. S.

Directions as to maintenance.

12. Under the head of trusts which we are now considering, may be classed the cases where property is given to a parent or other person standing or regarded *loco parentis*, with a direction touching the *maintenance* of the children. The first question is, Did the settlor intend to impose a trust, or do the words express only the motive of the gift? Instances where *no trust* is created are, where the bequest is to a person "to enable him to maintain the children" (*a*), or an absolute bequest is made, and afterwards the motive is assigned, as "that he may support himself and his children" (*b*), or "*for* the maintenance of himself and his family" (*c*), [or "towards the support and maintenance of her two children until they shall attain the age of twenty-one years" (*d*);] or "to A. for her own use and benefit absolutely, having full confidence in her sufficient and judicious provision for her children (*e*), or, "being well assured that she will husband the means left to her for the sake of herself and her children" (*f*), or "to be applied by her in the bringing up and maintenance of her children" (*g*). Instances of the creation of a *trust* are where property is given, "that he may dispose thereof for the benefit of himself *and* his children" (*h*), or "at her sole and entire disposal for the maintenance of herself *and* her children" (*i*), or "for his own use and benefit, *and* the maintenance and education of his children" (*j*), [or "for their own use and support of their children" (*k*)], or "at the disposal of the legatee for herself *and* her children" (*l*), or "all overplus towards her support *and* her family" (*m*), or to A. "for the education and advancing in life of her children" (*n*), [or to A. "and the said

358; *Lefroy* v. *Flood*, 4 Ir. Chanc. Rep. 9; *Lambe* v. *Eames*, 10 L. R. Eq. 267; 6 L. R. Ch. App. 597; [*Stead* v. *Mellor*, 5 Ch. D. 225; *Re Adams and the Kensington Vestry*, 24 Ch. D. 199; 27 Ch. Div. 394; see especially observations of Cotton, L. J., at p. 410, and Lindley, L. J., at p. 411; *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321, 330.]

(*a*) *Benson* v. *Whittam*, 5 Sim. 22; but see *Leach* v. *Leach*, 13 Sim. 304; and see *Ryan* v. *Keogh*, 4 Ir. R. Eq. 357.

(*b*) *Thorp* v. *Owen*, 2 Hare, 607; see 611.

(*c*) *Re Robertson's Trust*, 6 W. R. 405; *Bond* v. *Dickinson*, 33 L. T. N.S. 221.

[(*d*) *Farr* v. *Hennis*, 44 L. T. N.S. 202.]

(*e*) *Fox* v. *Fox*, 27 Beav. 301.

(*f*) *Scott* v. *Key*, 35 Beav. 291.

(*g*) *Mackett* v. *Mackett*, 14 L. R. Eq. 49.

(*h*) *Raikes* v. *Ward*, 1 Hare, 445.

(*i*) *Scott* v. *Key*, 35 Beav. 291.

(*j*) *Longmore* v. *Elcum*, 2 Y. & C. Ch. Ca. 369; *Carr* v. *Living*, 28 Beav. 644; *Berry* v. *Bryant*, 2 Drew. & Sm. 1; *Bird* v. *Maybury*, 33 Beav. 351.

[(*k*) *Dixon* v. *Dixon*, W. N. 1876, p. 225.]

(*l*) *Crockett* v. *Crockett*, 1 Hare, 451; and see *S. C.* 2 Phil. 461; *Bibby* v. *Thompson* (No. 1), 32 Beav. 646.

(*m*) *Woods* v. *Woods*, 1 M. & Cr. 401.

(*n*) *Gilbert* v. *Bennett*, 10 Sim. 371.

tenement I leave to the disposal of her, with a view that the said tenement may be disposed of as she may think proper for the maintenance and education of my two daughters" (*a*).] In a modern case (*b*), it was held that the circumstance of a trustee being interposed, instead of the property being given directly to the parent, was sufficient to show that no sub-trust was intended, but this view appears not to be supported by earlier decisions (*c*).

Nature of such a trust.

13. Where a trust is created, the person bound by it is the hand to administer it, and can sign a valid receipt for the fund, the subject of the trust (*d*). And the person bound by the trust is regarded in the same light as a committee of a lunatic, or guardian of an infant (*e*), that is, he has a duty imposed upon him; but so long as he discharges that duty, he is entitled to the surplus for his own benefit, and the Court requires from him no account retrospectively of the application of the fund (*f*), and allows him prospectively to propose any reasonable arrangement how the object of the trust may be accomplished (*g*), or will order payment to him on his undertaking to maintain the children properly, with liberty to the children to apply (*h*). Should the person bound by the trust become by misconduct unfit to maintain and educate the children, the Court will not allow him to receive the fund (*i*); and should the fiduciary assign his interest, the Court will inquire what part is needed for the maintenance and education of the children, and will give the surplus only to the assignee (*j*).

Forisfamiliation.

14. It follows from these principles that if there be no children born (*k*), or if they have since died (*l*), the person bound by the trust takes the whole produce for his own benefit. So the

[(*a*) *Talbot* v. *O'Sullivan*, 6 L. R. Ir. 302; *Re Haly's Trusts*, 23 L. R. Ir. 130.]

(*b*) *Byne* v. *Blackburn*, 26 Beav. 41.

(*c*) *Gilbert* v. *Bennett*, 10 Sim. 371; *Longmore* v. *Elcum*, 2 Y. & C. C. C. 363; and see *Carr* v. *Living*, 20 Beav. 644.

(*d*) *Woods* v. *Woods*, 1 M. & Cr. 409, *per* Lord Cottenham; *Raikes* v. *Ward*, 1 Hare, 449, *per* V.-C. Wigram; *Cooper* v. *Thornton*, 3 B. C. C. 186; *Robinson* v. *Tickell*, 8 Ves. 142; *Crockett* v. *Crockett*, 1 Hare, 451, 2 Phil. 553; *Greene* v. *Greene*, 3 Ir. R. Eq. 102, *per cur.*; but see *Webb* v. *Wools*, 2 Sim. N.S. 272.

(*e*) As to the position of committees and guardians see *Jodrell* v. *Jodrell*, 14 Beav. pp. 411-413.

(*f*) *Leach* v. *Leach*, 13 Sim. 304; *Browne* v. *Paull*, 1 Sim. N.S. 92; *Carr* v. *Living*, 28 Beav. 644; *Hora* v. *Hora*, 33 Beav. 88.

(*g*) *Raikes* v. *Ward*, 1 Hare, 450.

(*h*) *Crockett* v. *Crockett*, 1 Hare, 451; *Hadow* v. *Hadow*, 9 Sim. 438.

(*i*) *Castle* v. *Castle*, 1 De G. & J. 352.

(*j*) *Carr* v. *Living*, 28 Beav. 644; *Scott* v. *Key*, 35 Beav. 291.

(*k*) *Hammond* v. *Neame*, 1 Swans. 35; *Cape* v. *Cape*, 2 Y. & C. Ex. 543; *Re Main's Settlement*, 15 W. R. 216.

(*l*) *Bushnell* v. *Parsons*, Pr. Ch. 219.

children lose their claim if they become forisfamiliated, *i.e.*, cease to be members of or to belong to the establishment contemplated by the testator, as if a child marry (*a*), or under other circumstances maintain a separate establishment (*b*), for it can scarcely be supposed that the testator meant an income given with reference to one establishment, to be split into as many different incomes as there are children (*c*). But it has been said that if a daughter marry, and afterwards becomes a widow and has no support, the right to maintenance may revive (*d*).

Attaining 21.

15. Whether a child's right to maintenance will cease *ipso facto* by his or her attaining the age of twenty-one years, must depend, of course, upon the particular words used (*e*), but is open generally to some uncertainty (*f*). It can hardly be maintained, on the one hand, that when a child has attained majority, and is fairly launched into the world, and is making a livelihood, the trust is to continue (*g*); and, on the other hand, if a child be willing to remain at home, and no reasonable objection can be made to it, the person bound by the trust cannot refuse maintenance on the mere ground that the child has attained twenty-one (*h*). [But an annuity given to children for their "maintenance and education" is not confined to their minorities, but endures during their lives (*i*).]

Case of tenant for life bound by such a trust with remainder over.

16. If a person be entitled for life for the maintenance of herself, and the maintenance and education of the testator's children, and after her death the trust is for the children absolutely, a child on coming of age cannot, even with the concurrence of the tenant for life, call for a transfer of a proportionate share of the property, if this diminution of the fund would endanger the right of the other children to be properly maintained and educated during the tenancy for life. The Court in such a case has adopted the expedient that a *part* of the child's share should be paid out on his undertaking to account for the income of it,

(*a*) *Bowden* v. *Laing*, 14 Sim. 113; *Carr* v. *Living*, 28 Beav. 644; *Staniland* v. *Staniland*, 34 Beav. 536; *Massey* v. *Massey*, W. N. 1873, p. 76.

(*b*) See *Thorpe* v. *Owen*, 2 Hare, 612; *Longmore* v. *Elcum* 2 Y. & C. C. C. 370; *Wilson* v. *Bell*, 4 L. R. Ch. App. 581.

(*c*) See *Thorp* v. *Owen*, 2 Hare, 613.

(*d*) *Scott* v. *Key*, 35 Beav. 291; [*Wilkins* v. *Jodrell*, 13 Ch. D. 564, 573.]

(*e*) See the cases reviewed by V. C. Wood in *Gardner* v. *Barber*, 18 Jur. 508.

(*f*) *Longmore* v. *Elcum*, 2 Y. & C. C. C. 370; *Thorpe* v. *Owen*, 2 Hare, 610.

(*g*) See *Thorp* v. *Owen*, 2 Hare, 612; *Carr* v. *Living*, 28 Beav. 644.

(*h*) See *Carr* v. *Living* (No. 2), 33 Beav. 474; *Thorp* v. *Owen*, 2 Hare, 613; *Scott* v. *Key*, 35 Beav. 291.

[(*i*) *Wilkins* v. *Jodrell*, *sup.*; *Soames* v. *Martin*, 10 Sim. 287.]

and on the footing that the residue of the share should be retained as a security for the due payment of the income (*a*). Where there was a clear trust for the maintenance of the children, the Court reserved the consideration of what would be the rights of the parties after the parent's death, and gave liberty to apply on that event (*b*).

Charge of debts, &c., in a will.

17. To proceed with the instances of implied trusts, if a person by will direct his realty to be sold, or charge it with debts and legacies (*c*), or with any particular legacy (*d*), the legal estate may descend to the heir, or it may pass to a devisee; but the Court will view the direction as an implied declaration of trust, and will enforce the execution of it against the legal proprietor.

Conditions construed as trusts.

18. So, in many cases, if a person devise an estate with words of condition annexed, the conditional words are not construed to impose a legal forfeiture on breach so as to give a right of entry, but are viewed as trusts affecting the conscience of the owner, and so enforceable in a Court of Equity; as if a house be devised to A. for life, "he keeping the same in repair," or if an estate be given to A. in fee, "he paying the testator's debts within twelve months from the testator's death" (*e*).

Agreement for valuable consideration.

19. Again, if a person agree for valuable consideration to settle a specific estate, he thereby becomes a trustee of it for the intended objects, and all the consequences of a trust will follow (*f*); and so if he covenant to charge all lands that he may possess at a particular time (*g*), or at any time (*h*), he will be a trustee of such lands to the extent of the charge. And even if a person engages

(*a*) *Berry* v. *Briant*, 2 Dr. & Sm. 1.

(*b*) *Scott* v. *Key*, 35 Beav. 291.

(*c*) *Pitt* v. *Pelham*, 2 Freem. 134; *S. C.* 1 Ch. Rep. 283; *Locton* v. *Locton*, 2 Freem. 136; *Auby* v. *Doyl*, 1 Ch. Cas. 180; *Tenant* v. *Brown*, Ib.; *Garfoot* v. *Garfoot*, 1 Ch. Ca. 35; *S. C.* 2 Freem. 176; *Gwilliams* v. *Rowel*, Hard. 204; *Blatch* v. *Wilder* 1 Atk. 420; *Carvill* v. *Carvill*, 2 Ch. Rep. 301; *Cook* v. *Fountain*, 3 Swans. 592; *Bennet* v. *Davis*, 2 P. W. 318; *Briggs* v. *Sharp*, 20 L. R. Eq. 317, &c.

(*d*) *Wigg* v. *Wigg*, 1 Atk. 382; [*Re Kirk*, 21 Ch. Div. 431.]

(*e*) *Wright* v. *Wilkin*, 2 Best & Sm. 232; *Re Skingley*, 3 Mac. & G. 221; *Gregg* v. *Coates* 23 Beav. 33; [*Re Williames*, 54 L. T. N.S. 105; *Foot* v. *Cunningham*, 11 Ir. R. Eq. 306; reversed, *Cunningham* v. *Foot*, 3 App. Cas. 974;] but see *Kingham* v. *Lee*, 15 Sim. 396; *Kinnersley* v. *Williamson*, 39 L. J. N.S. Ch. 788; 18 W. R. 1016.

(*f*) *Finch* v. *Winchelsea*, 1 P. W. 277; *Fremoult* v. *Dedire*, ib. 429; *Kennedy* v. *Daly*, 1 Sch. & Lef. 355; *Legard* v. *Hodges*, 1 Ves. jun. 477; *S. C.* 3 B. C. C. 531; 4 B. C. C. 421; *Ravenshaw* v. *Hollier*, 7 Sim. 3.

(*g*) *Wellesley* v. *Wellesley*, 4 M. & Cr. 561. As to the proper construction of the particular covenant in that case, see *Countess of Mornington* v. *Keane*, 2 De G. & J. 293.

(*h*) *Lyster* v. *Burrows*, 1 Drury & Walsh, 149; *Stack* v. *Royse*, 12 Ir. Ch. Rep. 246; [*Cleary* v. *Fitzgerald*, 7 L. R. Ir. 229.]

on his marriage to settle *all* the *personal* estate that he may acquire during the coverture, the trusts upon which it is so agreed the personalty shall be settled will fasten upon the property as it falls into possession; and if the money has been laid out in a purchase, it may be followed into the land (*a*). But if a person covenant to settle such property as he shall *die seised of*, he may dispose of his property as he pleases in his lifetime, and the covenant will affect only such property as he may leave after payment of his just debts (*b*); and if a person covenant to secure an annuity, *either* by a charge on freeholds, *or* by investment in the funds, *or* by the best means in his power, it will not create a charge on the covenantor's property generally (*c*). [Where a covenant for settlement comprises the covenantor's *whole* future property, it may be doubtful whether such covenant can be enforced in equity (*d*), but if it contains specific words the Court will, if necessary, construe it divisibly, and enforce it as to classes of property falling within the specific words (*e*).]

Contract for sale.

20. Again, if a person contract to sell another an estate, the vendor has impliedly declared himself a trustee in fee for the purchaser, and is accountable to him for the rents and profits (*f*); and if the tenants have been allowed improperly to run in arrear (*g*), or there has been unhusbandlike farming (*h*), or any other injury done, either by the wilful waste or neglect of the vendor (*i*), he is answerable to the purchaser as for a breach of trust. On the other hand, if any damage arise to the estate, not by default of the vendor, as by fire (*j*), or dilapidations (*k*), the loss will fall on

(*a*) *Lewis* v. *Madocks*, 8 Ves. 150; *S. C.* 17 Ves. 48; [*Galavan* v. *Dunne*, 7 L. R. Ir. 144. But in case of the settlor's bankruptcy, see 46 & 47 Vict. c. 52, s. 47; *Ex parte Bolland*, 17 L. R. Eq. 115.]

(*b*) *Rowan* v. *Chute*, 13 Ir. Ch. Rep. 168; *Re M'Kenna*, ib. 239; *Nayler* v. *Wetherall*, 12 Jan. 1831; affirmed 23 Jan. 1833 (MS.); where the covenant was to settle all the real and personal estate which he should be seised or possessed of at the time of his death, and it was declared that the covenant bound all the real and personal estate which he had power to dispose of by will.

(*c*) *Countess of Mornington* v. *Keane*, 2 De G. & J. 292; and see *Stack* v. *Royse*, 12 Ir. Ch. Rep. 246.

[(*d*) See *In re Turcan*, 40 Ch. Div. 5.]

[(*e*) *In re Turcan* (*ubi sup.*); *In re Clarke*, 35 Ch. D. 109; 36 Ch. Div. 348; *Official Receiver* v. *Tailby*, 13 App. Cas. 523.]

(*f*) See *Acland* v. *Gaisford*, 2 Mad. 32; *Wilson* v. *Clapham*, 1 J. & W. 38.

(*g*) *Acland* v. *Gaisford*, 2 Mad. 28.

(*h*) *Ferguson* v. *Tadman*, 1 Sim. 530; *Foster* v. *Deacon*, 3 Mad. 394.

(*i*) *Wilson* v. *Clapham*, 1 J. & W. 39.

(*j*) *Paine* v. *Meller*, 6 Ves. 349; *Harford* v. *Purrier*, 1 Mad. 539, *per* Sir T. Plumer; *Acland* v. *Gaisford*, 2 Mad. 32, *per eundem*. As to *Stent* v. *Bailis*, 2 P. W. 220, see *Paine* v. *Meller*, 6 Ves. 352. [And he will not, in the absence of express contract, be entitled to the benefit of a subsisting policy of fire insurance; *Rayner* v. *Preston*, 18 Ch. Div. 1.]

(*k*) *Minchin* v. *Nance*, 4 Beav. 332.

the purchaser; and if the accident by which the damage arises brings with it legal obligations which must be immediately answered, and which the vendor satisfies, the expense thus incurred must be borne by the purchaser (*a*). But where pending the completion of a purchase of copyholds the trustee for sale died, and a new admittance became necessary, it was held that the expense of the fine must be borne by the trust estate (*b*). Should the estate become by any accident more valuable, the purchaser then will take the improvement (*c*). It should be observed, however, that the *vendor* is, after all, a trustee *sub modo* only, for he cannot be compelled to deliver up the possession until the purchase money has been paid (*d*). And so the *purchaser* is only *a cestui que trust sub modo*, and he cannot enforce any equitable rights attached to the estate until the contract has been completed (*e*).

21. It would be endless to pursue implied trusts through all their ramifications; a subject so extensive that years might be passed in the study of equitable jurisprudence, without exhausting so ample a field; but the leading general principles by which the Courts are guided may be gathered sufficiently for our purpose from the few examples given.

(*a*) *Robertson* v. *Skelton*, 12 Beav. 260.

(*b*) *Paramore* v. *Greenslade*, 1 Sm. & Giff. 541.

(*c*) See *Harford* v. *Purrier*, 1 Mad. 539; *Revell* v. *Hussey*, 2 B. & B. 287; *Paine* v. *Meller*, 6 Ves. 352; *Spurrier* v. *Hancock*, 4 Ves. 667; *White* v. *Nutts*, 1 P. W. 61.

(*d*) See *Acland* v. *Gaisford*, 2 Mad. 32; *Wall* v. *Bright*, 1 J. & W. 494; *M'Creight* v. *Foster*, 5 L. R. Ch. App. 604.

(*e*) See *Tasker* v. *Small*, 3 M. & Cr. 70.

CHAPTER IX.

OF RESULTING TRUSTS.

Classification of trusts by operation of law.

HAVING discussed the various questions involved in the creation of trusts by the act of a party, we shall next direct our attention to the creation of trusts by operation of law. Trusts of this kind may be regarded as twofold, viz. 1. Resulting. 2. Constructive.

Subdivision of resulting trusts.

Resulting Trusts, the subject of the present chapter, may be subdivided into the two following classes: *First*, where an *owner* or person legally and equitably entitled makes a conveyance, devise, or bequest of the legal estate, and there is no ground for the inference that he meant to dispose of the equitable; and, *Secondly*, Where a *purchaser* of property takes a conveyance of the legal estate in the name of a third person, but there is nothing to indicate an intention of not appropriating to himself the beneficial interest.

SECTION I.

OF RESULTING TRUSTS WHERE THERE IS A DISPOSITION OF THE LEGAL AND NOT OF THE EQUITABLE INTEREST.

General rule.

1. THE general rule is, that wherever, upon a conveyance, devise, or bequest, it appears that the grantee, devisee, or legatee was intended to take the legal estate merely, the equitable interest, or so much of it as is left undisposed of, will result, if arising out of the settlor's realty, to himself, or his heir, and, if out of personal estate, to himself or his executor.

Chattel interest in real estate results to heir's personal representatives.

2. Should the interest resulting, as a remnant of the real estate, to the heir be of a chattel nature, as a term of years, or a sum of money, it will on the death of the *heir*, devolve on *his* personal representative (*a*).

(*a*) *Levet* v. *Needham*, 2 Vern. 138; *Wych* v. *Packington*, 3 B. P. C. 44; *Sewell* v. *Denny*, 10 Beav. 315; *Barrett* v. *Buck*, 12 Jur. 771. See *Halford* v. *Stains*, 16 Sim. 448.

3. The settlor's intention of excluding the person invested with the legal estate from the usufructuary enjoyment, may either be *presumed* by the Court or be actually *expressed* upon the instrument. Of trusts resulting by presumption.

4. If an estate be granted either without consideration or for merely a nominal one (*a*), and no trust is declared of *any part*, then if the conveyance be simply to a *stranger and no intention appear of conferring the beneficial interest*, as the law will not suppose a person to part with property without some inducement thereto, a trust of the *whole estate* (as in the analogous case of uses before the statute of Henry VIII.) will result to the settlor (*b*). And if two joint tenants make such a conveyance without consideration, the equitable interest will result to them in joint tenancy (*c*). Whether trust will result where no trust declared of any part.

5. If the conveyance be to a *wife* (*d*) or *child* (*e*) it will be presumed an advancement, and the wife or child will be entitled beneficially. Case of wife or child.

6. In a case where a son conveyed an estate to his father, as purchaser on the face of the deed, for the sum of £400, and then filed a bill against the devisees of the father for a re-conveyance, on the ground that the son never intended to part with the beneficial interest, but meant only to facilitate the raising of a sum upon mortgage by means of this machinery, Sir J. Leach held, that since the Statute of Frauds parol evidence was inadmissible to prove a trust for the son, and that as there was no fraud or misapprehension, but the meaning was that the father should exercise towards the world at large the beneficial ownership, there was no resulting or constructive trust, and that the devisees must keep the estate. But the Court decreed the son as the ostensible vendor to have a lien upon the property for the £400, as for unpaid purchase

(*a*) See *Hayes* v. *Kingdome*, 1 Vern. 33; *Sculthorp* v. *Burgess*, 1 Ves. jun. 92.

(*b*) *Duke of Norfolk* v. *Browne*, Pr. Ch. 80; *Warman* v. *Seaman*, 2 Freem. 308, *pur Cur.*; *Hayes* v. *Kingdome*, 1 Vern. 33; *Grey* v. *Grey*, 2 Sw. 598, *per* Lord Nottingham; *Elliot* v. *Elliot*, 2 Ch. Ca. 232, *per eundem*; *Attorney-General* v. *Wilson*, 1 Cr. & Phil. 1; and see *Sculthorp* v. *Burgess*, 1 Ves. jun. 92; *Lady Tyrrell's* case, 2 Freem. 304; *Ward* v. *Lant*, Pr. Ch. 182; *Davies* v. *Otty* (No. 2), 35 Beav. 208. But in *Lloyd* v. *Spillet*, 2 Atk. 150, and *Young* v. *Peachey*, ib. 257, Lord Hardwicke was apparently of opinion that, since the Statute of Frauds, there are only two cases of resulting trust, viz.: 1st, Where an estate is purchased in the name of a stranger; and 2ndly, Where on a voluntary conveyance a trust is declared of part, in which case the residue results. It would seem to follow that, in his opinion, should a voluntary conveyance be made and no trust at all be expressed, the grantee would take the beneficial interest to his own use; and see *Hutchins* v. *Lee*, 1 Atk. 447.

(*c*) *Rex* v. *Williams*, Bunbury, 342.

(*d*) See *Christ's Hospital* v. *Budgin*, 2 Vern. 683.

(*e*) *Jennings* v. *Sellick*, 1 Vern. 467; *Grey* v. *Grey*, 2 Swans. 598, *per* Lord Nottingham; *Elliot* v. *Elliot*, 2 Ch. Ca. 232; *per eundem*; and see *Hayes* v. *Kingdome*, 1 Vern. 33; *Baylis* v. *Newton*, 2 Vern. 28; *Cook* v. *Hutchinson*, 1 Keen, 42.

money (*a*). However, in a similar case of absolute sale upon the face of the deed, but where the grantee afterwards admitted himself in writing to be a trustee, Lord Kenyon held that, as the written evidence established facts inconsistent with the deed, further evidence by parol was admissible to prove the truth of the transaction (*b*).

Mistake or fraud.

7. Of course the Court will not permit the grantee to retain the beneficial interest if there was any mistake on the part of the *grantor* (*c*), or any *mala fides* on the part of the *grantee* (*d*). But if the *grantor* himself intended a *fraud* upon the law, the assurance, if the defendant set up the defence, will remain absolute against the grantor (*e*); but if the defendant admit the trust, it seems the Court will relieve (*f*).

Addition to a trust fund.

8. If a person invest a sum in the names of the trustees of his marriage settlement, no trust will result, the presumption being that he meant it to be held upon the trusts of the settlement (*g*); and Sir J. Bacon once observed generally, that in marriage settlements the resulting trust was not in favour of the settlor (*h*), meaning it is conceived that the presumption of making provision for the persons marrying and their issue, was strong enough in certain cases to prevail against the general rule. [But where by a marriage settlement the intended wife's father settled property upon trust for the intended husband for life, and then for the intended wife for life, and then for the children of the marriage, but the trusts for the children were void for remoteness, Kay, J., held that there was a resulting trust for the settlor (*i*).]

Transfer of chattels.

9. It was said in one case that if a man transfer *stock* or deliver *money* to another, it must proceed from an intention to benefit that other person, and therefore, although he be a stranger, it

(*a*) *Leman* v. *Whitley*, 4 Russ. 423.

(*b*) *Cripps* v. *Jee*, 4 B. C. C. 472.

(*c*) *Birch* v. *Blagrave*, Amb. 264; *Anon.*, cited *Woodman* v. *Morrell*, 2 Freem. 33; *Childers* v. *Childers*, 1 De G. & J. 482; *Manning* v. *Gill*, 13 L. R. Eq. 485; *Davies* v. *Otty* (No. 2), 35 Beav. 208; and see *Attorney-General* v. *Poulden*, 8 Sim. 472.

(*d*) *Lloyd* v. *Spillet*, 2 Atk. 150; *S. C.* Barn. 388, *per* Lord Hardwicke; *Hutchins* v. *Lee*, 1 Atk. 448, *per eundem*; *Young* v. *Peachy*, 2 Atk. 254; *Wilkinson* v. *Brayfield*, cited ib. 257; *S. C.* reported 2 Vern. 307; *Davies* v. *Otty* (No. 2), 35 Beav. 208.

(*e*) *Cottington* v. *Fletcher*, 2 Atk. 156, *per* Lord Hardwicke; and see *Chaplin* v. *Chaplin*, 3 P. W. 233; *Muckleston* v. *Brown*, 6 Ves. 68.

(*f*) See *Cottington* v. *Fletcher*, *Muckleston* v. *Brown*, *ubi suprà*.

(*g*) *Re Curteis' Trusts*, 14 L. R. Eq. 217.

(*h*) *Rainy* v. *Ellis*, W. N. 1872, p. 104; [and see *S. C.* 26 L. T. N.S. 602, and on appeal 27 L. T. N.S. 463.]

[(*i*) *Re Nash's Settlement*, 51 L. J. N.S. Ch. 511; 30 W. R. 406; 46 L. T. N.S. 97.]

shall be *primâ facie* a gift (*a*); but if such an intention cannot be inferred consistently with the attendant circumstances, a trust will result (*b*). And even where there is a gift of stock by transfer into the joint names of the settlor and a stranger, still in this, as in other similar cases, the settlor retains the beneficial interest for his life (*c*).

Where a trust is declared of part of the estate, the trust of the residue results.

10. If upon a conveyance (*d*), devise (*e*), or bequest (*f*), a trust be declared of *part* of the estate, and nothing is said as to the residue, then, clearly, the creation of the partial trust is regarded as the sole object in view, and the equitable interest undisposed of by the settlor will result to him or his representative. [But the question whether or not the trust is partial is necessarily one of construction, and where by a creditors' deed the business and property of a firm were assigned to trustees upon trust to carry on the business, or sell and dispose of the assets, and pay and divide the clear residue of the profits and moneys among the creditors in rateable proportion, according to the amounts of the debts, it was held by the House of Lords (reversing the decision of the Court of Appeal (*g*)) that by the form of the deed there was no resulting trust of any possible surplus in favour of the assignors.]

Partial declaration of trust distinguished from a charge.

11. But upon this subject a distinction must be observed between a devise to a person for a particular purpose with no intention of conferring the beneficial interest, and a devise with the view of conferring the beneficial interest, but subject to a particular injunction. Thus, if lands be devised to A. and his heirs *upon trust to pay debts*, this is simply the creation of a trust, and the residue will result to the heir; but if the devise be to A. and

(*a*) *George* v. *Howard*, 7 Price, 651, 653; and see *Batstone* v. *Salter*, 19 L. R. Eq. 250; 10 L. R. Ch. App. 431.

(*b*) See *Custance* v. *Cunningham*, 13 Beav. 363; *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343.

(*c*) *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343, see 351.

(*d*) *Northen* v. *Carnegie*, 4 Drew. 587; *Cottington* v. *Fletcher*, 2 Atk. 155; *Culpepper* v. *Aston*, 2 Ch. Ca. 115; *Cook* v. *Gwavas*, cited *Roper* v. *Radcliffe*, 9 Mod. 187; *Lloyd* v. *Spillet*, 2 Atk. 150; *S. C.* Barn. 388, *per* Lord Hardwicke; [*Re Croome*, 59 L. T. N.S. 582; 61 L. T. N.S. 814.]

(*e*) *Sherrard* v. *Lord Harborough*, Amb. 165; *Marquis of Townshend* v. *Bishop of Norwich*, cited Sanders on Uses, C. 3, s. 7, div. 3; *Hobart* v. *Countess of Suffolk*, 2 Vern. 644; *Nash* v. Smith, 17 Ves. 29; *Wych* v. *Packington*, cited *Roper* v. *Radcliffe*, 9 Mod. 187; *Davidson* v. *Foley*, 2 B. C. C. 203; *Kiricke* v. *Bransbey*, 2 Eq. Ca. Ab. 508; *Levet* v. *Needham*, 2 Vern. 138; *Halliday* v. *Hudson*, 3 Ves. 210; *Kellett* v. *Kellett*, 3 Dow, 248; *Hall* v. *Waterhouse*, W. N. 1867, p. 11; [*Re Croome*, *sup.*]

(*f*) *Robinson* v. *Taylor*, 2 B. C. C. 589; *Mapp* v. *Elcock*, 2 Phill. 793; affirmed on appeal, 3 H. L. Cas. 492; *Read* v. *Stedman*, 26 Beav. 495; *Bird* v. *Harris*, 9 L. R. Eq. 204; and see *Dawson* v. *Clarke*, 18 Ves. 254; *Williams* v. *Arkle*, 7 L. R. H. L. 606.

[(*g*) *Cooke* v. *Smith*, 45 Ch. Div. 38.]

his heirs *charged with debts*, the intention of the testator is to devise beneficially subject to the charge, and then whatever remains, after the charge has been satisfied, will belong to the devisee (*a*).

No positive rule to be laid down.

12. No positive rule can be laid down in what cases the devise will carry with it a beneficial character, and in what it will be construed a trust; but on all occasions the Court, refusing to be governed by mere technical phraseology, extracts the probable intention of the settlor from the general scope of the instrument (*b*).

Relationship of the devisee or legatee.

13. The recognition of the *relationship* of the parties has often materially influenced the Court against the construction of a mere trust (*c*); as, where a testator gave 5*l.* to his brother, who was his heir-at-law, and "made and constituted *his dearly beloved wife* his sole heiress and executrix to sell and dispose thereof at her pleasure, and to pay his debts and legacies;" and Lord King decreed the devisee to be beneficially entitled (*d*). But any allusion of this kind is merely one circumstance of evidence, and therefore to be counteracted by the language of the other parts of the instrument (*e*).

Heir of settlor not to be excluded from the resulting trust on mere conjecture.

14. It must also be observed, that the heir will not be excluded from the resulting trust on bare conjecture (*f*); and there must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that no benefit was intended to the heir; for the trust results to the real representative, not on the ground of intention, but because the ancestor has declared no intention (*g*). Thus, a legacy to the heir, will not prevent a trust from resulting (*h*); but, joined to other circumstances in favour of the devisee, it will not be without its effect (*i*).

(*a*) *King* v. *Denison*, 1 V. & B. 272, *per* Lord Eldon [*Re Croome*, 59 L. T. N.S. 582; 61 L. T. N.S. 814.]

(*b*) *Hill* v. *Bishop of London*, 1 Atk. 620, *per* Lord Hardwicke; *Walton* v. *Walton*, 14 Ves. 322, *per* Sir W. Grant, *Starkey* v. *Brooks*, 1 P. W. 391, *per* Lord Cowper; *King* v. *Denison*, 1 V. & B. 279, *per* Lord Eldon.

(*c*) *Lloyd* v. *Spillet*, cited *Cook* v. *Duckenfield*, 2 Atk. 566; *Lloyd* v. *Wentworth*, cited *Robinson* v. *Taylor*, 2 B. C. C. 594; *Smith* v. *King*, 16 East, 283; *Coningham* v. *Mellish*, Pr. Ch. 31; *Cook* v. *Hutchinson*, 1 Keen, 42.

(*d*) *Rogers* v. *Rogers*, 3 P. W. 193.

(*e*) *Buggins* v. *Yates*, 9 Mod. 122; *Wych* v. *Packington*, 2 Eq. Ca. Ab. 507; and see *King* v. *Denison*, 1 V. & B. 274.

(*f*) *Halliday* v. *Hudson*, 3 Ves. 211, *per* Lord Loughborough, and see *Kellett* v. *Kellett*, 3 Dow, 248; *Amphlett* v. *Parke*, 2 R. & M. 227; *Phillips* v. *Phillips*, 1 M. & K. 661; *Salter* v. *Cavanagh*, 1 Dru. & Walsh, 668.

(*g*) See *Hopkins* v. *Hopkins*, Cas. *t.* Talb. 44; *Tregonwell* v. *Sydenham*, 3 Dow. 211; *Lloyd* v. *Spillet*, 2 Atk. 151; *Habergham* v. *Vincent*, 2 Ves. jun. 225.

(*h*) *Randall* v. *Bookey*, 2 Vern. 425; *S. C.* Pr. Ch. 162; *Hopkins* v. *Hopkins*, Cas. *t.* Talb. 44; *Starkey* v. *Brooks*, 1 P. W. 390, overruling *North* v. *Crompton*, 1 Ch. Ca. 196; *Salter* v. *Cavanagh*, 1 Dru. & Walsh, 668.

(*i*) *Rogers* v. *Rogers*, 3 P. W. 193;

Parol evidence.

15. As the species of trust we are now considering results by *presumption of law*, it may be rebutted as to instruments *inter vivos* by positive evidence by parol, that the settlor's intention was to confer the surplus interest beneficially (*a*). And it seems that in one case parol evidence was read as to the intention of a *testator*, but the decision of the case turned more particularly upon the intention, as collected from the will itself (*b*).

Of trusts resulting from intention expressed.

16. Next, a trust results, by operation of law, where the intention not to benefit the grantee, devisee, or legatee, is *expressed* upon the instrument itself, as if the conveyance, devise, or bequest, be to a person "upon trust," and no trust declared (*c*), or the bequest be to a person named as executor "to enable him to carry into effect the trusts of the will," and no trust is declared (*d*), or the grant, devise, or bequest be upon certain trusts that are too vague to be executed (*e*), or upon trusts to be thereafter declared, and no declaration is ever made (*f*), or upon trusts that are void for unlawfulness (*g*),

S. C. Sel. Ch. Ca. 81; and see *Docksey* v. *Docksey*, 2 Eq. Ca. Ab. 506; *King* v. *Denison*, 1 V. & B. 274; *Amphlett* v. *Parke*, 2 R. & M. 230; *Mallabar* v. *Mallabar*, Cas. *t.* Talb. 78.

(*a*) *Cook* v. *Hutchinson*, 1 Keen, 50, *per* Lord Langdale; *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343; and see *Nicholson* v. *Mulligan*, 3 Ir. R. Eq. 308.

(*b*) *Docksey* v. *Docksey*, 2 Eq. Ca. Ab. 506; and see *North* v. *Crompton*, 1 Ch. Ca. 196; *S. C.* cited 2 Vern. 253; *Mallabar* v. *Mallabar*, Cas. *t.* Talbot, 78. See also the analogous case of an executor rebutting by parol evidence the presumption arising from the will of a testator's intention to exclude him from the beneficial enjoyment of the residue, *ante*, p. 59.

(*c*) *Dawson* v. *Clarke*, 18 Ves. 254, *per* Lord Eldon; *Southouse* v. *Bate*, 2 V. &. B. 396; *Morice* v. *Bishop of Durham*, 10 Ves. 537; *Woollett* v. *Harris*, 5 Mad. 452; *Pratt* v. *Sladden*. 14 Ves. 198; *Dunnage* v. *White*, 1 Jac. & Walk. 583; *Goodere* v. *Lloyd*, 3 Sim. 538; *Anon. Case*, 1 Com. 345; *Penfold* v. *Bouch*, 4 Hare, 271; *Corporation of Gloucester* v. *Wood*, 3 Hare, 131; 1 H. L. Cas. 272; *Attorney-General* v. *Dean and Canons of Windsor*, 24 Beav. 679; *S. C.* in D. P. 8 H. L. Cas. 369; *Welford* v. *Stokoe*, W. N. 1867, p. 208; *Aston* v. *Wood*, 6 L. R. Eq. 419; *Candy* v. *Candy*, W. N. 1872, p. 168; *Yeap Cheah Neo* v. *Ong Cheng Neo*, 6 L. R. P. C. 381.

(*d*) *Barrs* v. *Fewke*, 2 H. & M. 60.

(*e*) *Fowler* v. *Garlike*, 1 R. & M. 232; *Morice* v. *Bishop of Durham*, 9 Ves. 399; *S. C.* 10 Ves. 522; *Stubbs* v. *Sargon*, 2 Keen, 255; *S. C.* 3 M. & Cr. 507; *Kendall* v. *Granger*, 5 Beav. 300; *Leslie* v. *Devonshire*, 2 B. C. C. 187; *Vezey* v. *Jamson*, 1 Sim. & Stu. 69; and see *Ellis* v. *Selby*, 7 Sim. 352; *S. C.* 1 M. & Cr. 286; *Williams* v. *Kershaw*, 5 Cl. & Fin. 111; (distinguished in *Re Sutton*, 28 Ch. D. 464); [*Copinger* v. *Crehane*, 11 Ir. R. Eq. 429: *Re Jarman's Estate*, 8 Ch. D. 584; *Fitzgerald* v. *Noad*, W. N. 1886, p. 97, where the testator's wife was to hold "upon trust to carry out my verbal wishes, and further to execute such trusts as shall be satisfactory to her solicitor."]

(*f*) *Emblyn* v. *Freeman*, Pr. Ch. 541; *City of London* v. *Garway*, 2 Vern. 571; *Collins* v. *Wakeman*, 2 Ves. jun. 683; *Fitch* v. *Weber*, 6 Hare, 145; and see *Brown* v. *Jones*, 1 Atk. 188; *Sidney* v. *Shelley*, 19 Ves. 352; *Brookman* v. *Hales*, 2 V. & B. 45; *Biddulph* v. *Williams*, 1 Ch. D. 203.

(*g*) *Carrick* v. *Errington*, 2 P. W. 361; *Arnold* v. *Chapman*, 1 Ves. 108; *Tregonwell* v. *Sydenham*, 3 Dow, 194; *Jones* v. *Mitchell*, 1 S. & S. 290; *Gibbs* v. *Rumsey*, 2 V. & B. 294; *Page* v. *Leapingwell*, 18 Ves. 463; *Pilkington*

[or uncertainty (*a*),] or that fail by lapse (*b*) &c.; for in these and the like cases the trustee can have no pretence for claiming the beneficial ownership, when, by the express language of the instrument, the whole property has been impressed with a trust.

"Trust" and "trustee," do not necessarily exclude a beneficial gift.

17. Although the introduction of the words "upon trust" may be strong evidence of the intention not to confer on the devisee a beneficial interest (*c*), yet that construction may be negatived by the context, or the general scope of the instrument (*d*); and in like manner the devisee may be designated as "trustee," but the expression may be explained away; as, for instance, if the term be used with reference to one only of two funds, the devisee may still establish his title to the beneficial interest in the other (*e*). On the other hand there may be a total *absence* of the word "trust" or "trustee" throughout the whole will, and yet the Court may collect an intention that the devisee or legatee should be a trustee, as where there is a direction that the devisee shall be allowed all his costs and expenses, which would be without meaning if he took beneficially (*f*).

Parol evidence.

18. Where a trust results to the settlor or his representative, not by presumption of law, but by force of the written instrument, the trustee is not at liberty to defeat the resulting trust by the production of extrinsic evidence by parol (*g*).

General observations as to resulting trusts.

19. Having distinguished between the two kinds of resulting

v. *Boughey*, 12 Sim. 114; *Morris* v. *Owen*, W. N. 1875, p. 134; and see *Cooke* v. *The Stationer's Company*, 3 M. & K. 262. If an estate be devised to A. and his heirs, in trust to sell and pay part of the proceeds to persons capable of taking, and other part to a charity, the statute of mortmain does not avoid the whole legal devise, but affects only the interest given to the charity; *Young* v. *Grove* 4 Com. B. Rep. 668; *Doe* v. *Harris*, 16 Mees. & W. 517. [The interest of a partner in the partnership property, so far as it arises from the proceeds of real estate belonging to the partnership, is within the statute of mortmain, *Ashworth* v. *Munn*, 15 Ch. Div. 363.]

[(*a*) *Scott* v. *Brownrigg*, 9 L. R. Ir. 246, where a trust for "missionary purposes" was held too vague to be enforced; and see *Re King*, 21 L. R. Ir. 273, 278.]

(*b*) *Ackroyd* v. *Smithson*, 1 B. C. C. 503; *Spink* v. *Lewis*, 3 B. C. C. 355; *Williams* v. *Coade*, 10 Ves. 500; *Digby* v. *Legard*, cited *Cruse* v. *Barley*, 3 P. W. 22, note by Cox (1); *Hutcheson* v. *Hammond*, 3 B. C. C. 128; *Davenport* v. *Coltman*, 12 Sim. 610; *Muckleston* v. Brown, 6 Ves. 63.

(*c*) See *Hill* v. *Bishop of London*, 1 Atk. 620; *Woollett* v. *Harris*, 5 Mad. 452.

(*d*) *Dawson* v. *Clarke*, 15 Ves. 409; *S. C.* 18 Ves. 247, see 257; *Coningham* v. *Mellish*, Pr. Ch. 31; *Cook* v. *Hutchinson*, 1 Keen, 42; *Hughes* v. *Evans*, 13 Sim. 196.

(*e*) *Batteley* v. *Windle*, 2 B. C. C. 31; *Pratt* v. *Sladden*, 14 Ves. 193; and see *Gibbs* v. *Rumsey*, 2 V. & B. 294.

(*f*) *Saltmarsh* v. *Barrett*, 29 Beav. 474; 3 De G. F. & J. 279.

(*g*) See *Langham* v .*Sanford*, 17 Ves. 442; *S. C.* 19 Ves. 643; *Rachfield* v. *Careless*, 2 P. W. 158; *Gladding* v. *Yapp*, 5 Mad. 59; *White* v. *Evans*, 4 Ves. 21; *Walton* v. *Walton*, 14 Ves. 322; *Irvine* v. *Sullivan*, 8 L. R. Eq. 673.

trusts (a classification necessary to be made for the purpose of ascertaining the admissibility of parol evidence), we proceed to introduce a few remarks applicable to resulting trusts generally, whether arising by presumption of law, or from the language of the instrument.

In trusts for sale, the undisposed of proceeds result to the heir, not the executor.

First. If *real estate* be devised upon trust to *sell* for a particular purpose, and that purpose either wholly fails or does not exhaust the proceeds, the part that remains unapplied, whether the estate has been actually sold or not, will result to the testator's *heir*, and not to his *next of kin* (*a*), and if the testator was seised of the estate *ex parte maternâ*, the undisposed of interest will result to the maternal heir (*b*). And the whole or surplus will result in this manner, though the proceeds of the realty be blended with personal estate in the formation of one common fund (*c*). And even an express declaration that the proceeds of the sale shall be considered as part of the testator's *personal estate* will not prevent the operation of the rule (*d*); for a direction of this kind is construed to extend to the purposes of the *will* only, and not to give a right to those who claim, as the next of kin, by *operation of law*. The case of *Phillips* v. *Phillips* (*e*), before Sir J. Leach, to the contrary,

The conversion is only for the purposes of the will.

(*a*) *Starkey* v. *Brooks*, 1 P. W. 390; *Randall* v. *Bookey*, Pr. Ch. 162; 2 Vern. 425; *Stonehouse* v. *Evelyn*, 3 P. W. 252; *Robinson* v. *Taylor*, 2 B. C. C. 589; *City of London* v. *Garway*, 2 Vern. 571; *Berry* v. *Usher*, 11 Ves. 87; *Wilson* v. *Major*, 11 Ves. 205; *Watson* v. *Hayes*, 5 M. & Cr. 125; and see *Crue* v. *Barley*, 3 P. W. 20; *Buggins* v. *Yates*, 2 Eq. Ca. Ab. 508; *Hill* v. *Cock*, 1 V. & B. 173; *Nicholls* v. *Crisp*, cited *Croft* v. *Slee*, 4 Ves. 65; *Whitehead* v. *Bennett*, 1 Eq. Rep. 560; *Digby* v. *Legard*, 2 Dick. 500; *Spink* v. *Lewis*, 3 B. C. C. 355; *Chitty* v. *Parker*, 4 B. C. C. 411; *Collins* v. *Wakeman*, 2 Ves. jun. 683; *Howse* v. *Chapman*, 4 Ves. 542; *Williams* v. *Coade*, 10 Ves. 500; *Gibbs* v. *Rumsey*, 2 V. & B. 294; *Maugham* v. *Mason*, 1 V. & B. 410; *Wright* v. *Wright*, 16 Ves. 188; *Hooper* v. *Goodwin*, 18 Ves. 156; *Jones* v. *Mitchell*, 1 S. & S. 290; *Page* v. *Leapingwell*, 18 Ves. 463; *Gibbs* v. *Ougier*, 12 Ves. 416; *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 545; *Mogg* v. *Hodges*, 2 Ves. 52; *Eyre* v. *Marsden*, 2 Keen, 564; *Ex parte Pring*, 4 Y. & C. 507; *Davenport* v. *Coltman*, 12 Sim. 610; *Bunnett* v. *Foster*, 7 Beav. 540; *Marriott* v. *Turner*, 20 Beav. 557; *Smith* v. *Harding*, W. N. 1874, p. 101; *Watson* v. *Arundel*, 10 Ir. R. Eq. 299; &c. Note, *Countess of Bristol* v. *Hungerford*, 2 Vern. 645, is misreported—see *Rogers* v. *Rogers*, 3 P. W. 194, note (C).

(*b*) *Hutcheson v. Hammond*, 3 B. C. C. 128.

(*c*) *Ackroyd* v. *Smithson*, 1 B. C. C. 503; *Jessopp* v. *Watson*, 1 M. & K. 665; *Salt* v. *Chattaway*, 3 Beav. 576.

(*d*) *Collins* v. *Wakeman*, 2 Ves. jun. 683; and see *Amphlett* v. *Parke*, 2 R. & M. 226; *Field* v. *Peckett* (No. 1), 29 Beav. 568. *Ogle* v. *Cook*, cited in *Fletcher* v. *Ashburner*, 1 B. C. C. 502, and in *Ackroyd* v. *Smithson*, id. 513, was for a long time considered *contra*; but in *Collins* v. *Wakeman*, 2 Ves. jun. 686, Lord Loughborough had the Reg. Lib. searched, and it was found the point had been left undecided.

(*e*) 1 M. & K. 649.

has repeatedly received the disapprobation of the Court (*a*), and has now been overruled (*b*).

Direction for sale, and that the proceeds shall be personal estate.

If a testator direct the proceeds of the sale to be taken as personal estate, and *nothing more is said*, then, as every part of the will ought, if possible, to have an operation, the meaning of the testator might be thought to be, that the realty should be converted into personalty for the benefit of the next of kin by implication; and in *The Countess of Bristol* v. *Hungerford* (*c*), where the testator directed the proceeds of the sale to be taken as personal estate, and go to his executors, to whom he gave 20*l.* a-piece, it is said the next of kin were declared entitled. The two *next of kin*, however, were also the *co-heirs*, and therefore as *utrâque viâ datâ* the same persons would claim, it was obviously unnecessary to determine the question. And in a late case where the testator even said, "nothing shall result to the heir-at law," it was held that nevertheless a bequest to the next of kin was not implied, but that the heir-at-law must take in spite of the intention to the contrary (*d*).

Fitch *v.* Weber.

Whether the interest results as real or personal estate.

If the execution of the trust require the estate to be sold, but the purposes of the trust do not exhaust the proceeds, the part that is undisposed of will result to the heir in the character of personalty, and, though the sale was not actually effected in his lifetime, will devolve on his executor (*e*); and in the case of a trust created by a settlor in his lifetime, the undisposed of interest in the proceeds of sale will result to the settlor as personal estate, and go to his personal representative, even though the trust for sale was not to arise until after the settlor's decease (*f*). If however the trusts declared by the testator so entirely fail as not to call for a conversion, then the whole estate will result to the heir as realty, and descend upon his heir (*g*),

Where trusts wholly fail.

(*a*) See *Fitch* v. *Weber*, 6 Hare, 145; *Shallcross* v. *Wright*, 12 Beav. 505; *Flint* v. *Warren*, 16 Sim. 124.

(*b*) *Taylor* v. *Taylor*, 3 De G. M. & G. 190; *S. C.* 1 Eq. Rep. 239; *Robinson* v. *London Hospital*, 10 Hare, 19.

(*c*) Pr. Ch. 81; *S. C.* 2 Vern. 645; corrected from Reg. Lib. in *Rogers* v. *Rogers*, 3 P. W. 194, note (C); and see *Sir W. Basset's case*, cited *Bayley* v. *Powell*, 2 Vern. 361.

(*d*) *Fitch* v. *Weber*, 6 Hare, 145; and compare *Johnson* v. *Johnson*, 4 Beav. 318.

(*e*) *Hewitt* v. *Wright*, 1 B. C. C. 86; *Wright* v. *Wright*, 16 Ves. 188; *Smith* v. *Claxton*, 4 Mad. 484; *Dixon* v. *Dawson*, 2 S. & S. 327; *Jessopp* v. *Watson*, 1 M. & K. 665; *Hatfield* v. *Pryme*, 2 Coll. 204; *Bagster* v. *Fackerel*, 26 Beav. 469; *Wilson* v. *Coles*, 28 Beav. 215; *Hamilton* v. *Foot*, 6 Ir. R. Eq. 572; *The Attorney-General* v. *Lomas*, 9 L. R. Ex. 29.

(*f*) *Clarke* v. *Franklin*, 4 K. & J. 257.

(*g*) *Smith* v. *Claxton*, *ubi supra* (where the doctrines of the Court are clearly stated); *Bagster* v. *Fackerel*, 26 Beav. 469; *Chitty* v. *Parker*, 2 Ves. jun. 213; *Buchanan* v. *Harrison*, 1 J. & H. 662.

though the estate may by the mistake of the trustees have been actually sold (*a*), and if the testator was seised *ex parte maternâ*, the equitable interest will descend to the testator's heir in the maternal line (*b*).

Sale by Court.

If real estate be devised to A. subject to a charge of debts, and it is sold by the *Court*, the surplus money, it seems, will not be considered personal estate, so as to devolve on the devisee's *personal representative*, but will descend to his *heir* (*c*); [and the same rule applies to the surplus arising from the sale of mortgaged property under an order made in a foreclosure action (*d*)].

But in a sale of an infant's estate under an order of the Court, which finds that the sale would be for his benefit, the conversion is absolute, and the proceeds are personalty (*e*).

Under Partition Act.

In the sale of the property of an infant (*f*), [or lunatic (*g*)], under the Partition Act, 1868, which incorporates some of the provisions of the Leases and Sales of Settled Estates' Act, the interest of the infant [or lunatic] retains its character of real estate [and on his death intestate descends to his heir-at-law, but the heir will take it as realty or personalty according to its actual state of investment (*h*).

So, where in a partition suit a sale was directed of certain real estate, one eighth of which belonged to a married woman in fee, and an order was subsequently made directing that the husband and wife accepting a certain sum as the purchase money of the one-eighth, that sum should be paid into Court, which was accordingly done, but before any conveyance was executed the married woman died, it was held that the purchase money must be treated as realty (*i*). But since the Partition Act, 1876, if an order be made for the sale of a married woman's share in real estate, with her consent or at her request, it will operate as a conversion (*j*). Where a sale was ordered in a partition

(*a*) *Davenport* v. *Coltman*, 12 Sim. 610.

(*b*) *Wood* v. *Skelton*, 6 Sim. 176; see *Buchanan* v. *Harrison*, 1 J. & H. 673.

(*c*) *Cooke* v. *Dealy*, 22 Beav. 196; [*Scott* v. *Scott*, 9 L. R. Ir. 367;] but see *Flanagan* v. *Flanagan*, cited *Fletcher* v. *Ashburner*, 1 B. C. C. 500; and *Re Cross's Estate*, 1 Sim. N. S. 260; and see *Crowther* v. *Bradney*, 28 L. T. N.S. 464.

[(*d*) *Scott* v. *Scott*, 9 L. R. Ir. 367; *Jermy* v. *Preston*, 13 Sim. 356; *Richardson* v. *Nixon*, 2 J. & L. 250, 259.]

(*e*) *Steed* v. *Preece*, 18 L. R. Eq. 192; and see *Batteste* v. *Maunsell*, 10 Ir. R. Eq. 97, 314; [*Ferguson* v. *Benyon*, 17 L. R. Ir. 212.]

(*f*) *Foster* v. *Foster*, 1 Ch. D. 588; but see *Arnold* v. *Dixon*, 19 L. R. Eq. 113.

[(*g*) *Re Barker*, 17 Ch. Div. 241; *Grimwood* v. *Bartels*, 46 L. J. N.S. Ch. 788.]

[(*h*) *Mordaunt* v. *Benwell*, 19 Ch. D. 302.]

[(*i*) *Mildmay* v. *Quicke*, 6 Ch. D. 553.]

[(*j*) *Wallace* v. *Greenwood*, 16 Ch. D. 362.]

action and the share of a person who was *sui juris* was ordered to be paid to her, but before payment she became lunatic and afterwards died intestate, it was held that conversion of the share had taken place at the date of the sale (*a*).

[Where discretion in trustees.]

If trustees have a discretionary power of sale, and an order is made in an administration action directing a sale, the property is converted into personalty as from the date of the order (*b*).

[Under Lands Clauses Consolidation Act.]

If land of which an infant is seised in fee simple be taken under the provisions of the Lands Clauses Consolidation Act, 1845, and the purchase-money be paid into Court, the money retains the quality of real estate, and on the death of the infant descends to his heir-at-law (*c*)].

Money to be laid out on land results to the executor.

Secondly. If a testator bequeath *money* to be laid out in a purchase of *land*, to be settled to uses which either wholly or partially fail to take effect, the undisposed of interest in the money, or estate if purchased, will result to the [testator's *next of kin* (*d*); and will belong to them as realty or personalty, according to its nature in the view of a Court of equity at the time it results (*e*)].

The old authorities (*f*) upon the subject are somewhat conflicting; but it will be superfluous to enter upon a particular examination of them, as the case of *Cogan* v. *Stephens* (*g*) before Lord Cottenham, while at the Rolls, finally decided the point in favour of the next of kin.

Appointed fund results to the donee of the power.

Thirdly. "Where" (to use the words of Lord St. Leonards) "there is a power to appoint a settled fund, the execution of the power takes the part appointed entirely out of the settlement. Although, therefore, the beneficial interest in the fund is not in terms expressly disposed of, yet there can be no resulting trust for the benefit of any person under the *deed creating the power*, for when the fund is appointed it must be considered as if it had never been comprised in the trust, because it is absolutely taken

[(*a*) *Re Pickard*, 53 L. T. N.S. 293.]

[(*b*) *Hyett* v. *Mekin*, 25 Ch. D. 735; *Crowther* v. *Bradney*, 28 L. T. N.S. 464.]

[(*c*) *Kelland* v. *Fulford*, 6 Ch. D. 491.]

(*d*) *Cogan* v. *Stephens*, 5 L. J. N.S. Ch. 17; *Hereford* v. *Ravenhill*, 1 Beav. 481; [*Curteis* v. *Wormald*, 10 Ch. Div. 172; but see] *Reynolds* v. *Godlee*, Johns. 536, 583.

[(*e*) *Curteis* v. *Wormald*, 10 Ch. Div. 172.]

(*f*) *Fletcher* v. *Chapman*, 3 B. P. C. 1; *Hayford* v. *Benlows*, Amb. 582; *Leslie* v. *Duke of Devonshire*, 2 B. C. C. 187; *Browne* v. *De Laet*, 4 B. C. C. 534; *Tregonwell* v. *Sydenham*, 3 Dow, 207; *Abbot* v. *Lee*, 2 Vern. 284; *S. C.* Append. No. ii. to 3rd Edition; *Mogg* v. *Hodges*, 2 Ves. 52.

(*g*) Append. No. iii. to 3rd Edition; *S. C.* 5 L. J. N.S. Ch. 17. As to the principle, see the author's argument in favour of the next of kin in the early editions.

out of it by the execution of the power" (*a*). If, therefore, a *feme covert* has in certain events which occur a power to appoint a settled fund by will, and she appoints executors and directs them to apply the fund in payment of legacies which do not exhaust it, [or fail,] the executors hold the surplus in trust, not for the persons entitled under the settlement in default of appointment, but as part of the personal estate of the donee of the power (*b*). [And there is no distinction in this respect between the cases of real estate and personal estate; and so realty appointed under a general power to trustees for purposes which fail will result to the appointor and go as part of his realty (*c*). But where under a testamentary power an appointment is made to an intended beneficiary without the interposition of any trustee, on the death of the appointee in the lifetime of the donee of the power the appointment wholly fails, and the appointed funds will revert to the persons entitled in default of appointment (*d*). [Exceptions.]

[And the mere appointment of an executor is not sufficient evidence of an intention on the part of the appointor to make the property his own; and thus where the donee of the power, who was a married woman and also one of the trustees of the settlement creating the power, directed that the trust property should be held by her co-trustee on certain trusts which failed, and appointed the co-trustee her sole executor, it was held that the gift over in default of appointment took effect (*e*).]

In a gift of the whole, subject to a charge that may not arise, no trust results.

Fourthly. It often happens, that the settlor makes a primary disposition of the *whole* property to A. subject to a particular charge in favour of B., and the charge in event either wholly or partially fails so as either not to divest, or only *pro tanto* to divest the estate of A. The reader must distinguish the preceding cases of resulting trust from such a gift as this; for here, as the entirety is disposed of in the first instance to A., so far as

(*a*) Treat. of Powers, 8th Ed. p. 467.

(*b*) *Brickenden* v. *Williams*, 7 L. R. Eq. 310; [*Wilkinson* v. *Schneider*, 9 L. R. Eq. 423; *Re Pinède's Settlement*, 12 Ch. D. 667; *Re Ickeringill's Estate*, 17 Ch. D. 151; *Rous* v. *Jackson*, 29 Ch. D. 521; *Re Horton*, 51 L. T. N. S. 420.] *Chamberlain* v. *Hutchinson*, 22 Beav. 444; *Mansell* v. *Price*, Sug. Powers. Appendix. ["In all cases of this class the question is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes or only for the limited purpose of giving effect to the particular disposition expressed," *per* V. C. I. *Re De Lusi's Trusts*, 3 L. R. Ir. 232, 237, approved by M. R. *Re Pinède's Settlement*, *ubi sup.*; *Re Van Hagan*, 16 Ch. Div. 18; *Willoughby Osborne* v. *Holyoake*, 22 Ch. D. 238.]

[(*c*) *Re Van Hagan*, 16 Ch. Div. 18.]

[(*d*) *Re Davies' Trusts*, 13 L. R. Eq. 163; *Re De Lusi's Trusts*, 3 L. R. Ir. 232.]

[(*e*) *Re Thurston*, 32 Ch. D. 508.]

the charge does not exhaust it, there can nothing result to the heir, even should the charge not take effect. The distinction was thus stated by Sir J. Leach:—"If the devise," he said, "to a particular person, or for a particular purpose, be intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure" (*a*).

Gift charged with a contingent legacy.

Thus, if lands be devised to A. charged with a legacy to B. provided B. attain the age of twenty-one, should B. die without attaining that age, the devise has become absolute in A., and the will is to be read as if the legacy to B. had never been mentioned (*b*). So if the lands be given to A. charged with a legacy to B., and B. dies in the testator's lifetime (*c*).

Gift charged with a sum to be appointed, and the power not exercised.

The construction is the same, if lands be devised to A. subject to and charged with any sum not exceeding 10,000*l.* to such persons, and in such manner as the testator shall appoint, and the power is either never exercised, or the execution of it is void (*d*): for here, as the testator confers the whole interest on the devisee, reserving the power, if he either abstain from executing the power, or appoint for an illegal purpose, he does not diminish that interest, but the heir is wholly disinherited (*e*).

Noel *v.* Lord Henley.

And where a testator had devised certain estates upon trust to sell, and out of the proceeds to pay 5000*l.* unto his wife, her executors and administrators, *in part satisfaction of the sum of* 10,000*l. secured to her by marriage settlement in case of her surviving him,* and to invest the residue upon certain trusts, and the wife died in the lifetime of the husband, so that the 10,000*l.* never became raisable, it was held that the 5000*l.* instead of resulting to the heir was included in the residue (*f*). The construction put upon the will was, that the whole fund was in the first instance given to the residuary legatees, subject to a charge of 5000*l.* to arise on a certain event, and that contingency

(*a*) *Cooke* v. *The Stationers' Company*, 3 M. & K. 264.

(*b*) *Tregonwell* v. *Sydenham*, 3 Dow, 210, *per* Lord Eldon. *Sprigg* v. *Sprigg*, 2 Vern. 394, was decided on this principle; *Cruse* v. *Barley*, 3 P. W. 20, should have been decided the same way, but the point was not noticed. See *Attorney-General* v. *Milner*, 3 Atk. 112; *Croft* v. *Slee*, 4 Ves. 60.

(*c*) *Sutcliffe* v. *Cole*, 3 Drew. 185.

(*d*) *Jackson* v. *Hurlock*, 2 Eden, 263; *Cooke* v. *The Stationers' Company*, 3 M. & K. 262; *Tucker* v. *Kayes*, 4 K. & J. 339.

(*e*) *Tregonwell* v. *Sydenham*, 3 Dow, 213, *per* Lord Eldon.

(*f*) *Noel* v. *Lord Henley*, 7 Price, 241; *S. C.* Dan. 211 and 322.

having never occurred, the primary devise of the entirety was never divested (*a*).

Gift of a charge, and "subject thereto" to A.

Again, if an estate be settled to the use of trustees for a term of ninety-nine years, upon trusts that do not exhaust the whole interest, and from and after the expiration, or other sooner determination of the said term, and *subject thereto,* to uses in strict settlement, the surplus of the term will be in trust, not for the heir, but for the devisees in remainder, for here the intention is express, that subject to trusts which have been exhausted, the remaindermen shall take the whole estate (*b*). So where an estate was devised to trustees upon trust within one year after the testator's decease to raise 2000*l.* and "after raising the same" upon trusts in strict settlement, the Court held the 2000*l.* to be a charge upon and not an exception out of the estate (*c*).

"Subject thereto" implied.

And if the limitation be to trustees for ninety-nine years upon the trusts thereinafter expressed, and the instrument makes no mention of the trusts, and from and after the expiration, or other sooner determination of the said term to uses in strict settlement, the Court will consider the intention to be clearly *implied,* that the remaindermen should have the beneficial enjoyment subject to the term, and will read the will, as if the words *subject thereto and to the trusts thereof* had been actually expressed (*d*).

[Charge if actually raised reverts as personal estate.]

[If the amount charged be actually raised, and subsequently the trusts affecting it fail, so that it reverts to the devisee of the estate charged, the devisee will take it as *personal estate,* for there is no purpose requiring that it should be turned into land again, and no equity in any person to have it laid out in land (*e*).]

Charity legacies.

There has been much discussion in the Courts how far the rule establishing a distinction between a *charge upon* and *exception from* a devise is applicable to a charity legacy. The question is one of difficulty, and before stating the apparent result of the cases, it may be useful to premise a few words as to the principle.

Difference between exception from a devise, and charge upon a devise.

If a testator had, before the Wills Act, devised an estate, worth 10,000*l.*, to trustees in trust to sell, and out of the proceeds

(*a*) That the case was probably decided on this ground, see observations of Richards, C. B., Dan. 235, and of Lord Eldon, ib. 338.

(*b*) *Davidson* v. *Foley,* 2 B. C. C. 203; *Marshall* v. *Holloway,* 2 Swans. 432; *Lord Southampton* v. *Marquis of Hertford,* 2 V. & B. 54; and see *Maundrell* v. *Maundrell,* 10 Ves. 259; [*Re Newberry's Trusts,* 5 Ch. D. 746.]

(*c*) *Re Cooper's Trusts,* 4 De G. M. & G. 757; *S. C.* 2 Eq. Rep. 65.

(*d*) *Sidney* v. *Shelley,* 19 Ves. 352; *S. C. nom. Sidney* v. *Miller,* G. Coop. 206; overruling the dictum of Lord Hardwicke, in *Brown* v. *Jones,* 1 Atk. 191.

[(*e*) *Re Newberry's Trusts,* 5 Ch. D. 746.]

to pay 1000*l.* to A., and had given all the residue of his real estate to B., and A. had died in the testator's lifetime, the lapse would have enured to the benefit not of the devisee, but of the heir-at-law; the reason was, that in real estate the word "residue" had not the same meaning as in personal estate, but each devise was considered a specific one, and the 1000*l.* and the 9000*l.* were distinct fractions of the estate, so that if either failed in event, the undisposed of interest resulted to the heir-at-law. If, however, a testator had devised an estate to A. and his heirs *charged* with a legacy of 1000*l.* to B., and B. had died in the testator's lifetime, then A. would have taken the estate free from the legacy: not that the devisee was intended to take the legacy, *quâ legacy,* but the testator had constituted a *hæres factus* to the disinherison at all events of the heir-at-law, and as the legacy was given not directly to the legatee, in which case it would be an exception from the devise of the estate, but had been made a charge to be raised, so far as might be necessary, out of the estate previously devised, the legacy, as in the event it was not required to be raised, sunk for the benefit of the devisee.

Possible distinction in the case of a legacy to a charity.

Now in a devise to A. and his heirs charged with a legacy to a charity, on the one hand it may be said that in the case of an *ordinary* charge the lapse of the legacy is an incident to the bequest, which the testator may be taken to have contemplated and he may have meant that on the occurrence of that event the devisee should be entitled; but in the instance of a *charity,* the object of the legacy *exists* at the testator's death, and the event on which the money was payable has arisen; he could not, therefore, have intended the devisee to take the legacy, which is bequeathed under the very circumstances to the charity; the legacy therefore in this case, though in form a charge, is in fact an exception. On the other hand it may be argued that where the legacy is admitted to be a charge and not an exception, the devisee does not take the legacy *because the legacy was intended for him,* since then in the case of a *lapse* the charge would not have sunk for the benefit of the devisee; for in real estate, until the Wills Act, that only went to the devisee which was not otherwise *expressed* to be disposed of whether the bequest took effect or not, as in the case above noticed of a trust for sale, where the lapse of a legacy out of the proceeds enured to the benefit of the heir, but, nevertheless, in a charge the devisee did take the legacy in case of a lapse, *from the form in which the legacy was given;* a result which shows the true view to be that

the testator first constituted the devisee the *hæres factus* of the whole estate, which disinherited the heir, and then as the legacy was made a graft upon that estate, and the legacy failed, the estate was exonerated from the burden. Lord Alvanley was of opinion that this was the right ground, and that it mattered not in what way the failure of the legacy arose, whether by lapse, or the unlawfulness of the object: "It is now perfectly settled," said Lord Alvanley, "that if an estate is devised, charged with legacies, and the legacies fail, *no matter how*, the devisee shall have the benefit of it and take the estate" (*a*).

Results of the cases.

The cases upon the subject are very conflicting, but the best results that can be obtained from them appear to be these:

(I.) The first inquiry to be made is, whether upon the whole will the testator intended the legacy and the devise to be two distinct independent gifts, flowing directly from himself to the legatee and devisee, or whether he devised the whole estate in the first instance to the devisee to the disinherison of the heir, and then gave the legacy, not as an original gift from the testator to the legatee, but by way of graft upon the estate previously given to the devisee; in the former case the legacy would be an exception (*b*), and in the latter a charge.

(II.) Assuming the legacy to be, according to the true construction of the will, not an exception but a charge, then if the legacy be given by way of a *condition* imposed on the devisee, the legacy, as the condition is void, sinks for the devisee's benefit (*c*).

(III.) If the estate be devised charged with a sum, say of 1000*l*., *to be paid to the testator's executors* and applied in discharge of his debts and legacies, including a legacy to a charity, in this case the charge is raisable as against the devisee, and the charity legacy will be a resulting trust to the testator's heir-at-law (*d*).

(IV.) If the estate be simply devised to one, charged with or subject to a legacy in favour of another, and there is nothing on

(*a*) *Kennell* v. *Abbott*, 4. Ves. 811; [and see *Fisk* v. *Attorney-General*, 4 L. R. Eq. 521; *Dawson* v. *Small*, 18 L. R. Eq. 114.]

(*b*) *Cooper's Trusts*, 4 De G. M. & G. 757. See *Tucker* v. *Kayess*, 4 K. & J. 339.

(*c*) *Poor* v. *Mial*, 6 Madd. 32; *Arnold* v. *Chapman*, 1 Ves. 108; *Ridgway* v. *Woodhouse*, 7 Beav. 437. See *contrà Bland* v. *Wilkins*, cited *Wright* v. *Row*, 1 B. C. C. 61 note. In *Cooke* v. *Stationers' Company*, the M. R. said the condition made no difference, as it was no more than a charge, 3 M. & K. 266.

(*d*) *Arnold* v. *Chapman*, 1 Ves. 108; *Henchman* v. *Attorney-General*, 3 M. & K. 494, [where Lord Brougham, L.C., said that *Arnold* v. *Chapman* "proceeded upon the ground of the sum given to charitable uses being excepted out of the devise, and so undisposed of, unless the gift was valid, which by the statute it was not."]

the face of the will to show that the legacy, though expressed in the form of a charge, was meant to be an exception, then the leaning of the Court at the present day would appear to be in favour of the devisee (*a*).

(v.) It may be doubted whether the circumstance of a direction for an intermediate payment to the testator's executors of the sum to be raised be a tenable ground of distinction, and should the Court decide in favour of a devisee in a case under the fourth head, such decision would undoubtedly shake those in favour of the heir under the third. It would be a reasonable and intelligible rule to lay down that where the failure of the legacy arises from any event which the testator might reasonably have contemplated, as, the death of the legatee in his lifetime, then the legacy should sink for the benefit of the devisee: but that where the legacy is raisable in the event which has happened, and the legacy is only not paid because the policy of the law, in spite of the intention, forbids it, as in the case of a legacy to a charity, there the legacy was in fact never given to the devisee, and a trust should result for the benefit of the heir. The subject, as the matter now stands, is in a very unsatisfactory state.

The interest that would have resulted may be disposed of by will.

Fifthly. It has been stated in general terms, that, in the cases we have mentioned, a trust will result to the *settlor or his real or personal representative,* but the doctrine must be received with at least this qualification, that the interest which would have resulted is not otherwise disposed of by the settlor himself.

Any interest that would have resulted may of course be given away from the settlor's representative, by a *particular* and *specific* devise or bequest; it remains only to inquire what is the effect of certain *general* expressions.

Construction of the word "residue" in real estate.

With respect to a testator's realty, the heir "shall sit in the seat of his ancestor," unless the disinherison be expressed or clearly implied. The word "residue," therefore, had, before the Wills Act, received in devises a strict and narrow construction, and was held to mean, not all that the testator had not

(*a*) *Cooke* v. *Stationers' Company*, 3 M. & K. 262; *Baker* v. *Hall*, 12 Ves. 497 (but the heir was not a party); *Barrington* v. *Hereford*, cited *Wright* v. *Row*, 1 B. C. C. 61; *Jackson* v. *Hurlock*, 2 Eden, 263; Amb. 487; and see remarks of Lord Redesdale and Lord Eldon on this case in *Tregonwell* v *Sydenham*, 3 Dow, 208–213. Lord Eldon assumed the power to be good, but that, as it was exercised in favour of a charity, the devisee was not affected by a void execution of the power, and was rightly allowed to retain the estate; in fact, there was no appointment to a charity, for the letter, not being of a testamentary character, could not be read. See *contrà*, *Gravenor* v. *Hallum*, Amb. 643.

actually disposed of, but only so much of which he had shown no intention of disposing. Thus, if lands had been devised upon trust to raise 5000*l.* for a charity, the residue to A. (*a*), or upon trust to raise 5000*l.* for a charity, with a general devise "of all the residue of the testator's real estate, whatsoever and wheresoever" (*b*), in either case the void legacy would have resulted to the heir, and not have been included in the residuary clause. Now, by the Wills Act, a residuary devise, unless a contrary intention appear by the will, is made to sweep every interest undisposed of in real estate, as a residuary bequest already did in respect of personal estate (*c*).

Construction of "personal estate" as applicable to proceeds from sale of real estate.

If a testator direct his lands to be sold, and afterwards add a general bequest of all his *personal estate* (*d*), or appoint a person *residuary executor* (*e*), any part of the proceeds of the sale that is undisposed of will not form part of the residuary fund in the first case, or pass to the residuary executor in the second; for nothing, properly speaking, is a testator's "*personal estate*," but what possesses that character at the moment of his decease (*f*).

"Personal estate" in certain cases may pass such proceeds.

But the intention of converting the property absolutely by the sale, so as to make the proceeds undisposed of by the will pass by the description of the testator's "*personal estate*," may be collected from a will specially worded (*g*); and the blending of the real and personal estate into one fund will be regarded as a circumstance in some degree indicative of such an intention (*h*), and this of course will be the case, where the testator expressly directs the proceeds to be considered as part of his personalty (*i*).

(*a*) *Hutcheson* v. *Hammond*, 3 B. C. C. 128; *Page* v. *Leapingwell*, 18 Ves. 463; *Collins* v. *Wakeman*, 2 Ves. jun. 683; *Cruse* v. *Barley*, 3 P. W. 20; *Jones* v. *Mitchell*, 1 S. & S. 293; *Sprigg* v. *Sprigg*, 2 Vern. 394, *per Cur.*; *Cooke* v. *Stationers' Company*, 3 M. & K. 264, *per Cur.*; *Anon. case*, 1 Com. 345.

(*b*) *Goodright* v. *Opie*, 8 Mod. 123; *Wright* v. *Hall*, Fort. 182; *S. C.* 8 Mod. 222; *Roe* v. *Fludd*, Fort. 184; *Watson* v. *Earl of Lincoln*, Amb. 325; *Oke* v. *Heath*, 1 Ves. 141, *per* Lord Hardwicke; *Cambridge* v. *Rous*, 8 Ves. 25 *per* Sir W. Grant; *Doe* v. *Underdown*, Willes, 293. But see *Page* v. *Leapingwell*, 18 Ves. 463; but it does not appear that the heir was a party, and the question was not discussed.

(*c*) 1 Vict. c. 26, s. 25.

(*d*) *Maugham* v. *Mason*, 1 V. & B. 410; *Smith* v. *Harding*, W. N. 1874, p. 101; and see *Gibbs* v. *Rumsey*, 2 V. & B. 294.

(*e*) *Berry* v. *Usher*, 11 Ves. 87.

(*f*) See *Maugham* v. *Mason*, 1 V. & B. 416.

(*g*) *Mallabar* v. *Mallabar*, Cas. *t.* Talb. 78; *Brown* v. *Bigg*, 7 Ves. 279; *Court* v. *Buckland*, 1 Ch. D. 605; *Durour* v. *Motteux*, 1 Ves. 321. (See Motteux's will correctly stated, *Jones* v. *Mitchell*, 1 S. &. S. 292, note (d). See Observations on *Mallabar* v. *Mallabar*, and *Durour* v. *Motteux*, in *Maugham* v. *Mason*, 1 V. & B. 416.)

(*h*) Compare *Durour* v. *Motteux*, 1 Ves. 321, with *Maugham* v. *Mason*, 1 V. & B. 417; *Hutcheson* v. *Hammond*, 3 B. C. C. 148, *per* Lord Thurlow; but see *Berry* v. *Usher*, 11 Ves. 87.

(*i*) *Kidney* v. *Coussmaker*, 1 Ves.

Whether a gift of residuary personal estate will pass lapsed legacies from proceeds of sale of real estate.

The question was much discussed before the Wills Act, and may still be material, what expressions of a testator will amount to such an absolute conversion of real estate into personal, that a *void or lapsed legacy* given out of the proceeds of the sale shall, as if the property had been personal, fall into the residuary bequest, instead of resulting to the heir. "I agree," said Lord Brougham, "a testator may provide that lapsed and void legacies shall go in this manner, as if the testator say in express words, 'I give all lapsed and void legacies as parcel of my residue to the residuary legatee,' and if he can do it by express words, he can do it by plain and obvious intention to be gathered from the whole instrument" (*a*). But what will amount to such an implication is a point that can with difficulty be brought under any very definite rule.

Results of the authorities.

Apparently the only principle to be extracted from the authorities is, that a lapsed or void legacy will pass to the residuary legatee, *if the testator expressly declare that the proceeds of the sale shall be considered as "personal estate," or if the intention of an absolute conversion into personal estate for all the purposes of the will can, without the aid of any such express declaration, be gathered from the general structure of the will* (*b*).

Next of kin and residuary legatee distinguished.

It was stated in a former page, that if a testator direct the proceeds of the sale to be taken as "*personal estate,*" a part of the proceeds undisposed of by him will nevertheless not result to the *next of kin.* The distinction between the *next of kin* and the *residuary legatee* is this: the former claim *dehors* the will, while the latter is a claimant *under* the will, and when the proceeds of the sale are directed to be taken as personalty, the testator must be understood to mean for the purposes of the will only, and not for any object beyond it.

Resulting trust of personal estate.

With respect to resulting trusts of *personal* estate, the general residuary bequest was always held to sweep every interest, whether undisposed of by the will, or undisposed of in event, and therefore

jun. 436; and see *Field* v. *Peckett*, (No. 1), 29 Beav. 568, and *Lowes* v. *Hackward*, 18 Ves. 171. In *Collins* v. *Wakeman*, 2 Ves. jun. 683, the sum undisposed of did not fall into the residue on the principles adopted in *Davers* v. *Dewes*, 3 P. W. 40, and *Attorney-General* v. *Johnstone*, Amb. 577.

(*a*) *Amphlett* v. *Parke*, 2 R. & M. 232; and see *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 545.

(*b*) *Durour* v. *Motteux*, 1 Ves. 321 (see the will stated from Reg. Lib. in *Jones* v. *Mitchell*, 1 S. & S. 292, note (d)); *Kennell* v. *Abbott*, 4 Ves. 802; *Amphlett* v. *Parke*, 1 Sim. 275; *S. C.* 2 R. & M. 221; *Green* v. *Jackson*, 5 Russ. 35; *S. C.* 2 R. & M. 238; *Salt* v. *Chattaway*, 3 Beav. 576. [And see *Singleton* v. *Tomlinson*, 3 App. Cas. 404.] As to *Mallabar* v. *Mallabar*, Cas. *t.* Talb. 78, see *Phillips* v. *Phillips*, 1 M. & K. 660.

is is only where the will contains no residuary clause that the next of kin can assert a claim to the benefit of the resulting interest (*a*). But if any part of the personal estate be expressly excepted from the residue, as if a testator reserve a sum to be disposed of by a codicil, and give the residue not disposed of or reserved to be disposed of to A., and no codicil is executed, the sum so specially excepted will then result to the next of kin (*b*).

Case of settlor or devisor dying without heir or next of kin.

Sixthly. [In the case of the death of a settlor intestate, without heir or next of kin, the undisposed of beneficial interest in real estate, if the death occurred before the 14th August, 1884, sank into the land for the benefit of the trustee or legal tenant (*c*); and where the death occurs since that date, it escheats to the lord as if the interest were a legal estate in corporeal hereditaments (*d*);] but in the case of personalty the resulting interest, as *bonum vacans*, will fall to the Crown by the prerogative (*e*).

Of resulting trusts in gifts to charities.

Lastly, it may be noticed that settlements to *charitable* purposes are an exception from the law of resulting trusts: for, upon the construction of instruments of this kind, the Court has adopted the following rules:—

Where no object expressed, the Court will direct the application of the estate to some charity.

(1.) Where a person makes a valid gift, whether by deed or will, and expresses a general intention of charity, but either particularises no objects (*f*), or such as do not exhaust the proceeds (*g*), the Court will not suffer the property in the first case, or the

(*a*) See *Dawson* v. *Clarke*, 15 Ves. 417; *Brown* v. *Higgs*, 4 Ves. 708; *S. C.* 8 Ves. 570; *Shanley* v. *Baker*, 4 Ves. 732; *Jackson* v. *Kelly*, 2 Ves. 285; *Oke* v. *Heath*, 1 Ves. 141; *Cambridge* v. *Rous*, 8 Ves. 25; *Cooke* v. *Stationers' Company*, 3 M. & K. 264.

(*b*) *Davers* v. *Dewes*, 3 P. W. 40; *Attorney-General* v. *Johnstone*, Amb. 577.

(*c*) *Burgess* v. *Wheate*, 1 Eden, 177; *Henchman* v. *Attorney-General*, 3 M. & K. 485; *Taylor* v. *Haygarth*, 14 Sim. 8; *Davall* v. *New River Company*, 3 De G. & Sm. 394; *Cox* v. *Parker*, 22 Beav. 168.

[(*d*) 47 & 48 Vict. c. 71, s. 4.]

(*e*) *Middleton* v. *Spicer*, 1 B. C. C. 201; *Barclay* v. *Russell*, 3 Ves. 424; *Taylor* v. *Haygarth*, 14 Sim. 8; *Powell* v. *Merrett*, 1 Sm. & G. 381; *Cradock* v. *Owen*, 2 Sm. & G. 241; see *ante*, p. 60.

(*f*) *Attorney-General* v. *Herrick*, Amb. 712.

(*g*) *Attorney-General* v. *Haberdashers' Company*, 4 B. C. C. 102; *S. C.* 2 Ves. jun. 1; *Attorney-General* v. *Minshull*, 4 Ves. 11; *Attorney-General* v. *Arnold*, Shower's P. C. 22; and see *Attorney-General* v. *Sparks*, Amb. 201; and Lord Eldon's observations, in *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 319; [and *Biscoe* v. *Jackson*, 35 Ch. Div. 460.] But where a gift is to a particular charity which exists at the date of the will, but is dissolved in the testator's lifetime, it is as much a lapse as a gift to a man who has ceased to exist, *Fisk* v. *Attorney-General*, 4 L. R. Eq. 521; [but where the charity fails after the death of the testator but before the legacy is paid, there is no lapse, and the legacy must be applied *cy-pres*; *Re Slevin*, 64 L. T. N.S. 311, reversing *S. C.* (1891) 1 Ch. 373.] And where a fund was given to trustees for education in the United States, and the United States repudiated the gift, the fund was not applied to other charitable objects, but fell into the residue, *New* v. *Bonaker*, 4 L. R. Eq. 655.

surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied.

Where the rents increase, the surplus will be applied to like charitable purposes.

(II.) Where a person settles lands, or the rents and profits of lands to purposes which at the time exhaust the whole proceeds, but, in consequence of an increase in the value of the estate, an excess of income subsequently arises, the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount (*a*).

Exceptions from the foregoing rules.

(III.) But even in the case of charity, if the settlor do not give the land, or the whole rents of the land, but, noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir at law (*b*), *or* will belong to the donee of the property subject to the charge, if the donee be (as in the case of a charitable corporation) itself an object of charity (*c*).

The doctrine in favour of charities established before trusts were settled.

The exceptions we have noticed were established at an early period, when the doctrine of resulting trusts was imperfectly understood (*d*). The interest of the heir was shut entirely out of

(*a*) *Inhabitants of Eltham* v. *Warreyn*, Duke 67; *Sutton Colefield case*, second resolution, Id. 68; *Hynshaw* v. *Morpeth Corporation*, Id. 69; *Thetford School case*, 8 Rep. 130 *b*; *Attorney-General* v. *Johnson*, Amb. 190; *Kennington Hastings case*, Duke 71; *Attorney-General* v. *Mayor of Coventry*, 2 Vern. 397, reversed in D. P. 7 B. P. C. 236; (see the foregoing cases commented upon by Lord Eldon in *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 316); *Attorney-General* v. *Cooper's Company*, 19 Ves. 189, *per* Lord Eldon; *Attorney-General* v. *Master of Catherine Hall, Cambridge*, Jac. 381; *Attorney-General* v. *Christ's Hospital*, Ib. 73; *Attorney-General* v. *Corporation of Southmolton*, 14 Beav. 357; *S. C.* 5 H. L. C. 1; and see also *Attorney-General* v. *Wilson*, 3 M. & K. 362; *Lad* v. *London City*, Mos. 99; *Attorney-General* v. *Coopers' Company*, 3 Beav. 29; *Attorney-General* v. *Beverley*, 6 H. L. Cas. 310; *Attorney-General* v. *Draper's Company*, 2 Beav. 508; 4 Beav. 67; *Attorney-General* v. *Merchants Venturers' Society*, 5 Beav. 338; *Attorney-General* v. *Caius College*, 2 Keen, 150; *Attorney-General* v. *Wax Chandlers' Company*, 6 L. R. H. L. 1; *Attorney-General* v. *Smythies*, 2 R. & M. 717; *Attorney-General* v. *Drapers' Company*, 6 Beav. 382; *Attorney-General* v. *Jesus College*, 29 Beav. 163 [and see Wh. & Tudor's Leading Cases, 3rd ed., p. 52; Tyssen on Charitable Bequests, p. 244.] The additional benefit is not always distributed amongst the different objects of the charity ratably, but the Court exercises a discretion as to the proportions, *Attorney-General* v. *Marchant*, 3 L. R. Eq. 424.

(*b*) See *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 308.

(*c*) *Attorney-General* v. *Beverley*, 6 H. L. Cas. 310; *Attorney-General* v. *Southmolton*, 5 H. L. Cas. 1; *Attorney-General* v. *Trinity College*, 24 Beav. 383; *Attorney-General* v. *Dean of Windsor*, 24 Beav. 679; affirmed in D. P. 8 H. L. Cas. 369; *Attorney-General* v. *Sidney Sussex College*, 4 L. R. Ch. App. 722; *Attorney-General* v. *Wax Chandlers' Company*, 8 L. R. Eq. 452, 5 L. R. Ch. App. 503; 6 L. R. H. L. 1; and see *Attorney-General* v. *Mercers' Company*, 22 L. T. N.S. 222; 18 W. R. 448; *Merchant Taylors' Company* v. *Attorney-General*, 11 L. R. Eq. 35; affirmed, 6 L. R. Ch. App. 512.

(*d*) *Attorney-General* v. *Johnson*,

sight, and the question was viewed as between the charity and the trustee (*a*). Were the subject still unprejudiced by authority, there is little doubt but the Court would, at the present day, follow the general principle, and hold a trust to result (*b*).

SECTION II.

OF RESULTING TRUSTS UPON PURCHASES IN THE NAMES OF THIRD PERSONS.

PURCHASES of this kind are governed by different rules, according to the relation which subsists at the time between the person who pays the money, and the person in whose name the conveyance is taken. We must, therefore, distribute the subject under two heads: First, Purchases in the name of a stranger; and Secondly, Purchases in the name of a child, or wife, or near relative.

First. Where the purchase is in the name of a stranger.

General rule.

1. "The clear result," said Lord Chief Baron Eyre, "of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several, whether jointly (*c*), or *successivè* (*d*), results to the man who advances the purchase money (*e*); and it goes on a strict analogy to the rule of the common law, that where a

Amb. 190, *per* Lord Hardwicke; *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 307, *per* Lord Eldon.

(*a*) See *Thetford School case*, 8 Rep. 130.

(*b*) See *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 307.

(*c*) See *Ex parte Houghton*, 17 Ves. 251; *Rider* v. *Kidder*, 10 Ves. 367.

(*d*) *Withers* v. *Withers*, Amb. 151; *Howe* v. *Howe*, 1 Vern. 415; *Goodright* v. *Hodges*, 1 Watk. Cop. 227; *S. C.* Lofft, 230; *Smith* v. *Baker*, 1 Atk. 385; *Clark* v. *Danvers*, 1 Ch. Ca. 310; *Prankerd* v. *Prankerd*, 1 S. & S. 1.

(*e*) *Redington* v. *Redington*, 3 Ridg. 177, *per* Lord Loughborough; *Hungate* v. *Hungate*, Tothill, 120; *Ex parte Vernon*, 2 P. W. 549; *Ambrose* v. *Ambrose*, 1 P. W. 321; *Willis* v. *Willis*, 2 Atk. 71; *Woodman* v. *Morrel*, 2 Freem. 33 *per Cur.*; *Finch* v. *Finch*, 15 Ves. 50, *per* Lord Eldon; *Grey* v. *Grey*, 2 Sw. 597; *S. C.* Finch, 340, *per* Lord Nottingham; *Wray* v. *Steele*, 2 V. & B. 390, *per* Sir T. Plumer; *Smith* v. *Camelford*, 2 Ves. jun. 712, *per* Lord Loughborough; *Anon.* 2 Vent. 361; *Pelly* v. *Maddin*, 21 Vin. Ab. 498; *Lever* v. *Andrews*, 7 B. P. C. 288; *Lade* v. *Lade*, 1 Wils. 21; *Groves* v. *Groves*, 3 Y. & J. 170, *per* Ch. Bar. Alexander; *Murless* v. *Franklin*, 1 Sw. 17, 18, *per* Lord Eldon; *Crop* v. *Norton*, 9 Mod. 235; *S. C.* Barn. 184; *S. C.* 2 Atk. 75, *per* Lord Hardwicke; *Trench* v. *Harrison*, 17 Sim. 111; *James* v. *Holmes*, 4 De G. F. & J. 470.

feoffment is made without consideration, the use results to the feoffor" (*a*).

Who in particular cases is the real purchaser.

2. But no trust will result unless the person advance the money in the character of a *purchaser;* for if A. discharge the purchase money by way of *loan* to B., in whose name the conveyance is taken, no trust will result in favour of A., who is merely a creditor of B. (*b*). And, on the other hand, should B. advance the purchase money, but only on account of A., then A. is the owner in equity, and B., who takes the conveyance, stands in the light of a creditor (*c*).

Principle applicable to personalty.

3. Not only *real estate* but *personalty* also is governed by these principles, as if a man take a bond (*d*), or purchase an annuity (*e*), stock (*f*), or other chattel interest (*g*), in the name of a stranger, the equitable ownership results to the person from whom the consideration moved.

Joint advance and purchase in name of third person.

4. In *Crop* v. *Norton* (*h*) Lord Hardwicke doubted whether the rule was not confined to an individual purchaser. But in *Wray* v. *Steele* (*i*) the point was expressly decided in conformity with the general principle; for what was there applicable to an advance by a *single* individual which was not equally applicable to a *joint* advance under similar circumstances?

Joint advance and purchase as joint-tenants.

5. If two persons, joining in a purchase, take the conveyance not in the name of a *stranger*, or of *one* of themselves, but in the names of *both* of themselves as joint-tenants, then a distinction must be observed between an *equal* and an *unequal* contribution.

Equal contribution.

In the former case there is nothing on which to ground the presumption of a resulting trust, for persons making equal advances might very consistently take an estate in joint tenancy, as each has it in his power to compel a partition, or by executing a conveyance to pass a moiety of the estate, and in the meantime each runs his own life against that of the other (*j*). And so, if

(*a*) *Dyer* v. *Dyer*, 2 Cox, 93; *S. C.* 1 Watk. Cop. 218.

(*b*) See *Bartlett* v. *Pickersgill*, 1 Eden, 516; *Crop* v. *Norton*, 9 Mod. 235.

(*c*) See *Aveling* v. *Knipe*, 19 Ves. 441.

(*d*) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.

(*e*) *Mortimer* v. *Davies*, cited *Rider* v. *Kidder*, 10 Ves. 363, 366.

(*f*) *Rider* v. *Kidder*, 10 Ves. 360; *Loyd* v. *Read*, 1 P. W. 607; and see *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Garrick* v. *Taylor*, 29 Beav. 79; *Beecher* v. *Major*, 2 Dr. & Sm. 431.

(*g*) See *Ex parte Houghton*, 17 Ves. 253; *Garrick* v. *Taylor*, 29 Beav. 79.

(*h*) Barn. 179; *S. C.* 9 Mod. 233; *S. C.* 2 Atk. 74.

(*i*) 2 V. & B. 388.

(*j*) *Robinson* v. *Preston*, 4 K. & J. 505; *Rea* v. *Williams*, Append. to Sugd. Vend. and Purch. 11th Ed.; *Moyse* v. *Gyles*, 2 Vern. 385; *York* v. *Eaton*, 2 Freem. 23; *Rigden* v. *Vallier*, 3 Atk. 735, *per* Lord Hardwicke *Hayes* v. *Kingdome*, 1 Vern. 33; *Aveling* v. *Knipe*, 19 Ves. 444, *per* Sir W. Grant; *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 291, *per* Sir Jos. Jekyll; *Anon.*

two persons *contract* for a purchase in favour of them and their heirs, and one of them dies, the Court, if they paid equal proportions, will specifically perform the agreement, by ordering a conveyance, not to the heir of the deceased person and the survivor as tenants in common, but to the survivor alone (*a*). But even where equal contributors take a conveyance in joint-tenancy, collateral circumstances may induce a Court of Equity to construe it a tenancy in common (*b*). Thus where two tenants in common, of a mortgage term, purchased the equity of redemption to them and their heirs, it was held that the nature of the inheritance should follow that of the term (*c*); for if two persons join in lending money upon mortgage, equity says it could not have been the intention that the interest in that should survive, but though they took a joint security, each meant to lend his own, and take back his own (*d*), [and the insertion of a joint account clause is not conclusive to the contrary (*e*).] And in all cases of a joint undertaking or partnership, by way of trade, or upon the hazard of profit and loss, the *jus accrescendi* is excluded, and the survivors are trustees, in due proportions, for the representatives of those who are dead (*f*). And where the purchasers pay equally, and take a joint estate, and one afterwards *improves* the property at his own cost, he has a lien upon the land *pro tanto* for the money he has expended (*g*).

Mortgage.

Trading.

Subsequent improvement by one.

Should the contribution of the parties be *unequal*, then in all cases a trust results to each of them in proportion to the amount originally subscribed (*h*).

Unequal contribution.

6. If A. discharge the fine on a grant of *copyholds* to B., C., and D. successively for their lives, the equitable interest will result to A.; but should A. die intestate, on whom will the remaining

Copyhold grant to B. for life, and fine paid by A., who on A.'s death shall have it?

Carth. 15; *Bone* v. *Pollard*, 24 Beav. 288; and see *Thicknesse* v. *Vernon*, 2 Freem. 84.

(*a*) *Aveling* v. *Knipe*, 19 Ves. 441.

(*b*) *Robinson* v. *Preston*, 4 K. & J. 505.

(*c*) *Edwards* v. *Fashion*, Pr. Ch. 332; and see *Aveling* v. *Knipe*, 19 Ves. 444.

(*d*) *Morley* v. *Bird*, 3 Ves. 631, *per* Lord Alvanley; *Rigden* v. *Vallier*, 3 Atk. 734, *per* Lord Hardwicke; *Anon. case* Carth. 16; *Partridge* v. *Pawlet*, 1 Atk. 467; *Petty* v. *Styward*, 1 Ch. Rep. 57; *Vickers* v. *Cowell*, 1 Beav. 529; and see *Robinson* v. *Preston*, 4 K & J. 511 [and *Steeds* v. *Steeds*, 22 Q. B. D. 537, where the principle was extended to a common money bond.]

[(*e*) *Re Jackson*, 34 Ch. D. 732.]

(*f*) *Lake* v. *Gibson*, Eq. Ca. Ab. 290; *S. C.* (by name of *Lake* v. *Craddock*) affirmed 3 P. W. 158; *Jeffereys* v. *Small*, 1 Vern. 217; *Elliot* v. *Brown*, cited *Jackson* v. *Jackson*, 9 Ves. 597; *Lyster* v. *Dolland*, 1 Ves. jun. 434, 435, *per* Lord Thurlow; and see *York* v. *Eaton*, 2 Freem. 23; *Bone* v. *Pollard*, 24 Beav. 288.

(*g*) *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 291, *per* Sir J. Jekyll.

(*h*) *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 291, *per* Sir J. Jeckyll; *Rigden* v. *Vallier*, 3 Atk. 735, *per* Lord Hardwicke; *Hill* v. *Hill*, 8 Ir. R. Eq., 140; affirmed Ib. 622.

equity devolve? Estates *pur autre vie* in copyholds were not within the Statute of Frauds (*a*), nor the 14 G. 2. c. 20, s. 9 (*b*), nor is there a general occupancy of a trust (*c*), and before the Wills Act the questions were asked, Can the *heir* take an estate which has no descendible property; or can the *executor* claim as assets what is not of the nature of personalty? or shall the tenants of the legal estate become the beneficial proprietors in the absence of any one to advance a better title (*d*)? In *Clark* v. *Danvers* (*e*) the plaintiff was both *heir* and *executor* of the equitable owner, and was decreed the benefit of the trust. In *Howe* v. *Howe* (*f*) the administratrix was held entitled, and so it was allowed in *Rundle* v. *Rundle* (*g*), and *Withers* v. *Withers* (*h*), and was subsequently sanctioned by the high authority of Lord Mansfield (*i*). Now by the Wills Act (7 W. 4. and 1 Vict. c. 26, s. 6) it is declared, that, where there is no special occupant, an estate *pur autre vie* whether in freehold or in copyhold shall, if not disposed of by the will of the grantee, go to his personal representative (*j*).

Purchase of a ship in stranger's name.

7. The Court cannot imply a resulting trust in evasion of an Act of Parliament, and therefore [under the old Registry Acts,] if A., on purchasing a ship, took the transfer in the name of B., the complete ownership, both legal and equitable, was in B. (*k*). In order to enforce the navigation laws, and secure to British subjects the exclusive enjoyment of British privileges, the Registry Acts required an exact history to be kept of every ship, how far throughout her existence she had been British built and British owned, and if implied trusts were permitted the whole intent of the legislature might have been indirectly defeated (*l*).

Exceptions to the rule.

However, in certain cases [even under the old law a person

(*a*) 29 Car. 2. c. 3, s. 12.

(*b*) *Rundle* v. *Rundle*, Amb. 152.

(*c*) *Penny* v. *Allen*, 7 De G. M. & G. 422; and see *Castle* v. *Dod*, Cro. Jac. 200.

(*d*) See *Jones* v. *Goodchild*, 3 P. W. 33, note B.

(*e*) 1 Ch. Ca. 310.

(*f*) 1 Vern. 415.

(*g*) 2 Vern. 252, 264; *S. C.* Amb. 152.

(*h*) Amb. 151.

(*i*) *Goodwright* v. *Hodges*, 1 Watk. Cop. 228; and see *Rumboll* v. *Rumboll*, 2 Eden, 15.

(*j*) *Reynolds* v. *Wright*, 25 Beav. 100; 2 De G. F. & J. 590. [Where leaseholds for lives were conveyed to trustees, their executors, administrators, and assigns in trust (in the events which happened) for certain persons absolutely but without words of limitation, it was held in a case in Ireland, that the personal representatives of the *cestuis que trust* became entitled on their deaths to the property, either as special occupants, as indicated in the grant, or under the statute in default of a special occupant; *Croker* v. *Brady*, 4 L. R. Ir. 653; overruling S. C. 4 L. R. Ir. 61.]

(*k*) *Ex parte Yallop*, 15 Ves. 60; *Ex parte Houghton*, 17 Ves. 251; *Camden* v. *Anderson*, 5 T. R. 709.

(*l*) See *Ex parte Yallop*, 15 Ves. 66, 69.

might have been] the registered owner and still have been a trustee. When, for instance, one of the members of a firm had a ship registered in his name, it was held by him in trust for the firm including the other partners (*a*). And when a ship was registered by mistake in the name of a person who was not the owner of it, and where the person who transferred it to him had no interest in it, the transferee did not acquire such a title to the ship as to deprive the rightful owner of it (*b*). [And in delivering judgment in the case of *Holderness* v. *Lamport*, Sir J. Romilly, M.R., observed,] "If letters of administration were obtained to the estate of a shipowner, and the administrator transferred the ship into his own name, and afterwards a will was discovered and probate granted to the executor, could it be contended that the executor was precluded from obtaining the ship, because another person had, *bonâ fide* but by mistake, been registered as the owner?" (*c*).

[The law has, however, been lately modified so as to allow of a beneficial interest in a ship in persons not appearing on the register, and under the Acts now in force, although no notice of a trust is allowed on the register, equities may be enforced against the registered owners of ships or shares of ships in the same manner as they may be enforced in respect of any other personal property (*d*), and it follows that if a ship be purchased by A. in the name of a stranger, there will be a resulting trust in favour of A.] [Recent statutes.]

8. While the papistry laws were in force, if A., a papist, had purchased an estate in the name of B., the Court could not have presumed a resulting trust to A., which as soon as raised, would have become forfeitable to the State (*e*). Resulting trusts under papistry Acts.

9. And so if a purchaser take a conveyance in the name of another, with a view of giving him a vote for a member of parliament, he cannot afterwards claim the beneficial ownership, for the operation of such a right would render the original purchase fraudulent (*f*). In purchases for giving votes.

[10. Under the Patents, Designs and Trade Marks Act, 1883, no notice of any trust is allowed on the register, and the registered [Patents, designs and trade marks.]

(*a*) *Holderness* v. *Lamport*, 29 Beav. 129, *per* M. R.

(*b*) *Holderness* v. *Lamport*, 29 Beav. 129.

(*c*) Ib.

[(*d*) See 17 & 18 Vict. c. 104, ss. 37, *et seq.*; 25 & 26 Vict. c. 63, s. 3; 43 & 44 Vict. c. 18, s. 2; and see *Chasteauneuf* v. *Capeyron*, 7 App. Cas. 127.]

(*e*) See *Redington* v. *Redington*, 3 Ridg. 184.

(*f*) *Groves* v. *Groves*, 3 Y. & J. 163, see 172, 173.

proprietor of a patent, copyright in a design, or trade mark, as the case may be, is empowered (subject to any rights appearing from the register to be vested in any other person) absolutely to assign, grant licences as to, or otherwise deal with, the same, and to give effectual receipts for any consideration for such assignment, licence, or dealing. But any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property (*a*).]

Parol evidence as regards Statute of Frauds.

11. As the Statute of Frauds (*b*) extends to creations or declarations of trusts by parties only, and does not affect, indeed expressly excepts, trusts arising by operation or construction of law, it is competent for the real purchaser to prove his payment of the purchase-money by *parol*, even though it be otherwise expressed in the deed.

In *Kirk* v. *Webb* (*c*) the Court refused to admit evidence, and the decision was followed in subsequent cases (*d*); however, the doctrine, though supported by numerous precedents, has since been clearly overthrown by the concurrent authority of the most distinguished judges (*e*).

Purchase by an agent.

The rule as at present established will not warrant the admission of parol evidence, where an estate is purchased by an *agent*, and no part of the consideration is paid by the employer; for though an agent is a trustee in equity, yet the trust is one arising *ex contractu*, and not resulting by operation of law (*f*). The agent may be indicted for perjury in denying his character, and may be convicted, yet the Court has no power to decree the trust (*g*).

[(*a*) 46 & 47 Vict. c. 57, ss. 85, 87; 51 & 52 Vict. c. 50, s. 21.]

(*b*) 29 Car. 2, c. 3.

(*c*) Prec. Ch. 84.

(*d*) *Heron* v. *Heron*, Pr. Ch. 163; *S. C.* Freem. 246; *Skett* v. *Whitmore*, Freem. 280; *Kinder* v. *Miller*, Pr. Ch. 172; and see *Halcott* v. *Markant*, Pr. Ch. 168; *Hooper* v. *Eyles*, 2 Vern. 480; *Newton* v. *Preston*, Pr. Ch. 103; *Cox* v. *Bateman*, 2 Ves. 19; *Ambrose* v. *Ambrose*, 1 P. W. 321; *Deg* v. *Deg*, 2 P. W. 414. The earlier case of *Gascoigne* v. *Thwing*, 1 Vern. 366, was in harmony with the modern doctrine.

(*e*) *Ryall* v. *Ryall*, 1 Atk. 59; *S. C.* Amb. 413; *Willis* v. *Willis*, 2 Atk. 71; *Bartlett* v. *Pickersgill*, 1 Eden, 515; *Lane* v. *Dighton*, Amb. 409; *Knight* v. *Pechey*, 1 Dick. 327; *S. C.* cited from MS. 3 Vend. & Purch. 258; *Groves* v. *Groves*, 3 Y. & J. 163; *Lench* v. *Lench*, 10 Ves. 517; *Gray* v. *Lucas*, W. N. 1874, p. 223.

(*f*) *Bartlett* v. *Pickersgill*, 1 Eden, 515; [1 Cox, 15; 14 Ea. 576 n.;] *Rastel* v. *Hutchinson*, 1 Dick. 44; *Lamas* v. *Bayly*, 2 Vern. 627; *Atkins* v. *Rowe*, Mose. 39; *S. C.* Cas. Dom. Proc. 1730.

(*g*) *Bartlett* v. *Pickersgill*, *sup.* [In *Heard* v. *Pilley*, 4 L. R. Ch. 548, 553, doubt was expressed whether *Bartlett* v. *Pickersgill* was not "inconsistent with all the authorities of this Court, which proceed upon the footing that it will not allow the Statute of Frauds to be used as an instrument of fraud;" but in the recent case of *James* v. *Smith*, 39 W. R. 396; 63 L. T. N.S. 524, Kekewich, J., was of opinion that *Bartlett* v. *Pickersgill* was not overruled by *Heard* v. *Pilley*, and was still sound law. In *Heard* v. *Pilley* the

The employer, therefore, as he could not profit by the conviction, was never prevented by interest from being a witness against the agent (*a*).

Parol evidence must be clear.

And parol evidence, where admitted, must prove the fact very *clearly* (*b*); though no objection lies against the reception of *circumstantial* evidence, as that the means of the pretended purchaser were so slender as to make it impossible he should have paid the purchase-money himself (*c*).

Trust may be proved against defendant's denial.

And should the nominal purchaser *deny* the trust by his answer the solemnity of the defendant's oath will of course require a considerable weight of evidence to overcome its impression (*d*).

Of written evidence after the death of the nominal purchaser.

12. It is laid down by Mr. Sanders, that "if a person at his death leave any papers disclosing the real circumstances of the case, the Court will raise the trust even against the express declaration of the purchase-deed" (*e*). We have seen that, according to the latest authorities, parol evidence is in ordinary cases admissible against the language of the purchase-deed; but if Mr. Sanders's opinion to the contrary were well founded, it does not appear how mere papers would satisfy the requisitions of the statute; for, to have that effect, the writings ought also to be *signed* by the party. The cases of *Ryall* v. *Ryall* (*f*) and *Lane* v. *Dighton* (*g*), which are cited for the position, do not at all turn upon the distinction suggested.

Of parol evidence after the death of the nominal purchaser.

13. It is observed by the same writer, that, "*after the death of the supposed nominal purchaser*, parol proof alone can in no instance be admitted against the express declaration of the

agent had not taken a conveyance, the contract of agency was allowed to be proved by parol evidence, and the action was for relief based on that contract, and not on any contract by the agent to convey the land, or on the ground that he was a trustee of the land. *Lees* v. *Nuttall*, 1 Russ. & My. 53; 2 My. & K. 819; *Cave* v. *Mackenzie*, 46 L. J. Ch. 564; and *Chattock* v. *Muller*, 8 Ch. D. 177, turned on similar considerations. The decision of Malins, V.C., in *Booth* v. *Turle*, 16 L. R. Eq. 182 (which does not appear to have been cited in *James* v. *Smith*), is, no doubt, difficult to reconcile with *Bartlett* v. *Pickersgill*; but upon the whole it is submitted that that case is still an authority, at all events in cases where the conduct of the agent is not proved to be fraudulent.]

(*a*) *King* v. *Boston*, 4 East, 572.

(*b*) *Gascoigne* v. *Thwing*, 1 Vern. 366; *Halcott* v. *Markant*, Pr. Ch. 168; *Willis* v. *Willis*, 2 Atk. 71; *Goodright* v. *Hodges*, 1 Watk. Cop. 229, *per* Lord Mansfield; *Groves* v. *Groves*, 3 Y. & J. 163; and see *Rider* v. *Kidder*, 10 Ves. 364

(*c*) *Willis* v. *Willis*, 2 Atk. 71, *per* Lord Hardwicke; and see *Lench* v. *Lench*, 10 Ves. 518; *Wilkins* v. *Stevens*, 1 Y. & C. C. C. 431.

(*d*) See *Cooth* v. *Jackson*, 6 Ves. 39.

(*e*) Uses and Trusts, c. 3, s. 7, div. 2.

(*f*) Amb. 413.

(*g*) Amb. 409.

deed" (*a*); but the cases relied upon in support of this doctrine (*b*) do not distinguish between proofs in a person's lifetime and after his decease; they are certainly authorities for the exclusion of parol evidence universally, but in this respect, as before noticed, they have been subsequently overruled. It would seem upon principle, that the death of the nominal purchaser cannot affect the *admissibility* of parol testimony, whatever effect it may have in detracting from its *weight*.

Of following trust-money into land.

14. In the question, whether a purchase in the name of a third person can be established by parol testimony, is also involved the question, whether trust money can be followed into *land* by parol. A purchase with trust money is virtually a purchase paid for by the *cestuis que trust;* and on the ground that such a purchase is a trust resulting by operation of law, and not within the purview of the Statute of Frauds, it has been settled that parol evidence is clearly admissible (*c*).

The resulting trust may be rebutted by parol.

15. As in the cases we have been considering the trust results to the real purchaser by presumption of law, which is merely an *arbitrary implication* in the absence of *reasonable proof* to the contrary, the nominal purchaser is at liberty to rebut the presumption by the production of parol evidence showing the intention of conferring the beneficial interest (*d*); and the evidence to rebut need not be as strong as evidence to create a trust (*e*). And as he may repel the presumption *in toto*, so may he in part; as by proving the purchaser's intention to permit the legal tenant to enjoy beneficially for life (*f*); [or, where stock has been transferred into the joint names of the transferor and another person, by proving the intention of the transferor to have the dividends for his life, and that the transfer should enure for the benefit of such other person if he survived the transferor (*g*).]

(*a*) Uses and Trusts, c. 3, s. 7, div. 2.

(*b*) *Kirk* v. *Webb*, Pr. Ch. 84; *S. C.* Freem. 229; *Heron* v. *Heron*, Pr. Ch. 163; *Halcott* v. *Markant*, Id. 168; *Kinder* v. *Miller*, Id. 172; *S. C.* 2 Vern. 440; *Deg* v. *Deg*, 2 P. W. 414; *per* Lord King.

(*c*) *Lench* v. *Lench*, 10 Ves. 517, *per* Sir W. Grant; *Ryall* v. *Ryall*, 1 Atk. 59; *S. C.* Amb. 413; *Lane* v. *Dighton*, Amb. 409; *Balgney* v. *Hamilton*, Amb. 414; *Trench* v. *Harrison*, 17 Sim. 111.

(*d*) *Goodright* v. *Hodges*, 1 Watk. Cop. 227; *S. C.* Lofft, 230; *Rider* v. *Kidder*, 10 Ves. 364; *Rundle* v. *Rundle*, 2 Vern. 252, 264; *Taylor* v. *Taylor*, 1 Atk. 386; *Redington* v. *Redington*, 3 Ridg. 106; see 165, 177, 178; [*Standing* v. *Bowring*, 27 Ch. D. 341, 31 Ch. Div. 82]; *Garrick* v. *Taylor*, 29 Beav. 79; *Beecher* v. *Major*, 2 Dr. & Sm. 431.

(*e*) *Nicholson* v. *Mulligan*, 3 Ir. R. Eq. 332, *per cur.*

(*f*) *Rider* v. *Kidder*, 10 Ves. 360, see 368; *Benbow* v. *Townsend*, 1 M. & K. 506; and see *Nicholson* v. *Mulligan*, 3 Ir. R. Eq. 308.

[(*g*) *Standing* v. *Bowring*, 27 Ch. D. 341; 31 Ch. Div. 282.]

16. When it has been once ascertained that the understanding of the parties at the time of the purchase was that the legal owner should also be the beneficial owner, it is not competent to the person who paid the money to put a different construction upon the instrument at any subsequent period, and claim the estate against his intentions at the time (*a*); and even if under such circumstances the legal tenant agreed afterwards to execute a conveyance to the person who paid the money, the Court would not enforce the contract, if merely voluntary (*b*). Declarations subsequent to the purchase.

17. The real purchaser may be barred of his interest by laches, for the presumption of a resulting trust will not be raised, after a great length of time, more particularly if it be in opposition to the evidence afforded by the actual enjoyment (*c*). Effect of time.

Secondly. Where the purchase is made by a person in the name of a child, or wife, or near relative.

Where a father purchases in the name of his child, the presumption of law is, that a provision was intended (*d*). The grounds of this doctrine are well stated by Lord Chief Baron Eyre (*e*). "The circumstance," he said, "of one or more of the nominees being a child or children of the purchaser, is held to operate by *rebutting the resulting trust;* and it has been determined in so many cases that the nominee being a child shall have such operation as a *circumstance of evidence*, that it would be disturbing landmarks if we suffered either of these proposi- Advancement. The relationship of father and child a mere circumstance of evidence.

(*a*) *Groves* v. *Groves*, 3 Y. & J. 172, *per* Alexander, C. B.

(*b*) *Groves* v. *Groves*, 3 Y. & J. 163.

(*c*) *Delane* v. *Delane*, 7 B. P. C. 279; and see *Groves* v. *Groves*, 3 Y. & J. 172; *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

(*d*) *Dyer* v. *Dyer*, 2 Cox, 93; *S. C.* 1 Watk. Cop. 219, *per* Eyre, C. B.; *Grey* v. *Grey*, 2 Swans. 597; *S. C.* Finch, 340, *per* Lord Nottingham, *Sidmouth* v. *Sidmouth*, 2 Beav. 454, *per* Lord Langdale; *Redington* v. *Redington*, 3 Ridg. 176, *per* Lord Loughborough; *Christy* v. *Courtenay*, 13 Beav. 96; *Elliot* v. *Elliot*, 2 Ch. Ca. 231, agreed; *Bedwell* v. *Froome*, cited 2 Cox. 97, and 1 Watk. Cop. 224, *per* Sir T. Sewell; *Goodright* v. *Hodges*, 1 Watk. Cop. 228, *per* Lord Mansfield; *Pole* v. *Pole*, 1 Ves. 76, *per* Lord Hardwicke; *Lamplugh* v. *Lamplugh*, 1 P. W. 111, 2nd point; *Woodman* v. *Morrel*, 2 Freem. 33, *per cur.*; *Murless* v. *Franklin*, 1 Sw. 17, 18, *per* Lord Eldon; *Finch* v. *Finch*, 15 Ves. 50, *per eundem*; Fearne's P. W. 327, &c. ["Where money is paid by one man to another, the legal presumption is that it was paid in discharge of some prior debt or obligation, and not that it was meant as a gift; and if money is paid by a father to a son, and nothing beyond the fact of payment is proved, there is no legal obligation on the son to repay it, and the equitable doctrine that there is a presumption that moneys advanced by a father to a son are intended as a gift has no application. The onus of proof is in the person who claims repayment to show that there was some contract rendering the payee liable to repay the money," *per* Jessel, M. R., *Ex parte Cooper*, W. N. 1882, p. 96.]

(*e*) *Dyer* v. *Dyer*, 2 Cox, 94; *S. C.* 1 Watk. Cop. 218; and see Lord Nottingham's observations in *Grey* v. *Grey*, 2 Sw. 598.

tions to be called into question;—namely, That such circumstance shall rebut the resulting trust; and, That it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine, if the children had been considered as *purchasers for valuable consideration*. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must, of course, be evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea without very certain guides."

The difficulties arising from the light in which the question has been viewed will amply appear from the numerous refined distinctions upon which the Court from time to time has been called upon to adjudicate.

Case of the child being an infant.

1. A distinction was formerly taken where the child was an *infant* (*a*); for a parent, it was said, could scarcely have intended to bestow a separate and independent provision upon one utterly incapable of undertaking the management of it. But still more improbable was the supposition that an infant should have been selected as a trustee (*b*), and accordingly the notion has long since been overruled (*c*); nay, the infancy of the child is now looked upon as a circumstance particularly favourable (*d*).

Purchase of a reversionary estate.

2. It was objected, that a *reversionary estate*, from the uncertainty of the time when it would fall into possession, was not such a kind of interest as a parent would prudently purchase by way of provision for a child; but mere proximity or remoteness of the enjoyment, whether the reversion be expectant on the decease of the parent or a stranger, has since been held clearly insufficient to countervail the general rule (*e*).

Purchase in joint names of father and son.

3. A purchase in the *joint* names of the father and son has met with objections; "for this," observed Lord Hardwicke, "does not answer the purpose of an advancement, as it entitles the father to the possession of the whole till a division, and to a moiety absolutely even after a division, besides the father's

(*a*) 2 Freem. 128, c. 151; and see *Binion* v. *Stone*, Id. 169; *S. C.* Nels. 68.

(*b*) See *suprà*, p. 36.

(*c*) *Lamplugh* v. *Lamplugh*, 1 P.W. 111; *Lady Gorge's case*, cited 2 Sw. 600; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; *Christy* v. *Courtenay*, 13 Beav. 96; *Collinson* v. *Collinson*, 3 De G. M. & G. 403; *Mumma* v. *Mumma*, 2 Vern. 19; *Finch* v. *Finch*, 15 Ves. 43, &c.

(*d*) Fearne's P. W. 327.

(*e*) *Rumboll* v. *Rumboll*, 2 Eden, 17, *per* Lord Henley; *Finch* v. *Finch*, 15 Ves. 43; *Murless* v. *Franklin*, 1 Sw. 13.

taking a chance to himself of being a survivor of the other moiety: nay, if the son die during his minority, the father would be entitled to the whole by survivorship, and the son could not prevent it by severance, he being an infant" (*a*). But surely no improvidence can be justly charged on a parent who so settles his estate, that if the son die a minor it shall revert to himself; that until the marriage of the son or other pressing occasion, the father and son shall possess an equal interest during their joint lives, with the right of survivorship as to the whole; that the son shall have the power, when necessary, of settling one moiety of the estate, but shall leave the other moiety to his parent. Whatever opinion may be entertained as to the *principle*, the doubts above expressed by Lord Hardwicke can scarcely be maintained in opposition to repeated decisions (*b*). A purchase in the joint names of the son and a *stranger* is less favourable to the supposition of an intended advancement (*c*); but even here the right of the child is now indisputably established (*d*). However, the advancement cannot be *more extensive than the legal estate in the child* (*e*); and therefore the *stranger, quatenus* the legal estate vested in *him*, must hold upon trust for the father (*f*).

Purchase of copyholds granted for lives *successivè*.

4. It is the custom, in many manors, to make grants for lives *successivè*. Should a father pay a fine upon a grant to himself and his two sons, shall this be held an advancement or a trust? Upon the difficulty of this case, Lord Chief Baron Eyre remarked, that "when the lessees were to take *successivè*, the father could not take the whole in his own name, but *must* insert other names in the lease, and that there might be many prudential reasons for putting in the life of a child as trustee for him, in preference to any other person." (*g*). And in accordance with this reasoning was decided the case of *Dickinson* v. *Shaw* (*h*); but in *Dyer* v. *Dyer* (*i*) the notion was overruled as savouring

(*a*) *Stileman* v. *Ashdown*, 2 Atk. 480; and see *Pole* v. *Pole*, 1 Ves. 76.

(*b*) *Scroope* v. *Scroope*, 1 Ch. Ca. 27; *Back* v. *Andrews*, 2 Vern. 120; *Grey* v. *Grey*, 2 Sw. 599, and cases there cited; *Dummer* v. *Pitcher*, 2 M. and K. 272.

(*c*) See *Hayes* v. *Kingdome*, 1 Vern. 34.

(*d*) *Lamplugh* v. *Lamplugh*, 1 P. W. 111; *Kingdome* v. *Bridges*, 2 Vern. 67. [And see *Re Eykyn's Trusts*, 6 Ch. D. 115.]

(*e*) See *Rumboll* v. *Rumboll*, 1 Eden, 17.

(*f*) See *Kingdome* v. *Bridges*, 2 Vern. 67; *Lamplugh* v. *Lamplugh*, 1 P. W. 112.

(*g*) *Dyer* v. *Dyer*, 2 Cox, 95; *S. C.* 1 Watk. Cop. 221.

(*h*) Cited 2 Cox, 95; 1 Watk. Cop. 221.

(*i*) 2 Cox, 92; 1 Watk. Cop. 216.

too much of refinement; and so at the present day it must be considered as settled (*a*).

Child already provided for.

5. It may happen, that the child in whose name the purchase is taken may have been *already provided for*, a circumstance of very considerable weight in rebutting the presumption of further advancement. "The rule of equity," said Lord Chief Baron Eyre, "as recognised in other cases, is, that the father is the only judge on the question of a son's provision, and therefore the distinction of the son being provided for or not is not very solidly taken" (*b*). However, the distinction has been relied upon in several cases (*c*), and has been repeatedly recognised by the highest authorities (*d*). At the same time, it must be noticed that the prior advancement of the child has always been accompanied with some additional circumstance that tended to strengthen the presumption that no further provision was designed (*e*); and Lord Loughborough laid down the general rule to be, that a purchase made by a father in the name of a son, already fully advanced and established by him, not *was* but *might* be, a trust for the father (*f*).

Whether child considered as provided for when adult.

It is said by Lord Chief Baron Gilbert, that "if a father purchase in the name of a son *who is full of age, which by our law is an emancipation out of the power of the father*, there if the father take the profits, etc., the son is a trustee for the father" (*g*). But for this opinion there appears to be not the slightest ground (*h*). The provision must exist not by a fiction of law, but *bonâ fide* and substantially; "as," said Lord Nottingham, "if the son be married in his father's lifetime, and with his father's consent, and a settlement be thereupon made, whereby the son appears to be fully advanced, and in a manner emancipated" (*i*). A provision in part will not have the effect of rebutting the presumption of advancement (*j*); and the settlement of a reversionary estate upon the son will not be deemed

Previous provision in part.

Reversionary estate not a provision.

(*a*) *Swift* v. *Davis*, 8 East, 354, note (*a*); Fearne's P. W. 327; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; *Jeans* v. *Cooke*, 24 Beav. 513.

(*b*) *Dyer* v. *Dyer*, 2 Cox, 94; *S. C.* 1 Watk. Cop. 220.

(*c*) *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Pole* v. *Pole*, 1 Ves. 76.

(*d*) See *Grey* v. *Grey*, 2 Sw. 600; *S. C.* Finch, 341; *Lloyd* v. *Read*, 1 P. W. 608; *Redington* v. *Redington*, 3 Ridg. 190; Gilb. Lex. Præt. 271.

(*e*) *Pole* v. *Pole*, *Elliot* v. *Elliott*, *ubi suprà*; and see *Grey* v. *Grey*, 2 Sw. 600; Gilb. Lex. Præt. 271.

(*f*) *Redington* v. *Redington*, 3 Ridg. 190; and see *Sidmouth* v. *Sidmouth*, 2 Beav. 456; [*Re Gooch*, 62 L. T. N. S. 384.]

(*g*) Lex. Præt. 271.

(*h*) In *Grey* v. *Grey* (*ubi suprà*), for instance, the son was of age.

(*i*) *Grey* v. *Grey*, 2 Sw. 600.

(*j*) Ib; *Redington* v. *Redington*, 3 Ridg. 190.

a provision, for he might starve before it fell into possession (*a*).

Case of father holding the possession, and child an infant.

6. Suppose the father continues, after the purchase, in the perception of the rents and profits, and exerts other acts of ownership, then, if the son be an infant, it is said, as the parent is the natural *guardian* of the child, the perception of the profits or other exercise of dominion shall be referred to that ground, and the right of the son shall not be prejudiced, and so in numerous cases the point has been adjudged (*b*); and it will not vary the case if the son sign receipts in the name of the father, for during his minority he could give no other receipts that would discharge the tenants who hold by lease from his father (*c*). Lord Chief Baron Eyre expressed himself dissatisfied with this reasoning in reference to the guardianship (*d*), and Lord Nottingham referred the decisions to a higher ground. "Some," he said, "have taken the difference, that where the father has colour to receive the rents as guardian, there perception of profits is no evidence of a trust: otherwise it would be if the perception of profits were without any such colour. Plainly the reason of the resolutions stands not upon the *guardianship*, but upon the *presumptive advancement*, for a purchase in the name of an infant *stranger* (that is, notwithstanding the relation of guardian and ward) with perception of profits, etc., will be evidence of a trust" (*e*).

Son signing receipts for rents in father's name.

Chief Baron Eyre's opinion.

Lord Nottingham's opinion.

Case of a father holding the possession, and son adult.

7. Suppose the father purchases in the name of the son who is *adult*, and then, without contradiction from the son, takes the rents and profits, and exerts other acts of ownership; even here it has been determined that the right of the son will prevail. A stronger instance can hardly be conceived than occurred in the very leading case of *Grey* v. *Grey* (*f*), before Lord Nottingham. We have his lordship's own manuscript of this case, and the circumstances are thus stated:—"The evidence to prove this purchase in the name of the son to be a trust for the father consists of—1st, father possessed the money; 2ndly, received the profits twenty years; 3rdly, made leases; 4thly, took fines; 5thly, enclosed part in a park; 6thly, built much; 7thly, pro-

Grey *v.* Grey.

(*a*) *Lamplugh* v. *Lamplugh*, 1 P. W. 111.

(*b*) *Gorge's case*, cited Cro. Car. 550, & 2 Sw. 600; *Mumma* v. *Mumma*, 2 Vern. 19; *Taylor* v. *Taylor*, 2 Atk. 386; *Lamplugh* v. *Lamplugh*, 1 P. W. 111; and see *Stileman* v. *Ashdown*, 2 Atk. 480; *Lloyd* v. *Read*, 1 P. W. 608; *Christy* v. *Courtenay*, 13 Beav. 96; *Fox* v. *Fox*, 15 Ir. Ch. Rep. 89.

(*c*) *Taylor* v. *Taylor*, 1 Atk. 386.

(*d*) *Dyer* v. *Dyer*, 2 Cox, 94; *S. C.* 1 Watk. 220.

(*e*) *Grey* v. *Grey*, 2 Sw. 600.

(*f*) 2 Sw. 594; Finch, 338.

vided materials for more; 8thly, directed Lord Chief Justice North to draw a settlement; 9thly, treated about the sale of it" (*a*): yet, for all this, it was decided, after long and mature deliberation, that the consideration of blood and affection was so predominant, that the father's perception of rents and profits, or making leases, or the like acts, which the son, in good manners, did not contradict, could not countervail it (*b*). The propriety of this decision, upon principle independently of authority, has been called into question (*c*). It might perhaps be successfully contended, that Lord Nottingham's determination was founded upon the more enlarged view of the subject in respect even of *principle;* however, the point must at the present day be considered as settled at least upon *authority*, if any point can be considered as settled after repeated decisions (*d*).

[Policy on father's life.]

[So if a father effects a policy of assurance on his own life in the name of a child, and himself pays the premiums and retains the policy until the time of his death, the child will be entitled to the benefit of the policy (*e*).]

[Contract of purchase by son only.]

[Where a contract to purchase a business was entered into by *the son alone*, the purchase-money being payable by instalments, and the father paid a sum in cash, and the rest was secured by the joint and several promissory notes of the father and son, it was held that the case was not one of advancement, but merely of suretyship (*f*).]

Evidence from facts to rebut the presumption.

8. The advancement of the son is a mere question of intention, and, therefore, facts *antecedent to* or *contemporaneous with* the purchase (*g*), or so *immediately after* it as to constitute part of the same transaction (*h*), may properly be put in evidence for the

(*a*) 2 Sw. 596.

(*b*) See 2 Sw. 599.

(*c*) *Dyer* v. *Dyer*, 2 Cox, 95; *S. C.* 1 Watk. Cop. 220.

(*d*) *Woodman* v. *Morrel*, 2 Freem. 32, reversed on the re-hearing (see note by Hovenden); *Shales* v. *Shales*, Ib. 252; *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Williams* v. *Williams*, 32 Beav. 370; *Batstone* v. *Salter*, 19 L. R. Eq. 250; 10 L. R. Ch. App. 431; and see *Elliot* v. *Elliot*, 2 Ch. Ca. 231; but see *Lloyd* v. *Read*, 1 P. W. 607; *Redington* v. *Redington*, 3 Ridg. 190; *Murless* v. *Franklin*, 1 Sw. 17; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65.

[(*e*) *Re Richardson*, 47 L. T. N.S. 514.]

[(*f*) *Re Whitehouse*, 37 Ch. D. 683.]

(*g*) See *Williams* v. *Williams*, 32 Beav. 370; *Tucker* v. *Burrow*, 2 H. & M. 524; *Collinson* v. *Collinson*, 3 De G. M. & G. 409; *Murless* v. *Franklin*, 1 Sw. 17, 19; *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Lloyd* v. *Read*, 1 P. W. 607; *Taylor* v. *Alston*, cited 2 Cox, 96, 1 Watk. Cop. 223; *Redington* v. *Redington*, 3 Ridg. 177; *Grey* v. *Grey*, 2 Sw. 594; *Rawleigh's case*, cited Hard. 497; *Baylis* v. *Newton*, 2 Vern. 28; *Shales* v. *Shales*, 2 Freem. 252; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65; *Christy* v. *Courtenay*, 13 Beav. 96.

(*h*) *Redington* v. *Redington*, 3 Ridg. 196, *per* Lord Loughborough; *Jeans* v. *Cooke*, 24 Beav. 521, *per* M. R.

purpose of rebutting the presumption. Thus it will not be held an advancement, if, on a grant of copyholds to a father and his son for their lives *successivè*, the father at the same Court surrenders the copyholds to the use of his will (*a*), or obtains a license from the lord to lease for years (*b*), or takes possession by some overt act immediately consequent upon the purchase (*c*), or serves a notice with a view of taking possession, and then waives it and receives the rents, &c. (*d*), [or if a father transfers shares in companies into his son's name for the purpose of qualifying him as a director (*e*).]

Evidence from parol declaration.

So the father may prove a parol declaration of trust by himself, either before or at the time of the purchase, not that it operates by way of declaration of trust (for the Statute of Frauds would interfere to prevent it); but as the trust would result to the father, were it not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration of intention (*f*). But his evidence is admissible for the purpose of proving what was the intention at the time (*g*).

Evidence on the part of a child.

On the other hand, the son may produce parol evidence to prove the intention of advancement (*h*), and *a fortiori* such evidence is admissible on his side, as it tends to support both the legal operation and equitable presumption of the instrument (*i*). And it seems the subsequent acts and declarations of the father may be used *against* him by the son, though they cannot be used *in his favour* (*j*), and so the subsequent acts or declarations

(*a*) *Prankerd* v. *Prankerd*, 1 S. & S. 1.

(*b*) *Swift* v. *Davis*, 8 East, 354, note (a).

(*c*) Lord Eldon could scarcely have meant more than this, when he observed, "Possession taken by the father at the time would amount to such evidence." *Murless* v. *Franklin*, 1 Sw. 17.

(*d*) *Stock* v. *McAvoy*, 15 L. R. Eq. 55. In this case evidence was given that the father said it should be his son's after his own death, but V. C. Wickens observed, "If the son is a trustee at all, he is wholly a trustee," Ib. 58.

[(*e*) *Re Gooch*, 62 L. T. N.S. 384, following *Childers* v. *Childers*, 1 D. G. & J. 482.]

(*f*) See *Williams* v. *Williams*, 32 Beav. 370; *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Finch* v. *Finch*, 15 Ves. 51; *Woodman* v. *Morrel*, 2 Freem. 33; *Birch* v. *Blagrave*, Amb. 266; Gilb. Lex. Præt. 271; *Sidmouth* v. *Sidmouth*, 2 Beav. 456; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; *Christy* v. *Courtenay*, 13 Beav. 96; *O'Brien* v. *Shiel*, 7 Ir. R. Eq. 255.

(*g*) *Devoy* v. *Devoy*, 3 Sm. & G. 403; [and see *Re Gooch*, 62 L. T. N.S. 384.]

(*h*) *Taylor* v. *Alston*, cited 2 Cox, 96, 1 Watk. Cop. 223; *Beckford* v. *Beckford*, Lofft, 490.

(*i*) See *Taylor* v. *Taylor*, 1 Atk. 386; *Lamplugh* v. *Lamplugh*, 1 P. W. 113; *Redington* v. *Redington*, 3 Ridg. 182, 195.

(*j*) See *Redington* v. *Redington*, 3 Ridg. 195, 197; *Sidmouth* v. *Sidmouth*, 2 Beav. 455; *Stock* v. *McAvoy*, 15 L. R. Eq. 55.

of the *son* may be used against *him* by the father, provided he was a party to the purchase, and his construction of the transaction may be taken as an index to the intention of the father (*a*); but not otherwise, for the question is, not what did the *son*, but what did the *father* mean by the purchase?

[Where the parties to the transaction are alive and give evidence, there is no occasion to resort to any presumption (*b*).]

Rule not to be eluded by nice refinements.

9. From the manner in which the Court has disposed of the several distinctions we have been considering, one general principle is to be extracted applicable to every case. "We think," said Chief Baron Eyre, "that reasons which partake of too great a degree of refinement should not prevail against a rule of property, which is so well established as to become a land-mark, and which, whether right or wrong, should be carried throughout" (*c*); and Lord Eldon to the same effect observed, "that the Court in *Dyer* v. *Dyer* meant to establish this principle, that the purchase is an advance *primâ facie*, and in this sense, that this principle of law and presumption is not to be frittered away by mere refinements" (*d*).

Rule applies to an illegitimate child.

10. The doctrine of advancement has been applied to the case of even an *illegitimate son* (*e*); for it is said the principle is, that a father is under a moral duty to provide for his child, and as the obligation extends to the case of an illegitimate child, he is equally entitled to the benefit of the presumption (*f*). But the doctrine will not be applied to the illegitimate son of a legitimate child of the real purchaser, the person who paid the purchase-money, though such purchaser may have placed himself *loco parentis* to the illegitimate grandchild (*g*).

Rule applies to daughters as well as sons.

11. It has been said that the presumption of advancement is not so strong in favour of a *daughter* as of a *son*, because daughters are not generally provided for by a settlement of real estate (*h*); but the distinction has been contradicted by more than one decision, and does not now exist (*i*).

(*a*) See *Murless* v. *Franklin*, 1 Sw. 20; *Pole* v. *Pole*, 1 Ves. 76; *Sidmouth* v. *Sidmouth*, 2 Beav. 455; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65; *Jeans* v. *Cooke*, 24 Beav. 521.

[(*b*) *Per* Lindley, L. J., *Ex parte Cooper*, W. N. 1882, p. 96.]

(*c*) 2 Cox, 98; 1 Watk. Cop. 226.

(*d*) *Finch* v. *Finch*, 15 Ves. 50.

(*e*) *Beckford* v. *Beckford*, Lofft, 490; Fearne's P. W. 327; and see *Soar* v. *Foster*, 4 K. & J. 160; *Kilpin* v. *Kilpin*, 1 My. & K. 520; *Tucker* v. *Burrow*, 2 H. & M. 525.

(*f*) See Fonb. Eq. Tr. 123, note (*i*), 4th ed.

(*g*) *Tucker* v. *Burrow*, 2 H. & M. 515.

(*h*) Gilb. Lex. Præt. 272.

(*i*) *Lady Gorge's case*, cited Cro. Car. 550, 2 Sw. 600; *Jennings* v. *Selleck*, 1 Vern. 467; and see *Woodman* v. *Morrel*, 2 Freem. 33; *Clark* v. *Danvers*, 1 Ch. Ca. 310.

12. Advancement will be presumed in the case of a *wife* (*a*), and this presumption may, as in that of a child, be rebutted by the special circumstances under which the transfer was made (*b*). But no presumption will arise in favour of a reputed *wife*, being the sister of a former wife, and therefore not legally married (*c*); and the presumption will be made where the purchase is taken in the name of a grandchild, where the father is dead (*d*), or of a nephew who had been adopted as a son (*e*); but it seems that the advancement will not be presumed in favour of a more remote relation, and *à fortiori* not of a stranger, though the real purchaser may have placed himself *loco parentis* (*f*).

Rule applies to a wife, and grandchild or nephew, towards whom the purchaser stands in loco parentis.

[13. The doctrine of advancement has been applied to the case of an investment by a husband in the joint names of himself, his wife and strangers (*g*).]

Case of investment in joint names of purchaser, his wife, and strangers.

14. The cases of advancement are generally those of a father, but [the question has arisen on several occasions whether the principle is applicable as between mother and child, and has given rise to some difference of opinion. On the balance of the authorities as well as on principle, it would seem that the true rule is, that, as a Court of Equity recognises no such obligation according to the rules of equity in a mother to provide for her child as exists in the case of a father, so the mere purchase or investment in the name of the child is not sufficient *per se* to raise a presumption of advancement, but, to entitle the child to the property, there must be some evidence of intention on the part of the mother, either to place herself *in loco parentis* or to advance the child. However, very slight evidence of intention is sufficient, there being very little additional motive required beyond the relationship to induce a mother to make

Case of a mother.

(*a*) *Kingdome* v. *Bridges*, 2 Vern. 67; *Christ's Hospital* v. *Budgin*, id. 683; *Back* v. *Andrews*, id. 120; *Glaister* v. *Hewer*, 8 Ves. 199, *per* Sir W. Grant; *Rider* v. *Kidder*, 10 Ves. 367, *per* Lord Eldon; Gilb. Lex. Præt. 272; *Dummer* v. *Pitcher*, 2 M. & K. 262; and see *Lloyd* v. *Pughe*, 14 L. R. Eq. 241; 8 L. R. Ch. App. 88.

(*b*) *Marshall* v. *Crutwell*, 20 L. R. Eq. 328; and M. R. further observed: "Now in all the cases in which a gift to the wife has been held to have been intended, the husband has retained the dominion over the fund in this sense, that the wife during the lifetime of the husband has had no power independently of him, and the husband has retained the power of revoking the gift." Ib. 330, *sed qu.*

(*c*) *Soar* v. *Foster*, 4 K. & J. 152.

(*d*) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26; and see *Loyd* v. *Read*, 1 P. W. 607; *Currant* v. *Jago*, 1 Coll. 265, note (*c*); *Tucker* v. *Burrow*, 2 H. & M. 525; *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343.

(*e*) *Currant* v. *Jago*, 1 Coll. 261.

(*f*) See *Tucker* v. *Burrow*, 2 H. & M. 515; but see the analogous class of cases in reference to double portions, *Powys* v. *Mansfield*, 3 My. & Cr. 359, &c.

[(*g*) *Re Eykyn's Trusts*, 6 Ch. D. 115.]

a gift to her child (*a*); and the principle] does not apply to a *step-mother* (*b*).

Purchase-money not paid, a debt from parent.

15. Where the purchase is held to be an advancement, and the purchase-money has not been paid, it will be a charge on the father's assets as an ordinary debt (*c*); and the conveyance, where the contract in favour of the wife or child remains to be executed, will be made to the wife or child, though the real purchaser's executor pays the purchase-money, for it is not the case of a volunteer (viz., the wife or child), calling for specific performance, but the vendor on his side has a right to enforce the contract and compel payment of the price, and then the Court settles the conveyance in the form in which, according to the contract, it was meant to be taken, viz., in favour of the wife or child (*d*).

Advancement applies to personalty.

16. Of course, the doctrine of advancement applies to personal as well as real estate; as where a father purchases stock in the name of his son (*e*), or daughter (*f*), [or transfers stock into the joint names of a married daughter and her husband (*g*).]

Solicitor.

17. Where money was lent out upon a bond in the name of a person who was both *son* and *solicitor* of the owner of the sum lent, it was held that the particular relation of solicitor prevented the application of the general rule (*h*).

[(*a*) *Re De Visme*, 2 De G. J. & Sm. 17; *Bennet* v. *Bennet*, 10 Ch. D. 474; *Re Orme*, 50 L. T. N.S. 51; but see *Sayre* v. *Hughes*, 5 L. R. Eq. 376; *Batstone* v. *Salter*, 10 L. R. Ch. App. 431, and the provision of sec. 21 of the Married Women's Property Act, 1882, rendering a married woman having separate property liable for the maintenance of her children, may be material.]

(*b*) *Todd* v. *Moorhouse*, 19 L. R. Eq. 69.

(*c*) *Redington* v. *Redington*, 3 Ridg. 196, see 200; and see *Nicholson* v. *Mulligan*, 3 Ir. R. Eq. 308.

(*d*) *Drew* v. *Martin*, 2 H. & M. 130; and see *Nicholson* v. *Mulligan*, 3 Ir. R. Eq. 308.

(*e*) *Dummer* v. *Pitcher*, 2 M. & K. 263; *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Hepworth* v. *Hepworth*, 11 L. R. Eq. 10; *Fox* v. *Fox*, 15 Ir. Ch. Rep. 89; and see *Bone* v. *Pollard*, 24 Beav. 283; *Devoy* v. *Devoy*, 3 Sm. & G. 403.

(*f*) *O'Brien* v. *Sheil*, 7 Ir. R. Eq. 255.

[(*g*) *Batstone* v. *Salter*, 10 L. R. Ch. App. 431.]

(*h*) *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244.

CHAPTER X.

OF CONSTRUCTIVE TRUSTS.

General doctrine.

1. A *constructive trust* (*a*) is raised by a court of equity, *wherever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee;* for as it is impossible that a trustee should be allowed to make a profit by his office, it follows that so soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a *legal* title he may have, will be decreed in *equity* to hold for the benefit of his *cestui que trust.*

Renewal of leases.

2. A common instance of a constructive trust occurs in the renewal of leases; the rule being, that if a trustee (*b*), or executor (*c*), or even an executor *de son tort* (*d*), renew a lease in his own name, he will be deemed in equity to be trustee for those interested in the original term.

Rumford Market case.

The leading authority upon this subject is *Sandford* v. *Keech*, commonly called the Rumford Market Case (*e*). A lessee of the profits of a market had devised the lease to a trustee for an infant, and the trustee applied for a renewal on behalf of the infant, which was refused, on the ground that there could be no distress of the profits of a market, but the remedy must rest singly in covenant, of which an infant was incapable. Upon this

(*a*) As to the meaning of the term "constructive trust," see page 113, *supra*.

(*b*) *Griffin* v. *Griffin*, 1 Sch. & Lef. 354, *per* Lord Redesdale; *Pickering* v. *Vowles*, 1 B. C. C. 198, *per* Lord Thurlow; *Pierson* v. *Shore*, 1 Atk. 480, *per* Lord Hardwicke; *Nesbitt* v. *Tredennick*, 1 B. & B. 46, *per* Lord Manners; *Turner* v. *Hill*, 11 Sim. 13, *per* Sir L. Shadwell.

(*c*) *Walley* v. *Walley*, 1 Vern. 484; *Holt* v. *Holt*, 1 Ch. Ca. 190; *Abney* v. *Miller*, 2 Atk. 597, *per* Lord Hardwicke; *Killick* v. *Flexney*, 4 B. C. C. 161; *Pickering* v. *Vowles*, 1 B. C. C. 198, *per* Lord Thurlow; *Luckin* v. *Rushworth*, Finch, 392; *Anon.* 2 Ch. Ca. 207; and see *Mulvany* v. *Dillon*, 1 B. & B. 409; *Fosbrooke* v. *Balguy*, 1 M. & K. 226; *Owen* v. *Williams*, Amb. 734; *Nesbitt* v. *Tredennick*, 1 B. & B. 46, *per* Lord Manners; [*Kelly* v. *Kelly*, 8 Ir. R. Eq. 403.]

(*d*) *Mulvany* v. *Dillon*, 1 B. & B. 409.

(*e*) Sel. Ch. Ca. 61.

the trustee took a lease for the benefit of himself; but Lord King said, "I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*. This may seem hard, that the trustee is the only person of all mankind who might not have the lease, but it is very proper that the rule should be strictly pursued, and not in the least relaxed." And so he decreed the lease to be assigned to the infant.

Rule applicable to tenant for life, &c.

3. Upon the same principle, if a person, possessing only a partial interest in a lease, as a tenant for life (*a*), though with an absolute power of appointment, but which he does not exercise (*b*), a mortgagee (*c*), devisee subject to debts and legacies (*d*), or to an annuity (*e*), a joint tenant (*f*), or partner (*g*), renew the term upon his own account, he shall hold for the benefit of all parties interested in the old lease; for in consideration of equity the subject of the settlement is not only the lease, but also the right of renewal; and no person taking only a limited interest can avail himself of the situation in which the settlement has placed him to obtain a disproportionate advantage in derogation of the rights of others who have similar claims.

[So where a lessee had assigned the original lease by way of settlement and subsequently, without disclosing the settlement, took a new lease for a longer term in consideration of (in addition to a money payment) the surrender of the lease which was erroneously stated to be vested in him, the renewed lease was held to be bound by the settlement (*h*).]

(*a*) *Eyre* v. *Dolphin*, 2 B. & B. 290; *Rawe* v. *Chichester*, Amb. 715; *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Pickering* v. *Vowles*, 1 B. C. C. 197; *Tastcr* v. *Marriott*, Amb. 668; *Owen* v. *Williams*, id. 734; and see *James* v. *Dean*, 11 Ves. 383; *S. C.* 15 Ves. 236; *Kempton* v. *Packman*, cited 7 Ves. 176; *Giddings* v. *Giddings*, 3 Russ. 241; *Nesbitt* v. *Tredennick*, 1 B. & B. 46, *per* Lord Manners; *Crop* v. *Norton*, 9 Mod. 233; *Buckley* v. *Lanauze*, Ll. & G. Rep. *t.* Plunket, 327; *Tanner* v. *Elworthy*, 4 Beav. 487; *Waters* v. *Bailey*, 2 Y. & C. C. C. 218; *Yem* v. *Edwards*, 3 K. & J. 564; 1 De G. & J. 598; *Stratton* v. *Murphy*, 1 Ir. Rep. Eq. 345; and other cases cited Wh. & Tud. 6th ed. p. 53, in the note to *Keech* v. *Sandford*. See also *Hill* v. *Hill*, 8 Ir. R. Eq. 140, 622; *In the matter of P. Dane*, 5 Ir. R. Eq. 498; [*Re Lord Ranelagh's Will*, 26 Ch. D. 590.]

(*b*) *Brookman* v. *Hales*, 2 V. & B. 45.

(*c*) *Rushworth's case*, Freem. 13; *Nesbitt* v. *Tredennick*, 1 B. & B. 46, *per* Lord Manners.

(*d*) *Jackson* v. *Welsh*, Ll. & G. Rep. *t.* Plunket, 346.

(*e*) *Winslow* v. *Tighe*, 2 B. & B. 195; *Stubbs* v. *Roth*, id. 548; and see *Webb* v. *Lugar*, 2 Y. & C. 247; *Jones* v. *Kearney*, 1 Conn. & Laws, 34.

(*f*) *Palmer* v. *Young*, 1 Vern. 276.

(*g*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Ex parte Grace*, 1 Bos. & Pul. 376; *Clegg* v. *Fishwick*, 1 Mac. & G. 294; *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

[(*h*) *Re Lulham*, 53 L. J. N.S. Ch. 928; 32 W. R. 1013; affirmed 33 W. R. 788; 53 L. T. N.S. 9.]

Even to a yearly tenant.

4. Even where a testator was possessed of leaseholds, and devised all his interest therein to A. for life, remainder to B., and the lease having expired in the testator's lifetime, he was at his death a mere yearly tenant, it was held that A., having renewed the lease, must hold it upon the limitations of the will, for the yearly tenancy was an interest capable of transmission by devise; and the tenant for life could not, by acting on the good-will that accompanied the possession, get the exclusive benefit of a more durable term (*a*).

[So if the legal personal representative of a tenant from year to year of lands in Ireland, procure by reason of any tenant right custom, a renewal of the tenancy or a regrant to himself, he will take the lands impressed with a trust for the benefit of the estate of the deceased tenant (*b*).]

Case of tenant at will, or at sufferance.

5. But if a testator be merely *tenant at will*, or *at sufferance*, then, if the executor renew, he is not a trustee for the devisees, for as there was no interest upon which the will could operate, there was in fact no devise (*c*). And so, where a testator possessed leaseholds for years and was in possession of other lands without title under the mistaken impression that they were contained in the lease, and devised the lands he held upon lease to A., his executrix, for life, with remainder over, and A. obtained a lease of the lands not passed by the will, it was ruled that no trust attached upon the term in favour of the remainderman (*d*). But although the *devisees* cannot claim in these cases, the executor himself will not be allowed to keep the beneficial interest; but it will be an accretion to the general estate (*e*).

Agent of trustee cannot renew for his own benefit.

6. Neither can an agent (*f*), or other person acting under the authority of a trustee, executor, or tenant for life, renew for his own benefit (*g*).

Trustee may not sell the right of renewal.

7. And if, instead of taking a renewal himself, the trustee, executor, or tenant for life, dispose of the right of renewal for a valuable consideration, the purchase-money will be subjected in equity to the trusts of the settlement; for if a person cannot ap-

(*a*) *James* v. *Dean*, 11 Ves. 383; *S. C.* 15 Ves. 236; *Re Tottenham*, 16 Ir. Ch. Rep. 118.

[(*b*) *M'Cracken* v. *M'Clelland*, 11 Ir. R. Eq. 172; *Kelly* v. *Kelly*, 8 Ir. R. Eq. 403.]

(*c*) See *James* v. *Dean*, 11 Ves. 391, 392.

(*d*) *Rawe* v. *Chichester*, Amb. 715.

(*e*) *James* v. *Dean*, 11 Ves. 392, *per* Lord Eldon. In *Rawe* v. *Chichester*, *ubi supra*, the executrix was also residuary legatee.

(*f*) *Griffin* v. *Griffin*, 1 Sch. & Lef. 353; and see *Edwards* v. *Lewis*, 3 Atk. 538; *Mulvany* v. *Dillon*, 1 B. & B. 417; [*Re Lulham*, 53 L. J. N.S. Ch. 928; 32 W. R. 1013; affirmed 33 W. R. 788; 53 L. T. N.S. 9.]

(*g*) *Edwards* v. *Lewis*, 3 Atk. 538.

propriate the renewal to himself, the Court will not suffer him to sell for his own benefit (*a*).

What particular circumstances will not vary the general rule.

8. In the preceding cases the rules of equity will still hold good, though the lease had not customarily been renewed (*b*), or the period of the old lease had actually expired (*c*), or the renewal was for a different term, or at a different rent (*d*), or instead of a chattel lease, was for lives (*e*), or other lands were demised not comprised in the original lease (*f*), or the landlord refused to renew to the *cestui qui trust* (*g*), or the co-trustees refused to concur in a renewal for the *cestui que trust's* benefit (*h*), or the lessee having purchased the immediate reversion, being a term of years, took the renewal from the superior landlord (*i*).

Nesbitt *v.* Tredennick.

9. But where a lessee of lands in Ireland charged a lease with a jointure, and then *mortgaged it* to Newcomen and again to Nesbitt, and afterwards the rent falling in arrear, the landlord recovered possession upon ejectment, and the lessee allowed six months (the period of redemption by the lessee fixed by the statute) (*j*) to pass without tendering the rent, fines and costs, and Nesbitt (who as mortgagee, had three months longer to redeem under the statute), sent notice to the lessee that he would not redeem, but that if the lessee himself did *not* proceed, he should make the best bargain he could with the landlord, and then offered to take a new lease, to commence from the expiration of three months, with a proviso, that if any other of the parties interested should make a lodgment before that time, the agreement should be void, Lord Manners said that in all the previous cases the party had obtained the renewal by being in possession, or it was done behind the back, or by some contrivance in fraud of those who were interested in the old lease, and there was either a remnant of the old lease, or a tenant-right of renewal, on which the new lease could be ingrafted; but that here no part of Nesbitt's conduct showed a contrivance, nor was he in possession, and all that Nesbitt treated for was a new lease, giving, however, full oppor-

(*a*) *Owen* v. *Williams*, Amb. 734.

(*b*) See *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Mulvany* v. *Dillon*, 1 B. & B. 409; *Eyre* v. *Dolphin*, 2 B. & B. 290; *Killick* v. *Flexney*, 4 B. C. C. 161.

(*c*) *Edwards* v. *Lewis*, 3 Atk. 538, *per* Lord Hardwicke.

(*d*) *Mulvany* v. *Dillon*, 1 B. & B. 409; *James* v. *Dean*, 7 Ves. 383; *S. C.* 15 Ves. 236, &c.

(*e*) *Eyre* v. *Dolphin*, 2 B. & B. 299.

(*f*) *Giddings* v. *Giddings*, 3 Russ. 241; [*Re Morgan*, 18 Ch. Div. 93.] But the lease of the additional lands will not be a graft, *Acheson* v. *Fair*, 2 Conn. & Laws. 208.

(*g*) *Keech* v. *Sandford*, Sel. Ch. Ca. 61; *Griffin* v. *Griffin*, 1 Sch. & Lef. 353.

(*h*) *Blewett* v. *Millett*, 7 B. P. C. 367.

(*i*) *Giddings* v. *Giddings*, 3 Russ. 241.

(*j*) 8 Geo. 1. c. 2, s. 4.

tunity to the lessee to dispose of his interest, or to renew, if he was enabled to do so. And under these circumstances his Lordship held that the lease granted to the mortgagee was not bound by any trust for the mortgagor (*a*).

Trustee's lien for expenses of renewal.

10. A trustee or executor who has renewed a lease has a lien upon the estate for the costs and expenses of the renewal, with interest (*b*); and where lands are taken under the new lease that were not comprised in the original lease, the Court will apportion the expenses according to the value of the respective lands (*c*). The trustee will also be allowed for money subsequently laid out in lasting improvements (*d*), though made during the suit for recovering the lease (*e*).

Expenses incurred by tenant for life.

11. In the case of a renewal by tenant for life, if he put in his own life, he of course can have no claim to reimbursement (*f*), but if he put in the life of another, the expenses will be apportioned at the death of the tenant for life, according to the time of his actual enjoyment of the renewed interest (*g*); and his estate will be a creditor on the premises for the apportionment, though the remaindermen be his own children, who resist the claim on the ground of advancement (*h*).

Contribution to fine by annuitants.

12. In the case of a testator devising all his interest in leaseholds subject to an *annuity*, the question of the annuitant's contribution has been differently regarded by different judges. In *Maxwell* v. *Ashe* (*i*), the case of a *will*, Sir John Strange decided that the annuitant was *not* bound to contribute; and in *Moody* v. *Matthews* (*j*), where a feme *sold* an annuity to A. for his life, out of tithes held by her upon lease, and covenanted to pay the annuity, and that the tithes should continue subject to it during the life of A., and the feme married and died, and the husband, who took the term by survivorship, renewed at his own expense, Sir W. Grant determined that the annuitant was not to be called upon to contribute, for that would be to make him pay the consideration twice, and he said the case of *Maxwell* v. *Ashe* was decisive. On the other hand, it was ruled by Lord Manners, in the case of

(*a*) *Nesbitt* v. *Tredennick*, 1 B. & B. 29.

(*b*) *Holt* v. *Holt*, 1 Ch. Ca. 190; *Rawe* v. *Chichester*, Amb. 715, see 720; *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Lawrence* v. *Maggs*, 1 Eden, 453; *Pickering* v. *Vowles*, 1 B. C. C. 197; *James* v. *Dean*, 11 Ves. 383; *Kempton* v. *Packman*, cited 7 Ves. 176.

(*c*) *Giddings* v. *Giddings*, 3 Russ. 241.

(*d*) *Holt* v. *Holt*, 1 Ch. Ca. 190; *Lawrence* v. *Maggs*, 1 Eden, 453; *Stratton* v. *Murphy*, 1 Ir. Rep. Eq. 361.

(*e*) *Walley* v. *Walley*, 1 Vern. 184.

(*f*) *Lawrence* v. *Maggs*, 1 Eden, 453.

(*g*) See *infra*.

(*h*) *Lawrence* v. *Maggs*, 1 Eden, 453.

(*i*) Cited 7 Ves. 184.

(*j*) 7 Ves. 174; and see *Jones* v. *Kearney*, 1 Conn. & Laws. 47; *Thomas* v. *Burne*, 1 Dru. & Walsh, 657.

a *will*, that the annuitant must contribute in proportion to his interest in the property; for though the testator had given no direction upon this point, it was incident to this sort of tenure (*a*). At the time of this decision, his Lordship was not aware of the cases before Sir J. Strange and Sir W. Grant; but on a subsequent occasion, when the same point again arose before him, he adhered to the same opinion, notwithstanding those authorities, for "all the legatees," he said, "appear to have been equally the objects of the testator's favour. Could it have been his intention that one of them alone should bear the expense of the renewal, and that the others should receive the full amount of their annuities without any deduction?" (*b*)

Terms of assignment by the trustee.

13. In making the assignment to the *cestui que trust* the trustee will also be indemnified against the personal covenants which he entered into with the lessor (*c*); and on his own part must clear the lease of all incumbrances created by himself, except underleases at rack-rent (*d*).

Accounting for *mesne* rents and profits.

14. The trustee must also account to the *cestui que trust* for the *mesne* rents and profits which he has received from the estate (*e*), and also for any sub-fines that may have been paid to him by underlessees (*f*). And the *cestui que trust*, though the lease which was the ground of his equity has since actually expired, may still call for an account of the rents and profits (*g*). In the case of a renewal by tenant for life, the account will of course be restricted to the period since the tenant for life's decease (*h*).

Remedy against purchasers and others claiming under the lessee.

15. The *cestui que trust* may pursue his remedy not only against the original trustee, executor, or tenant for life, and volunteers claiming through them (*i*); but also against a purchaser, with notice express or implied of the plaintiff's title (*j*); and a purchaser will be deemed to have had notice if the lease assigned to him recited the surrender of a former lease which recited the surrender of a previous lease, in which mention was made of the

(*a*) *Winslow* v. *Tighe*, 2 B. & B. 195.
(*b*) *Stubbs* v. *Roth*, 2 B. & B. 548.
(*c*) *Giddings* v. *Giddings*, 3 Russ. 241; *Keech* v. *Sandford*, Sel. Ch. Ca. 61.
(*d*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 209, see 230.
(*e*) *Giddings* v. *Giddings*, *Keech* v. *Sandford*, *ubi suprà*; *Mulvany* v. *Dillon*, 1 B. & B. 409; *Walley* v. *Walley*, 1 Vern. 484; *Luckin* v. *Rushworth*, Finch, 392; *Blewett* v. *Millett*, 7 B. P. C. 367.
(*f*) *Rawe* v. *Chichester*, Amb. 715, see 720.
(*g*) *Eyre* v. *Dolphin*, 2 B. & B. 290.
(*h*) *James* v. *Dean*, 11 Ves. 383, see 396; *Giddings* v. *Giddings*, 3 Russ. 241.
(*i*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 209; *Eyre* v. *Dolphin*, 2 B. & B. 290; *Blewett* v. *Millett*, 7 B. P. C. 367.
(*j*) *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Walley* v. *Walley*, 1 Vern. 484; *Eyre* v. *Dolphin*, 2 B. & B. 290; *Stratton* v. *Murphy*, 1 Ir. Rep. Eq. 345.

settlement under which the *cestui que trust* claims (*a*); and the volunteer or purchaser with notice will not be helped by a fine levied (*b*), or even by a release from the *cestui que trust*, if executed by him while in ignorance of the facts of the case (*c*). However, a purchaser will stand in the place of his assignor in respect of any allowances for expenses incurred in the renewal (*d*).

Limitation of time.

16. A *cestui que trust* will be barred of his remedy if he be guilty of long *acquiescence*, as, in one case, for a period of fifteen years (*e*); and in another case concerning a lease of mines (which stand on a peculiar footing), relief was refused after a period of nine years (*f*), and continual claim by the *cestui que trust*, if without any effective step to enforce the right, will be of no avail (*g*).

Case of trustee of a lease purchasing the reversion.

17. If the trustee of a lease become the *purchaser of the reversion* Sir W. Grant said, that, as he thereby intercepts and cuts off the chance of future renewals, and consequently makes use of his situation to prejudice the interests of those who stand behind him, there might be some sort of equity in a claim to have the reversion considered as a substitution for those interests, but his Honour was not aware of any determination to that effect (*h*). [However it has recently been held in a case in Ireland that a trustee of leaseholds customarily renewable, who purchased the reversion at a sale by auction was a constructive trustee for the persons beneficially interested in the leaseholds (*i*); and in another recent case where the assignee of the tenant for life of leaseholds which had been customarily renewable, but which the Ecclesiastical Commissioners had refused to renew any more, purchased the reversion, it was held that he had become a trustee of the reversion for the benefit of the persons interested in the lease subject to his right to be recouped the purchase-money paid by him (*j*).

(*a*) *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Hodgkinson* v. *Cooper*, 9 Beav. 304.

(*b*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 209.

(*c*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 209.

(*d*) *Coppin* v. *Fernyhough*, 2 B. C. C. 291.

(*e*) *Isald* v. *Fitzgerald*, cited *Owen* v. *Williams*, Amb. 735, 737; and see *Norris* v. *Le Neve*, 3 Atk. 38; *Jackson* v. *Welsh*, Ll. & G. Rep. *t.* Plunket 346.

(*f*) *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

(*g*) *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

(*h*) *Randall* v. *Russell*, 3 Mer. 197; and see *Hardman* v. *Johnson*, ib. 347; *Norris* v. *Le Neve*, 3 Atk. 37 & 38; *Lesley's case*, 2 Freem. 52; *Fosbrooke* v. *Balguy*, 1 M. & K. 226; *Giddings* v. *Giddings*, 3 Russ. 241.

[(*i*) *Gabbett* v. *Lawder*, 11 L. R. Ir. 295; but see the observations of L. J. James in *Trumper* v. *Trumper*, 8 L. R. Ch. App. 879.

[(*j*) *Re Lord Ranelagh's Will*, 26 Ch. D. 590; *Phillips* v. *Phillips*, 29 Ch. Div. 673; and see *Leigh* v. *Burnett*, 29 Ch. D. 231.]

No tenant-right where a corporation has sold to an individual.

But where a lease had been held by a trustee as tenant of a college, and the college having disposed of the reversion to a stranger, the trustee purchased of the alienee, Sir W. Grant decided that the parties interested in the original lease had no equity against the trustee, for the tenant-right of renewal with a public body was gone, and the lease at a rack-rent was all that could be expected from a private proprietor (*a*).

But if the trustee of a lease with a covenant for perpetual renewal, or if any person standing in a fiduciary position in respect of such a lease acquires the legal possession of and dominion over the fee which is subject to the covenant, and so deals with the property as to make the renewal impossible by his own act and for his own benefit, he is bound to give full effect to the charges on the trust estate, and to satisfy those charges out of the acquired estate (*b*).

Factor, agent, &c., constructive trustees.

18. The principle upon which a Court of equity elicits constructive trusts might be pursued into numerous other instances; as if a factor (*c*), agent (*d*), partner (*e*), inspector under a creditors' deed (*f*), or other confidential person, acquire any pecuniary advantage to himself through the medium of his fiduciary character, he is accountable as a constructive trustee for those profits to his employer or other person whose interest he was bound to advance; [but until some judgment or decree has been obtained the money cannot be said to be the money of the principal (*g*).]

Unauthorized fall of timber.

19. Again, a constructive trust may arise under special instances in respect of waste. If a tenant for life commit *legal* waste by felling timber, the tenant of the first estate of *inheritance* at the time (though there be an intermediate life estate [and though there be a possibility of intermediate estates of inheritance coming into *esse* (*h*)]) can recover the trees or damages (*i*), for even an inter-

(*a*) *Randall* v. *Russell*, 3 Mer. 190.

(*b*) *Trumper* v. *Trumper*, 14 L. R. Eq. 295, see p. 310; affirmed 8 L. R. Ch. App. 870.

(*c*) *East India Company* v. *Henchman*, 1 Ves. jun. 287; *S. C.* 8 B. P. C. 85.

(*d*) *Fawcett* v. *Whitehouse*, 1 R. & M. 132; *Hichens* v. *Congreve*, Ib. 150; *Carter* v. *Horne*, 1 Eq. Ca. Ab. 7; *Brookman* v. *Rothschild*, 3 Sim. 153; *Gillett* v. *Peppercorn*, 3 Beav. 78.

(*e*) *Bentley* v. *Craven*, 18 Beav. 75; *Burton* v. *Wookey*, 6 Mad. 368.

(*f*) *Coppard* v. *Allen*, 4 Giff. 497; 2 De G. J. & S. 173.

[(*g*) *Lister & Co.* v. *Stubbs*, 45 Ch. Div. 1, 13.]

[(*h*) *Cavendish* v. *Mundy*, W. N. 1877, p. 198; *Simpson* v. *Simpson*, 3 L. R. Ir. 308.]

[(*i*) Formerly a court of law was the proper tribunal in which to sue for a recovery of the trees or for damages, and relief was given in equity only when the plaintiff asked for an account or injunction, *Gent* v. *Harrison*, Johns. 517; *Higginbotham* v. *Hawkins*, 7 L. R. Ch. App. 676; *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Lee* v. *Alston*, 1 B. C. C. 194; 3 B. C. C. 38; and see *Seagram* v. *Knight*, 3

mediate tenant for life, though he be unimpeachable of waste, cannot claim the timber against the owner of the inheritance (*a*); and if the tenant for life commit *equitable* waste, the rule is the same, and the timber belongs to the owner of the first estate of inheritance, notwithstanding intermediate estates for life (*b*); and the wrongdoer is accountable for the proceeds, with interest at 4 per cent. (*c*), without being allowed for repairs (*d*); but subject to the bar of the statute of limitations which begins to run from the time of the waste (*e*). It may happen, however, that the *wrongdoer is himself, at the time, the owner of the first estate of inheritance,* while intermediate estates of inheritance may arise in future; as in a limitation to A. for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, remainder to A. in fee, and no issue of A. or B. are born at the time of commission of the waste. In this case, as no man shall take advantage of his own wrong, and there is no estate of inheritance in *esse* except that of A. himself, he is *constructively a trustee* in equity of the proceeds of the timber for the benefit of all the persons interested under the settlement, except himself, according to their respective estates, that is, he is made to account for the proceeds which are invested and deemed part of the settlement, and the income of such investment is payable to the tenant in *præsenti,* not being the wrongdoer, whether such tenant be for life or otherwise, and if there be no such tenant it accumulates. But if in the case put there be no issue afterwards born of A. or B., and therefore there is no inheritance but that of A., the fund subject to B.'s life estate will belong to A. (*f*). In the above case, *A. himself* had

L. R. Eq. 398; 2 L. R. Ch. App. 628. But now by 36 & 37 Vict. c. 66, s. 24, the jurisdictions of Courts of Law and Equity have been assimilated.]

(*a*) See *Gent* v. *Harrison*, Johns. 517.

(*b*) *Rolt* v. *Somerville*, 3 Eq. C. Ab. 759; *Ormonde* v. *Kynersley*, 5 Mad. 369; 2 S. & S. 15; *Butler* v. *Kynnersley*, 2 Bligh, N.S. 385; 7 L. J. O. S. 150; *Lushington* v. *Boldero*, 15 Beav. 1; *Duke of Leeds* v. *Amherst*, 2 Ph. 117; *Honywood* v. *Honywood*, 18 L. R. Eq. 306.

(*c*) *Garth* v. *Cotton*, 3 Atk. 751.

(*d*) *Whitfield* v. *Bewit*, 2 P. Wms. 240.

(*e*) *Seagram* v. *Knight*, 3 L. R. Eq. 398; 2 L. R. Ch. App. 628; [*Simpson* v. *Simpson*, 3 L. R. Ir. 308;] and see *Higginbotham* v. *Hawkins*, 7 L. R. Ch. App. 676.

(*f*) *Williams* v. *Bolton*, 1 Cox, 72; *Powlett* v. *Bolton*, 3 Ves. 374; see further statement of this case in 2 New Rep. 305. But in *Garth* v. *Cotton*, 3 Atk. 751; 1 Ves. sen. 523, 546, interest at 4 per cent. was given only from the filing of the bill; and in *Duke of Leeds* v. *Amherst*, 12 Sim. 476; 2 Ph. 117, interest at 4 per cent. was given only from the death of the wrongdoer. In the later case of *Bagot* v. *Bagot*, 32 Beav. 509, M. R. refused interest further back than from the death of the wrongdoer. The decision was appealed from to L. C. (Lord Westbury), and the case was compro-

the first vested estate of inheritance; but it may happen that the first vested estate of inheritance is in B., and that A. and B. collude together in cutting the timber, and then a court of equity equally interferes and makes A. and B. accountable as constructive trustees of the proceeds for the benefit of the other persons interested in the estate, including tenants for life (*a*). Where there is collusion between the tenant for life and the owner of the first estate of inheritance, or where the tenant for life is also owner of the first estate of inheritance, and the timber is improperly cut, the remedy of the next tenant for life in remainder, is said to be barred by the statute after six years from the death of the prior tenant for life (*b*). These principles which have been

mised, but in the course of the argument L. C. intimated his concurrence with the view of M. R. as to the time whence interest was to be computed. The L. C. seemed also to think that, as to such timber felled by the tenant for life as the Court upon application to it would have ordered to be cut, the tenant for life would be protected as having done a proper act, but that the onus would lie upon him to establish such a case. "As regards the question of interest on the money arising from timber properly cut, the plaintiff," he said, "could hardly ask for interest. Of course the obligation of making out the case lies upon the tenant for life."—*M.S.* However this may be as to the timber *properly* cut, the remark suggests itself as to the timber *improperly* cut, that if the tenant for life is not to pay interest from the time of felling, he takes advantage of his own wrong, for if the timber had been left standing the increase of growth would have enured to the benefit of the remainderman, but by cutting the timber the tenant for life intercepts this accretion and enjoys the *usufruct* himself. True he loses the mast and shade, but that is the result of his own wilful act, and he cannot therefore complain. [And if it be said that the tenant for life would get the advantage of the increase of growth, and that this is represented by the interest, the answer is that such advantage is of an uncertain character, while the advantage of receipt of the interest is certain and definite.] As regards mines, the case is different, for here there is no continuing growth for the benefit of the remainderman. But in one respect the offence of waste is greater, for if timber be cut other timber may grow in its place, but when minerals are abstracted the vacuum remains for ever. On the subject of timber generally, see the work of the late Mr. Craig, Q.C.

(*a*) *Garth* v. *Cotton*, 3 Atk. 751.

(*b*) *Birch-Wolfe* v. *Birch*, 9 L. R. Eq. 683. Where the timber is *properly* cut, either by order of the Court or by a wise exercise of the discretion of the trustees, the proceeds are treated as part of the settlement, and are invested for the benefit of all persons interested, whether tenants for life or otherwise, and whether impeachable for waste or not, according to their respective estates. *Waldo* v. *Waldo*, 12 Sim. 107; *Wickham* v. *Wickham*, 19 Ves. 419; *Gent* v. *Harrison*, Johns. 517; *Mildmay* v. *Mildmay*, 4 B. C. C. 76; *Delapole* v. *Delapole*, 17 Ves. 150; *Tooker* v. *Annesley*, 5 Sim. 235; *Consett* v. *Bell*, 1 Y. & C. C. C. 569; *Honywood* v. *Honywood*, 18 L. R. Eq. 306. And if there be a tenant for life unimpeachable of waste, whose estate comes into possession, as he might have cut the timber, he is held to be entitled absolutely to the fund; *Waldo* v. *Waldo*, 12 Sim. 107; *Phillips* v. *Barlow*, 14 Sim. 262; *Gent* v. *Harrison*, Johns. 517; [*Lowndes* v. *Norton*, 6 Ch. D. 139. And an equitable tenant for life unimpeachable for waste is entitled to the proceeds of ornamental timber cut by him where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber; but it does not follow that the Court will not at the instance of

laid down as to timber apply also *mutatis mutandis* to waste in opening mines (*a*). Mines.

By a recent Act, 36 & 37 Vict. c. 66, s. 25, subs. 3, "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life, any *legal* right to commit waste of the description known as *equitable waste*, unless an intention to confer such right shall expressly appear by the instrument creating such estate." 36 & 37 Vict. c. 66, s. 25.

[20. By the Settled Land Act, 1882, a tenant for life though impeachable for waste may with the consent of the trustees of the settlement or an order of the Court cut timber ripe and fit for cutting, and is entitled to one-fourth of the net proceeds (*b*), and the same Act gives the tenant for life power to lease unopened mines, setting aside a portion of the profits for the benefit of the remaindermen (*c*).] [Settled Land Act, 1882.]

21. As another instance of a constructive trust, where money is paid to a tenant for life in consideration of his not opposing a bill in parliament for sanctioning a railway, he is constructively a trustee of the money for all the persons interested under the settlement (*d*). Bonus for not opposing a bill in Parliament.

[22. So where one of the trustees of a lucrative agency agreement procured the agency to be renewed to a firm, in which he was a partner, upon terms less lucrative but still beneficial, it was held that the trustee's interest in the renewed agreement formed part of the trust estate (*e*).] [Renewal of agency agreement.]

[23. Again, where a grant had been made by the Crown to the Aberdeen Town Council of salmon-fishings in the sea opposite certain lands which in the view of the Court were held by the Town Council in trust for the Aberdeen University and [Salmon fishings.]

the remainderman grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary to cut, and direct that the cutting be done under its supervision; *Baker* v. *Sebright*, 13 Ch. D. 179.] *Windfalls* belong to the owner of the first estate of inheritance, except such trees as the tenant for life would have been entitled to cut as thinnings, etc., and these belong to the tenant for life, *Bateman* v. *Hotchkin*, (No. 2), 31 Beav. 486; [and see *Re Ainslie*, 28 Ch. Div. 89; *Re Harrison*, 28 Ch. Div. 220, where the Court directed that the proceeds of larch plantations which had been blown down should be invested, and fixed an annual sum to be paid to the equitable tenant for life out of the income, and, if necessary, the capital subject, to the right of the trustee to have recourse to the fund in order to replant the plantations.]

(*a*) See *Bagot* v. *Bagot*, 32 Beav. 509; [*Re Barrington*, 33 Ch. D. 523.]

[(*b*) 45 & 46 Vict. c. 38, s. 35.]

[(*c*) Sects. 6, 11.]

(*d*) *Pole* v. *Pole*, 2 Dr. & Sm. 420; [*Earl of Shrewsbury* v. *North Staffordshire Railway Company*, 1 L. R. Eq. 608.]

(*e*) *Bennett* v. *Gaslight and Coke Company*, 52 L. J. N.S. Ch. 98; 48 L. T. N.S. 156.]

its professors, it was held that the grant of the fishings having been made to the Town Council as the proprietors of the lands, they were constructive trustees of the fishings for the University and its professors (*a*).

[Mortgagee.] 24. A mortgagee is not a constructive trustee for the mortgagor of his power of sale, which is a power given to him for his own benefit, to enable him the better to realize his debt (*b*). But after he has exercised the power and paid himself his debt and costs he is accountable as a trustee for the surplus proceeds of sale, and may be charged with interest thereon (*c*).]

Mortgagee in possession. 25. A mortgagee in *possession* is constructively a trustee of the rents and profits, and bound to apply them in a due course of administration (*d*), and it has been held (*e*) that a mortgagee in possession is so strictly a trustee, that he is liable even after a transfer for the rents and profits subsequently accrued, but [the liability will not continue when the transfer is made by the direction of the Court in a redemption action (*f*).]

Fraud or negligence in attorney. 26. Again, where A. contracted for the sale of *part* of his estate, and the purchaser requiring a fine to be levied, B., who was A.'s attorney, and also his heir-apparent, advised a fine to be levied of the *whole* estate, whereby the will of the vendor was revoked, and the part not included in the sale descended to B. as his heir-at-law, it was held that the devisee under the will could call upon B. as a constructive trustee (*g*). "You," said

[(*a*) *Aberdeen Town Council* v. *Aberdeen University*, 2 App. Cas. 544.]

[(*b*) *Warner* v. *Jacob*, 20 Ch. D. 220; and see *Farrar* v. *Farrars Limited*, 40 Ch. Div. 395, 411; *Tomlin* v. *Luce*, 43 Ch. Div. 191; *Colson* v. *Williams*, 58 L. J. Ch. 539; 61 L. T. N.S. 71.]

[(*c*) *Charles* v. *Jones*, 35 Ch. D. 544.]

(*d*) *Coppring* v. *Cooke*, 1 Vern. 270; *Bentham* v. *Haincroft*, Pr. Ch. 30; *Parker* v. *Calcroft*, 6 Mad. 11; *Hughes* v. *Williams*, 12 Ves. 493; *Maddocks* v. *Wren*, 2 Ch. Rep. 109.

(*e*) *Venables* v. *Foyle*, 1 Ch. Ca. 3.

[(*f*) *Hall* v. *Heward*, 32 Ch. Div. 430. In the last edition of this work the existence of the liability in any case was doubted, and it was suggested that *Venables* v. *Foyle* was probably decided upon its own special circumstances, for a mortgagee, it was said, has surely a right to transfer his mortgage without notice to the mortgagor, though in the latter case he may not be allowed the costs of the transfer (see *Re Radcliffe*, 22 Beav. 201), and, if he be entitled to transfer, how can he be held responsible as for a breach of trust? (See *Kingham* v. *Lee*, 15 Sim. 400). But in *Hall* v. *Heward*, both Cotton and Lopes, L.JJ., treated the liability as existing where the transfer is made voluntarily. It is singular that there is no modern case directly in point, but the liability of the mortgagee may be supported on the ground that by entering into possession he has made himself a trustee for the mortgagor of the rents and profits, and that the transfer without the consent of the mortgagor merely constitutes the transferee to be the agent of the mortgagee for the receipt of the rents and profits, and leaves the mortgagee liable for the acts of his agent; and see Coote on Mortgages, 5th ed., 720, 809; Fisher on Mortgages, 4th ed., 854; *Hall* v. *Heward*, *sup.*]

(*g*) *Bulkley* v. *Wilford*, 2 Cl. & Fin.

Lord Eldon, "who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have been entitled to it if you had known what as an attorney you ought to have known, and, not knowing it, you shall not take advantage of your own ignorance" (*a*).

Agent not constructive trustee.

27. An *agent* employed by a trustee is accountable in general to his principal only, and cannot as a *constructive trustee* be made responsible to the *cestuis que trust* (*b*); [and the directors of a company which is bound by a trust will not be personally liable for breaches of trust committed by the company (*c*).] But of course the rule does not apply where the agent has taken an actively *fraudulent* part, and so made himself a principal (*d*). [And, where trust moneys come into the custody and control of a firm of solicitors with notice of the trusts upon which the moneys are held, it lies with the firm to discharge themselves by shewing that the moneys were applied in accordance with the trusts (*e*).]

Title-deeds.

28. Under the head of constructive trusts may be mentioned the case of a settlement left in the hands of a person taking only a partial benefit under it as a tenant for life, in which case the other persons interested and claiming under the same title have a right to the fair use of the document, and the holder is deemed a trustee for them, and is bound to produce it at their request (*f*).

177; *S. C.* 8 Bligh, N. S. 111; and see *Segrave* v. *Kirwan*, Beat. 157; *Nanney* v. *Williams*, 22 Beav. 452; [*Keogh* v. *M'Grath*, 5 L. R. Ir. 478; *Lysaght* v. *M'Grath*, 11 L. R. Ir. 142; *Re Birchall*, 44 L. T. N.S. 243; *Horan* v. *MacMahon*, 17 L. R. Ir. 641.]

(*a*) 2 Cl. & Fin. 177.

(*b*) *Keane* v. *Robarts*, 4 Mad. 332; see 356, 359; *Davis* v. *Spurling*, 1 R. & M. 54; *S. C.* Taml. 199; *Crisp* v. *Spranger*, Nels. 109; *Saville* v. *Tancred*, 3 Sw. 141, note; *Nickolson* v. *Knowles*, 5 Mad. 47; *Myler* v. *Fitzpatrick*, 6 Mad. 360; *Fyler* v. *Fyler*, 3 Beav. 550; *Maw* v. *Pearson*, 28 Beav. 196; *Lockwood* v. *Abdy*, 14 Sim. 437; *Archer* v. *Lavender*, 9 I. R. Eq. 225, *per cur.*; [*Barnes* v. *Addy*, L. R. 9 Ch. 244, *per* Lord Selborne, at p. 251; *Wilson* v. *Lord Bury*, 5 Q. B. D. 518; *Re Spencer*, 51 L. J. N.S. Ch. 271;] and see *Ex parte Burton*, 3 Mont. D. & De G. 364; *Re Bunting*, 2 Ad. & Ell. 467; [*Williams* v. *Williams*, 17 Ch. D. 437, where attention is drawn by Kay, J., to the distinction between notice to raise a constructive trust, and notice to an actual trustee; and see *Lister* v. *Stubbs*, 45 Ch. Div. 1.]

[(*c*) *Wilson* v. *Lord Bury*, 5 Q. B. D. 518, and a liquidator is not a trustee for creditors or contributories; *Knowles* v. *Scott*, 1891, 1 Ch. 717.]

(*d*) *Hardy* v. *Caley*, 33 Beav. 365; *Fyler* v. *Fyler*, 3 Beav. 550; *Portlock* v. *Gardner*, 1 Hare, 606; *Ex parte Woodin*, 3 Mont. D. & De G. 399; *Attorney-General* v. *Corporation of Leicester*, 7 Beav. 176; *Bodenham* v. *Hoskyns*, 2 De G. M. & G. 903; *Pannell* v. *Hurley*, 2 Coll. 241; *Alleyne* v. *Darcy*, 4 Ir. Ch. Rep. 199; and see *S. C.* 5 Ir. Ch. Rep. 56; *Bridgman* v. *Gill*, 24 Beav. 382; *Archer* v. *Lavender*, 9 I. R. Eq. 220.

[(*e*) *Blyth* v. *Fladgate* (1891), 1 Ch. 337, 351.]

(*f*) *Banbury* v. *Briscoe*, 2 Ch. Ca.

And in one case it was ruled that if a person sell part of his estate and retain the title-deeds, though he may not have given a covenant for production, he is compellable to produce them as common property to the purchaser (*a*). But in *Barclay* v. *Raine* (*b*), Sir J. Leach seems to have doubted whether, if part be sold and the title-deeds delivered to the *purchaser*, a future purchaser from him could be ordered, where there was no covenant for that purpose, to produce them to the owners of the other parts. The real property commissioners, however, observe, that previously to this case it had been supposed, either that an original independent equity existed entitling any party interested in a deed to call for its production by any other person having the custody of it, or *at least* that such an equity existed wherever the parties requiring the production claimed under a person who had *taken the precaution to procure a covenant for that purpose*, and the person having the actual custody of it derived that custody from or through a person who had entered into such covenant (*c*); upon which Lord St. Leonards observes, that the rule in equity was never so universal as it is quoted in the first part of the above statement, but that the second branch, stating what *at least* the doctrine was, appears to be correct (*d*). It is submitted that even where a vendor has taken no such covenant from the purchaser, the vendor, and those claiming under him, would have a right to production of the deeds as common property.

Constructive trustees from notice of the trust.

29. Constructive trusts are said also to arise where the trust estate is converted by the trustee from one species of property into another; and again, where the trust estate passes from the trustee into the hands of a volunteer whether with or without notice, or of a purchaser for valuable consideration with notice; but as these are cases rather of an existing trust continued and kept on foot than of a new trust created, the consideration of these topics will be reserved to a subsequent part of the treatise.

In concluding the subject of trusts by *operation of law*, it may be proper to offer a few remarks on the wording of the Statute of Frauds (*e*).

42; *Harrison* v. *Coppard*, 2 Cox, 318; *Shore* v. *Collett*, Coop. 234; *Davis* v. *Dysart*, 20 Beav. 405; *Curnick* v. *Tucker*, 17 L. R. Eq. 320.

(*a*) *Fain* v. *Ayers*, 2 S. & S. 533.

(*b*) 1 S. & S. 449; see Byth. by Jarm. vol. ix. 3rd ed. p. 98; vol. v. 4th ed. p. 252.

(*c*) 3rd Rep.

(*d*) Vend. & Purch. 14th ed. 454, note (1).

(*e*) 29 Car. 2, c. 3.

By the eighth section it is enacted, that "where any *conveyance* shall be made of any lands or tenements by which a trust or confidence shall or may *arise or result by the implication or construction of law*, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if that statute had not been made; anything hereinbefore contained to the contrary notwithstanding." Statute of Frauds as affecting trusts by operation of law.

Lord Hardwicke upon this clause observed, "I am now bound down by the Statute of Frauds to construe nothing a resulting trust but what are there called trusts by operation of law; and what are those? Why, First, when an estate is purchased in the name of one person but the money or consideration is given by another; or, Secondly, where a trust is declared only as to part, and nothing said as to the rest, in which case what remains undisposed of will result to the heir-at-law. I do not know any other instance besides these two, where the Court has declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on *malâ fide*" (*a*). Lord Hardwicke's opinion.

Upon this opinion of Lord Hardwicke, Mr. Fonblanque has made the following just remarks:—"This construction of a clause of the Statute of Frauds restrains it to such trusts as arise by *operation of law*, whereas it clearly extends to such as are raised by *construction of Courts of equity;* as, in the case of an executor or guardian renewing a lease, though with his own money, such renewal shall be deemed to be in trust for the person beneficially interested in the old lease. It is also observable, that the first instance stated by his Lordship of a resulting trust is not so qualified as to let in the exceptions to which the general rule is subject, and the second instance is only applicable to a *will*, whereas the doctrine of resulting trusts is also applicable to *conveyances*" (*b*). As to the latter part of this criticism it may be observed that while Atkyns makes Lord Hardwicke speak of a *will* only, Barnardiston, the other reporter, applies his Lordship's observation to a *conveyance* (*c*). It would thus appear that Lord Hardwicke in fact extended his remark to a will and a conveyance indifferently. Mr. Fonblanque's opinion.

Both Lord Hardwicke and Mr. Fonblanque assume that the *seventh* or enacting clause embraces all trusts indiscriminately, and that such as arise by operation of law are only saved from

(*a*) *Lloyd* v. *Spillet*, 2 Atk. 150. (*b*) 2 Tr. Eq. 116, note (*a*).
(*c*) *Lloyd* v. *Spillet*, Barn. 388.

the Act by virtue of the subsequent exception contained in the eighth section; but the language of the latter clause, that "where any *conveyance* shall be made of any lands or tenements by which a trust or confidence shall or may arise or result," &c., seems to have escaped observation; for, unless *conveyance* be taken with great violence to the meaning of the words to include a *devise*, it is clear that trusts resulting under a will are not reached by the terms of the saving. Nor is it easy to suppose that the legislature could mean to include a devise; for the fifth and sixth sections relate exclusively to devises, and, had it fallen within the scope of the Act to extend the eighth section to wills, it can scarcely be conceived that the proper and technical word should not necessarily have suggested itself. The question then arises, If resulting trusts upon a *will* are not saved by the exception, how are they not affected by force of the previous enactment? As the statute was directed against frauds and perjuries, it is obvious that resulting trusts were not within the mischief intended to be remedied. The aim of the legislature was, not to disturb such trusts as were raised by maxims of equity, and so could not open a door to fraud or perjury, but, by requiring the *creation of trusts by parties* to be manifested in writing, to prevent that fraud and perjury to which the admission of parol testimony had hitherto given occasion. And the enactment itself is applicable only to this view of the subject; for the legislature could scarcely direct that "all declarations or creations of trusts should be manifested and proved," &c., unless the trusts were in their nature capable of manifestation and proof; but, as resulting trusts are the effect of a rule of law, to prove them would be to instruct the Court in its own principles, to certify to the judge how equity itself operates. The exception could only have been inserted *ex majore cautelâ* that the extent of the enactment might not be left to implication. But why, it will be asked, are resulting trusts upon *conveyances* excepted, and not resulting trusts upon *wills?* The only explanation that suggests itself is this:—The statute had spoken only of *declarations* or *creations* of trusts, and by a will no resulting trust is or can be *declared* or *created*. If lands be devised to A. and his heirs upon trust to pay the testator's debts, the resulting trust of the surplus is no new declaration or creation; the right construction is, that the testator has disposed of the legal estate to the devisee, and of part of the equitable in favour of creditors; but the residue of the equitable, though said to result, has in fact never

been parted with, but descends upon the heir-at-law as part of the original inheritance. In *conveyances*, however, this is not equally the case; for if a purchase be taken in the name of a third person, a trust which had no previous existence arises upon the property in favour of the real purchaser; and so if a lease be renewed by a trustee, the equity which was annexed to the old term immediately fastens upon the new. Here, then, it is evident there is an actual *creation* of trust; and, to obviate all doubts as to the operation of the enactment, resulting trusts arising out of *conveyances* are expressly excepted.

PART II.

THE TRUSTEE.

CHAPTER XI.

OF DISCLAIMER AND ACCEPTANCE OF THE TRUST.

HAVING treated of the creation of trusts, whether by the act of a party or by operation of law, we shall next direct our attention to the *estate* and *office* of the *trustee*, and, as a preliminary inquiry, we propose in the present chapter to offer a few remarks upon the subject of the trustee's disclaimer or acceptance of the trust.

First. Of Disclaimer.

No person compellable to be a trustee.

1. It may be laid down as a clear and undisputed rule, that no one is *compellable* to undertake a trust (*a*). "Though a person," said Lord Redesdale, "may have agreed in the lifetime of a testator to accept the executorship, he is still at liberty to recede, except so far as his feelings may forbid it; and it will be proper for him to do so, if he finds that his charge as executor is different from what he conceived it to be when he entered into the engagement" (*b*).

Heir of a trustee.

2. But there does not appear to be any instance in which, after acceptance by the trustee, his *heir* has been allowed to disclaim the *estate;* and if the law permitted it, many instances would no doubt have occurred (*c*). The inconveniences of such a right of disclaimer would [before the recent Act (*d*) have been] great,

(*a*) *Robinson* v. *Pett*, 3 P. W. 251, *per* Lord Talbot; *Moyle* v. *Moyle*, 2 R. & M. 715, *per* Lord Brougham; *Lowry* v. *Fulton*, 9 Sim. 123, *per* Sir L. Shadwell.

(*b*) *Doyle* v. *Blake*, 2 Sch. & Lef. 239.

(*c*) See *Humphrey* v. *Morse*, 2 Atk. 408.

[(*d*) 44 & 45 Vict. c. 41, s. 30, under which the legal estate in realty (except copyholds, as to which see 50 & 51 Vict. c. 73, s. 45) devolves to the personal representative of the trustee as if it were a chattel real.]

as the legal estate would then [have] become vested in the Crown. However, where the heir took not strictly in that character, but as special occupant, he might have exercised his discretion in refusing or accepting the estate (*a*).

Disclaimer should be without delay.

3. If the party named as trustee intend to decline the administration of the trust, he ought to execute a disclaimer without delay. There is no rule, however, that a trustee must execute a disclaimer within any particular time. Thus it will operate after an interval of sixteen years, if the interval can be so explained as to rebut the presumption of his having accepted the trust (*b*). If a person know of the trust and lie by for a long period, it is for a jury, or the Court sitting as a jury, to say whether such acquiescence was not because he had assented to the office (*c*).

Form of the disclaimer.

4. The disclaimer should be by deed, for a deed is clear evidence and admits of no ambiguity (*d*); and the instrument should be a *disclaimer* and not a *conveyance*, for the latter, as it transmits the estate, has been held to imply a previous acceptance of the office (*e*); for a person cannot be allowed to disclaim the office and accept the estate (*f*). However Lord Eldon expressed his opinion, which seems the common-sense view, that where the intention is disclaimer, the instrument ought to receive that construction, though it be a conveyance in form (*g*).

Can a person accept a bounty and repudiate a trust under the same will?

5. If a person be nominated a trustee in a will and also take a benefit under it, he can claim the testator's bounty, and yet disclaim the *onus* of the trust (*h*); for an executor, who is also a legatee, may renounce probate and yet claim the legacy, and it is difficult to point out a distinction between the two cases. But if the benefit be *annexed to the office* of trustee or executor, and he does not act, he cannot claim the benefit (*i*).

(*a*) *Creagh* v. *Blood*, 3 Jones & Lat. 170.

(*b*) *Doe* v. *Harris*, 16 M. & W. 517; and see *Noble* v. *Meymott*, 14 Beav. 471.

(*c*) See *Doe* v. *Harris*, 16 M. & W. 522; *Paddon* v. *Richardson*, 7 De G. M. & G. 563; *James* v. *Frearson*, 1 Y. & C. C. C. 370.

(*d*) *Stacey* v. *Elph*, 1 M. & K. 199, *per* Sir J. Leach.

(*e*) *Crewe* v. *Dicken*, 4 Ves. 97; and see *Urch* v. *Walker*, 3 M. & C. 702.

(*f*) *Re Martinez' Trusts*, 22 L. T. N.S. 403.

(*g*) *Nicloson* v. *Wordsworth*, 2 Sw. 372. In *Attorney-General* v. *Doyley*, 2 Eq. Ca. Ab. 194, the trustee who declined to act was directed to *convey*, and the same decree was made in *Hussey* v. *Markham*, Rep. *t.* Finch, 258. In *Sharp* v. *Sharp*, 2 B. & A. 405, it was held the trustees had not *acted*, though they had *conveyed* the estate instead of disclaiming. See *Urch* v. *Walker*, 3 M. & C. 702; *Richardson* v. *Hulbert*, 1 Anst. 65.

(*h*) See *Talbot* v. *Radnor*, 3 M. & K. 254; *Pollexfen* v. *Moore*, 3 Atk. 272; *Andrews* v. *Trinity Hall, Camb.* 9 Ves. 525; *Warren* v. *Rudall*, 1 J. & H. 1.

(*i*) *Slaney* v. *Witney*, 2 L. R. Eq. 418; and see *Lewis* v. *Mathews*, 8 L. R. Eq. 277.

Opinion of counsel as to disclaimer.

6. If one be named as trustee without any authority from himself, he is justified (as between himself and the parties interested in the trust who require a disclaimer from him and thereby undertake to pay all proper costs), in taking the opinion of counsel upon the propriety of executing a deed of disclaimer (*a*).

Disclaimer of trust by statement of defence.

7. A trust may be disclaimed at the bar of the Court (*b*), or by [a statement of defence,] and the person named as trustee will, like any other person made a party to the suit unnecessarily, be entitled to his costs (*c*); (but only as between party and party (*d*);) though the action which might have been dismissed against him at an earlier stage be brought to a hearing (*e*); and if his [statement] be needlessly long, he will only be allowed what would have been the reasonable costs of a simple disclaimer (*f*).

May be shown by acts.

8. A trust may also be repudiated on the evidence of conduct without any express declaration of disclaimer (*g*); and conduct by a devisee in trust which amounts to a disclaimer of the office of trustee will also amount to a disclaimer of the legal estate (*h*); but a person would act very imprudently, who allowed so important a question as whether he is a trustee or not to remain matter of construction.

After disclaimer, the trustee may act as agent to the trust.

9. After renunciation of the trust, whether by express disclaimer, or by conduct which is tantamount to it, a trustee may assist as agent, or act under a letter of attorney, in the management of the estate without incurring responsibility (*i*); but the caution need scarcely be suggested, that all such interference cannot be too scrupulously avoided before the fact of the renunciation of the trust has been most unquestionably established; and where the person named as trustee is to receive a profit from his agency, this naturally excites a suspicion in the mind of the Court (*j*).

(*a*) *In re Tryon*, 7 Beav. 496.

(*b*) *Ladbrook* v. *Bleaden*, M. R. 16 Jur. 630; *Foster* v. *Dawber*, 8 W. R. 646; and see *Re Ellison's Trust*, 2 Jur. N. S. 62.

(*c*) *Hickson* v. *Fitzgerald*, 1 Moll. 14.

(*d*) *Norway* v. *Norway*, 2 M. & K. 278, overruling *Sherratt* v. *Bentley*, 1 R. & M. 655; see *Legg* v. *Mackrell*, 1 Giff. 166; *Bulkeley* v. *Earl of Eglinton*, 1 Jur. N. S. 994.

(*e*) *Bray* v. *West*, 9 Sim. 429.

(*f*) *Martin* v. *Persse*, 1 Moll. 146; *Parsons* v. *Potter*, 2 Hog. 281.

(*g*) *Stacey* v. *Elph*, 1 M. & K. 195; *White* v. *M'Dermott*, 7 I. R. C. L. 1; [*Delany* v. *Delany*, 15 L. R. Ir. 55.]

[(*h*) *Re Birchall*, 40 Ch. Div. 436.]

(*i*) *Dove* v. *Everard*, 1 R. & M. 231; *Harrison* v. *Graham*, 3 Hill's MSS. 239, cited 1 P. W. 241, 6th ed. note (*y*); *Stacey* v. *Elph*, 1 M. & K. 195; *Lowry* v. *Fulton*, 9 Sim. 104; *Montgomery* v. *Johnson*, 11 Ir. Eq. Rep. 480.

(*j*) *Montgomery* v. *Johnson*, 11 Ir. Eq. Rep 481.

How estate divested from the trustee.

10. On a grant or other conveyance to a trustee, though upon onerous trusts, the estate passes to him without any express assent but subject to the right of dissenting (*a*), and what will amount to a disclaimer *at law*, so as to *divest the estate*, may be a distinct question from the disclaimer of the *office* in equity.

Freeholds may be disclaimed by deed.

It was formerly held (at least such was the clear opinion of Lord Coke), that a *freehold*, whether vested in a person by feoffment, grant (*b*), or devise (*c*), could not be disclaimed but by *matter of record;* and the reason upon which this maxim was founded, was that the suitor might be more certainly apprised who was the tenant to the *præcipe* (*d*). But the doctrine of modern times is, that disclaimer by matter of record is unnecessary (*e*); for, as Lord Tenterden observed, there can be no disclaimer by a person in a court of record, unless some other person think fit to cite him there to receive his disclaimer, and if the estate be *damnosa hæreditas*, that is not very likely to happen (*f*). It has been lately held that the estate may be devested by the disclaimer of the trustee in chancery, though appearing only as a respondent upon a petition (*g*); and Mr. Justice Holroyd laid it down generally that a party might disclaim a freehold not only by deed but by parol (*h*); and the doctrine has since been sanctioned by actual decision (*i*).

Disclaimer of uses.

11. It was laid down in *Butler and Baker's case*, that estates limited *under the statute of uses* were to be disclaimed with the same formalities as estates at common law (*j*); but Lord Eldon doubted whether a party *could* disclaim in the case of a conveyance to *uses*, except by release with intent of disclaimer: however, his Lordship added, he was aware that such a doctrine would shake titles innumerable (*k*).

Disclaimer of chattels.

12. It seems to be clearly established, that a disclaimer by

(*a*) *Siggers* v. *Evans*, 5 Ell. & Bl. 380; [and see *Re Birchall*, 40 Ch. Div. 436.]

(*b*) *Butler and Baker's case*, 3 Rep. 26 a, 27 a; *Anon. case*, 4 Leon. 207; Shepp. Touch. 285.

(*c*) *Bonifant* v. *Greenfield*, Godb. 79, *per* Lord Coke; but at the rehearing (Cr. Eliz. 80) it was adjudged that three could pass the whole estate, the fourth having disclaimed by act *in pais;* and see Shepp. Touch. 452.

(*d*) *Butler and Baker's case*, 3 Rep. 26, b.

(*e*) *Townson* v. *Tickell*, 3 B. & A. 31; *Begbie* v. *Crook*, 2 Bing. N. C. 70; *S. C.* 2 Scott, 128.

(*f*) *Townson* v. *Tickell*, 3 B. & A. 36.

(*g*) *Foster* v. *Dawber*, 8 W. R. 646; the trust estate comprised mortgages: but see *Re Ellison's Trust*, 2 Jur. N. S. 62.

(*h*) *Townson* v. *Tickell*, 3 B. & A. 38, citing *Bonifant* v. *Greenfield*, Cro. Eliz. 80: and see *Doe* v. *Smyth*, 6 B. & C. 112.

(*i*) *Bingham* v. *Clanmorris*, 2 Moll. 253. And see Shepp. Touch. 452; *Doe* v. *Smyth*, 6 B. & C. 112; *Doe* v. *Harris*, 16 M. & W. 517; but see *Re Ellison's Trust*, 2 Jur. N. S. 62.

(*j*) 3 Rep. 27, a.

(*k*) *Nicloson* v. *Wordsworth*, 2 Sw. 372.

parol declaration will suffice to divest the legal estate, where the trust property is a mere *chattel interest* (*a*).

Disclaimer by *feme covert*.

13. Whether a *feme covert* could, under the Fines and Recoveries Act, *disclaim* an interest in real estate, was, by the terms of the statute, left doubtful; the Act enabling her only to "dispose of, release, surrender, or extinguish," any estate or power as if she were a *feme sole* (*b*). In the Irish Act, 4 & 5 W. 4. c. 92, s. 68, the word "disclaim" was expressly introduced. And now, by 8 & 9 Vict. c. 106, s. 7, a married woman is enabled, in like manner, to "disclaim" any estate or interest in lands in England. But the disclaimer must be by deed, and the husband must concur, and the *feme covert* must make the statutory acknowledgment. [Whether under the Married Women's Property Act, 1882 (*c*), a married woman can disclaim, is also doubtful; and it will be prudent, in all cases coming within 8 & 9 Vict. c. 106, s. 7, to comply with the formalities required by that Act.]

Effect of disclaimer.

14. The effect of disclaimer by a trustee, where there is a co-trustee, is to vest the whole *legal estate* in the co-trustee (*d*): and, as regards the exercise of the *office*, even if the trust be accompanied with a power, the continuing trustee may administer the trust without the concurrence of the trustee who has chosen to disclaim, and without the appointment of a new trustee (*e*). The settlor, it is said, must be presumed to know what the legal consequence of the death or disclaimer of one of the trustees would be (*f*). And when the disclaimer has been executed, it operates retrospectively, and makes the other trustee the sole trustee *ab initio* (*g*).

Disclaimer of personal contracts.

15. But in *personal contracts* the rule is different, for where A. covenants with B., C., and D. as trustees, and B. disclaims, C. and D. do not take the joint covenant, and cannot sue without B. (*h*).

(*a*) Shepp. Touch. 285; *Butler and Baker's case*, 3 Rep. 26, b, 27, a; *Smith* v. *Wheeler*, 1 Vent. 130; *S. C.* 2 Keb. 774; *Doe* v. *Harris*, 16 M. & W. 520, 521, *per* Parke, B.

(*b*) 3 & 4 W. 4. c. 74, s. 77.

[(*c*) 45 & 46 Vict. c. 75.]

(*d*) *Bonifant* v. *Greenfield*, Cro. Eliz. 80; *Crewe* v. *Dicken*, 4 Ves. 100, *per* Lord Loughborough; *Small* v. *Marwood*, 9 B. & C. 299; Freem. 13, case 111; *Hawkins* v. *Kemp*, 3 East, 410; *Townson* v. *Tickle*, 3 B. & Ald. 31; *Browell* v. *Reed*, 1 Hare, 435, *per* Sir J. Wigram; and see *Nicloson* v. *Wordsworth*, 2 Sw. 369.

(*e*) *Adams* v. *Taunton*, 5 Mad. 435; *Cooke* v. *Crawford*, 13 Sim. 96; *Bayly* v. *Cumming*, 10 Ir. Eq. Rep. 410; *Hawkins* v. *Kemp*, 3 East, 410; *White* v. *M'Dermott*, 7 Ir. R. C. L. 1; [*Delany* v. *Delany*, 15 L. R. Ir. 55; *Crawford* v. *Forshaw*, 43 Ch. D. 643; W. N. 1891, p. 75.]

(*f*) *Browell* v. *Reed*, 1 Hare, 435, *per* Sir J. Wigram.

(*g*) *Peppercorn* v. *Wayman*, 5 De G. & Sm. 230.

(*h*) *Wetherell* v. *Langston*, 1 Exch. 634.

16. If trustees are appointed *protectors* of the settlement, and they intend to disclaim the protectorship, the deed of disclaimer must, by the Fines and Recoveries Act, be enrolled in Chancery (*a*). Disclaimer of protectorship.

Secondly. Of Acceptance.

1. A trustee may *accept* the office either by signing the trust deed (*b*), or by an express declaration of his assent (*c*), or by proceeding to act in the execution of the duties of the trust. How trust accepted.

2. Where a trustee, with *notice of his appointment* as trustee, has done nothing, but has not disclaimed, it will be presumed after a long lapse of time, as twenty years (*d*), and *à fortiori*, after thirty-four years (*e*), that he accepted the trust (*f*). And even where the deed was only four years old, Lord St. Leonards observed, "that where an estate was vested in trustees who *knew of their appointment* and did not object at the time, they would not be allowed afterwards to say they did not assent to the conveyance, and it would require some strong act to induce the Court to hold that in such a case the estate was divested. He spoke with respect to the effect upon third parties; every Court and every jury would presume an assent" (*g*). Presumption of acceptance.

3. If the trustee execute the deed, he should see that the recitals are correct; or the Court may hold him liable for the consequences. However, in a late case (*h*), where it was recited in a marriage settlement that the lady was possessed of a sum of stock, which subsequently was not forthcoming, Lord Langdale said there were so many instances of parties representing that they were entitled to particular property, which representation afterwards turned out to be wholly untrue, that it would be unjust and dangerous to bind third parties by such representations; and that he did not therefore accede to the argument, that the recital alone bound the trustees. And in another case where a release from the *cestuis que trust* to the trustees stated that the legacy duty amounted only to Recitals.

(*a*) 3 & 4 W. 4. c. 74, s. 32.

(*b*) See *Buckeridge* v. *Glasse*, 1 Cr. & Ph. 131, 134.

(*c*) See *Doe* v. *Harris*, 16 M. & W. 517.

(*d*) *In re Uniacke*, 1 Jones & Lat. 1.

(*e*) *In re Needham*, 1 Jones & Lat. 34.

(*f*) But see *infra* as to renunciation of probate.

(*g*) *Wise* v. *Wise*, 2 Jones & Lat. 403; see 412; and see *White* v. *M'Dermott*, 7 Ir. R. C. L. 1.

(*h*) *Fenwick* v. *Greenwell*, 10 Beav. 418. I have been informed by one of the counsel in the cause that in *Bliss* v. *Bridgwater*, at the Rolls, many years ago, Sir J. Leach held that trustees were bound by a recital that stock had been transferred into their names; and see *Gore* v. *Bowser*, 3 Sm. & G. 6; *Chaigneau* v. *Bryan*, 8 Ir. Ch. Rep. 251; *Story* v. *Gape*, 2 Jur. N. S. 706; *Westmoreland* v. *Holland*, 23 L. T. N.S. 797; 19 W. R. 302, affirmed W. N. 1871, p. 124.

£19 8s., whereas it was much more, Lord Romilly said it was a mistake of all parties, and that the trustees were not estopped by it in equity (*a*).

Of acceptance by acting in the trust.

4. What *acts* of a person nominated as trustee will amount to a *constructive* acceptance of the office, is a question constantly arising, and not easily to be determined by any general rule.

Effect of probate.

5. If a person named as executor, takes out *probate* of the will, he thereby constitutes himself executor, and incurs all the liabilities annexed to the executorship (*b*). The *renunciation of probate* by a person named as executor and trustee is not in itself a *disclaimer* of the *trust*, but it is one circumstance of evidence, and if there be no proof of his ever having acted, the Court after a long lapse of time, as sixty years, will presume a disclaimer (*c*); [and where the trusts of the real and personal estate were combined, being trusts for sale and conversion, and application of the proceeds as a mixed fund in (*inter alia*) paying debts, legacies, and funeral expenses, and the same persons were appointed executors and trustees, and the only executor and trustee who survived the testator renounced probate, the late M.R. held that there was conclusive evidence of a disclaimer, as the trustee, after renouncing execution of the will as to the personal estate, could not carry out the trusts as to the payment of the debts and funeral and testamentary expenses, and could not get rid of a part of his trust in that way, but must have intended to disclaim all the trusts (*d*).]

Executor of an executor.

6. If an executor of an executor take upon himself the administration of the goods of the first testator, he thereby accepts the administration of the goods of the latter; for it is only through the medium of the latter testator that he can reach the executorship of the former. It was at one time thought that an executor might renounce probate of the will of the original testator, and at the same time or subsequently prove the will of the immediate testator (*e*), but the practice has now been settled to the contrary (*f*). But if the first executor never proved the will, the chain of representation is not continued (*g*).

(*a*) *Brooke* v. *Haynes*, 6 L. R. Eq. 25.

(*b*) *Booth* v. *Booth*, 1 Beav. 125; *Ward* v. *Butler*, 2 Moll. 533, *per* Lord Manners; *Styles* v. *Guy*, 1 Mac. & G. 431, *per* Lord Cottenham; *Scully* v. *Delany*, 2 Ir. Eq. Rep. 165. The case of *Balchen* v. *Scott*, 2 Ves. jun. 678, cannot be considered as law.

(*c*) *M'Kenna* v. *Eager*, 9 Ir. R. C. L. 79; and see *Earl Granville* v. *McNeile*, 7 Hare, 156, cited *post* with remarks.

[(*d*) *Re Gordon*, 6 Ch. D. 531.]

(*e*) Shepp. Touch. by Preston, 464; *Wankford* v. *Wankford*, Freem. 520; *Hayton* v. *Wolfe*, Cro. Jac. 614; *S. C.* Palmer, 156; Hutton, 30.

(*f*) *In the Goods of Perry*, 2 Curt. 655; *Brooke* v. *Haynes*, 6 L. R. Eq. 25; *In the Goods of Delacour*, 9 Ir. R. Eq. 86; *In the Goods of Griffin*, 2 Ir. R. Eq. 320; and see *In the Goods of Beer*, 15 Jur. 160.

(*g*) 21 & 22 Vict. c. 95, s. 16.

7. Any *voluntary interference with the assets*, whether with or without probate, will stamp a person as acting executor. Thus, where of four executors only one proved, and the other three, describing themselves as *executors*, gave a letter of attorney to the fourth, describing him as *acting executor*, to receive a quantity of stock, Lord Hardwicke ruled that the whole number, by this conduct, had drawn upon themselves the burden of the executorship (*a*); and so generally, if an executor sign a power of attorney to get in part of the testator's estate (*b*), he brings down the whole burden upon himself, though at the time of acting he disclaim the intention of assuming the office (*c*).

Voluntary interference with assets is acceptance of the executorship.

The joining in an assignment of the testator's lease (*d*), or the bringing an action on the footing of the trust (*e*), is an acceptance of the office. And an executor and trustee for sale will be deemed to have acted in the trust, if the property be expressed to be sold by direction of the trustees, and he is present, and takes part, and exercises authority or ownership by giving orders respecting the sale, and afterwards calls on a co-executor to inquire into the state of the testator's accounts (*f*).

Acts of acceptance.

8. The rule that every voluntary interference with the subject-matter will convert a person into a trustee, must be taken with this qualification, that the interference is not such as to be *plainly* referable to some other ground than the part execution of the trust (*g*).

Interference not acceptance, where clearly referable to another ground than acceptance.

(*a*) *Harrison* v. *Graham*, 3 Hill's MSS. 239; *S. C.* cited *Churchill* v, *Lady Hobson*, 1 P. W. 241, note (*y*). 6th ed.; *White* v. *Barton*, 18 Beav. 192; *Carberry & Daly* v. *Cody*, 1 Ir. Rep. Eq. 76.

(*b*) *Cummins* v. *Cummins*, 8 Ir. Eq. Rep. 723.

(*c*) *Doyle* v. *Blake*, 2 Sch. & Lef. 231; but see *Malzy* v. *Edge*, 2 Jur. N.S. 80.

(*d*) *Urch* v. *Walker*, 3 M. & Cr. 702.

(*e*) *Montfort* v. *Cadogan*, 17 Ves. 489.

(*f*) *James* v. *Frearson*, 1 Y. & C. C. C. 370; see 375, 377. In *Orr* v. *Newton*, 2 Cox, 274, A., one of six executors, *admitted in his answer* that during the life of B., another of the executors and who had alone taken out probate, he had assisted in writing letters to the co-executors towards collecting the testator's estate, and it was *proved* that A. had written on behalf of himself and his co-executors to a debtor of the testator requiring payment. Lord Camden, notwithstanding these circumstances, observed in his argument, that "B. undertook to act *solely*, and did act *solely* until he died," implying that A. had, by his conduct, not assumed the character of executor. But the case was one of "*cruel persecution*" against A.; and his Lordship put the fairest possible construction upon all that A. had done; and besides, Lord Camden might only have meant that B. was *substantially* the sole acting executor, without adverting to the question, whether the interference of A. ought or not, in strict legal construction, to be held an acceptance of the executorship.

(*g*) *Stacey* v. *Elph*, 1 M. & K. 195; and see *Dove* v. *Everard*, 1 R. & M. 281; *S.C.* Taml. 376; *Lowry* v. *Fulton*, 9 Sim. 115.

Trustee may not act ambiguously, and then disclaim.

9. If a trustee act *ambiguously* he cannot afterwards take advantage of the doubt, and say he acted not as trustee, but in some other character (*a*).

Case of executorship clothed with a trust.

10. If the office of executor be, by the will, clothed with certain trusts, a person named as executor who *proves* the will and thereby makes himself executor, is held to draw upon himself the obligations knit to the office of trustee. Thus, if a testator direct that his *executors* shall get in certain outstanding effects to be applied to a particular purpose, a person cannot make himself executor by proving the will, and refuse the trust (*b*).

Where the executor is also named as devisee upon trust.

11. And if an *executor* be also designated trustee of the *real* estate, and he *acts* as *executor*, he is deemed to have accepted the entire trusteeship (*c*).

Two trusts in same instrument.

12. And if a person, by the same instrument, be nominated trustee of two distinct trusts, he cannot divide them: but if he accept the one, he will be taken to have accepted the other (*d*). However, these are the doctrines in a court of equity only, for at law an executor may accept that office and yet disclaim the devise to him of a legal estate (*e*).

Taking custody of trust-deed not an acceptance of trust.

13. Where a person was *named* as a trustee in a settlement, but he did not execute it, and declined to act, he was held not to have accepted the trust by merely taking the settlement into his custody until a trustee could be found (*f*).

Devisee of several trust estates.

14. If [in a case not falling within the Conveyancing and Law of Property Act, 1881 (*g*)] a trustee of two distinct settlements, created at different times and wholly independent of each other, devise *all* his trust estates to the same person, can such person accept one estate and disclaim the other? It would probably be held that he might; but he should lose no time in manifesting his intention; for, should he act as owner of one estate and not expressly disclaim the other, the law would presume him to have accepted both.

Position of administrator where executor and trustee renounces.

15. If A. be named as executor *and trustee*, and he renounces probate and disclaims the trust, and B. takes out letters of administration with the will annexed; B., though he thus becomes the personal representative, is not also the trustee of the will, nor

(*a*) *Conyngham* v. *Conyngham*, 1 Ves. 522; *Montgomery* v. *Johnson*, 11 Ir. Eq. Rep. 476; see *Lowry* v. *Fulton*, 9 Sim. 115; *Doe* v. *Harris*, 16 M. & W. 517.

(*b*) *Mucklow* v. *Fuller*, Jac. 198; and see *Booth* v. *Booth*, Beav. 125; *Williams* v. *Nixon*, 2 Beav. 472.

(*c*) *Ward* v. *Butler*, 2 Moll. 533.

(*d*) *Urch* v. *Walker*, 3 M. & Cr. 702.

(*e*) *Lord Wellesley* v. *Withers*, 4 Ell. & Bl. 750; and see *Bence* v. *Gilpin*, 3 L. R. Ex. 82.

(*f*) *Evans* v. *John*, 4 Beav. 35.

[(*g*) 44 & 45 Vict. c. 41, s. 30.]

is he a trustee in any sense, except as holding the surplus assets after the ordinary administration, with notice of a trust. A proper trustee can only be appointed by the Court (*a*).

Executor converting himself into a trustee.

16. Where a fund is given to a person upon certain trusts, and he is appointed executor, as soon as he has severed the legacy from the general assets, and appropriated it to the specific purpose, he dismisses the character of executor, and assumes that of trustee (*b*). [But an executor by merely assenting to a legacy, as by signing a residuary account, does not constitute himself a trustee (*c*).] But the assent of the executor to a legacy to himself in trust, however proved, converts him into a trustee (*d*).

Parol evidence.

17. Upon the question of acceptance or non-acceptance of the office, *parol* evidence is of course admissible as on any other issue (*e*).

One nominated a trustee may sue as such without written acceptance.

18. If a person be asked and consent to become a trustee of a *marriage settlement*, and thereupon his name is introduced into *articles* as the basis of the settlement, he may sue the parties bound by the articles for specific performance, though he may not have executed any written instrument declaratory of his acceptance of the trust (*f*).

Of acceptance under hand and seal.

19. With respect to the liability of the trustee, it is perfectly immaterial to him whether he *declare* his acceptance of the office by deed or parol, or his consent be *implied* from his acts, for in each case the obligations imposed upon him are precisely the same (*g*). In the event of a *breach of trust*, the consequences to the parties beneficially interested admitted until recent enactments of a slight variation. A breach of trust creates *per se* a *simple contract* debt only (*h*); but, if the trustee has covenanted under his hand and seal to execute the trust, even though the heirs be not named, the breach of trust, thus becoming a *specialty debt*, would, as respects legal assets, and as to the estates of testators or intestates who died before January, 1870, take pre-

(*a*) See *Wyman* v. *Carter*, 12 L. R. Eq. 309.

(*b*) *Phillippo* v. *Munnings*, 2 M. & C. 309; *Byrchall* v. *Bradford*, 6 Mad. 13; *S. C.* Ib. 235; *Ex parte Dover*, 5 Sim. 500; *Ex parte Wilkinson*, 3 Mont. & Ayr. 145; see *Wilmott* v. *Jenkins*, 1 Beav. 401; [*Re Smith*, 42 Ch. D. 302; and as to the right of an administrator to appropriate part of the estate to his own share as next of kin; see *Barclay* v. *Owen*, 60 L. T. N.S. 220.]

[(*c*) *Re Rowe*, 58 L. J. Ch. 703; 61 L. T. N.S. 581.]

(*d*) *Dix* v. *Burford*, 19 Beav. 409.

(*e*) See *James* v. *Frearson*, 1 Y. & C. C. C. 370.

(*f*) *Cook* v. *Fryer*, 1 Hare, 498.

(*g*) See *Lord Montfort* v. *Lord Cadogan*, 19 Ves. 638.

(*h*) *Vernon* v. *Vawdry*, 2 Atk. 119; *S. C.* Barn. 280; *Cox* v. *Bateman*, 2 Ves. 19; *Kearnan* v. *FitzSimon*, 3 Ridg. P. C. 18; *Lockhart* v. *Reilly*, 1 De G. & J. 464; *Jenkins* v. *Robertson*, 1 Eq. Rep. 123.

cedence of simple contract debts (*a*). However, the mere fact of a trustee being made a party to and executing a deed appointing him to that office, does not of itself amount to a covenant on his part to execute the trusts, if the deed do not contain any words which could be construed a covenant at law (*b*); and if the deed do contain such words, yet the trustee cannot be sued upon covenant if he did not execute the deed; though, of course, after accepting the trust he would be liable for a breach of contract, as for a simple contract debt (*c*). If he execute the deed, it is not necessary, in order to make it a covenant, that there should be the word *covenant*, but the words *agree* and *declare* (*d*), or the word *declare* alone will suffice (*e*). There is no magic in words, and it is simply a question of intention whether the execution of the deed was for the purpose of creating a specialty debt or *alio intuitu* (*f*). In the case of a trustee covenanting for himself and his *heirs*, a remedy lay at *common law* against the *heir* in respect of estates descended; and by 3 W. & M. c. 14, the like remedy was given against the *devisee* of the debtor: but this was only where the specialty would have supported an *action of debt*, as in the case of a bond, and did not apply to a *covenant*, by which, not a debt, was created, but *damages* were recoverable (*g*); but 11 G. 4. & 1 W. 4. c. 47, perfected the remedy by extending it to the case of a covenant [or other specialty (*h*). By the Conveyancing and Law of Property Act, 1881, unless a contrary intention is expressed, a covenant and a

(*a*) *Wood* v. *Hardisty*, 2 Coll. 542; (see as to this case 1 Eq. Rep. 125); *Re Dickson*, 12 L. R. Eq. 154; *Gifford* v. *Manley*, For. 109; *Mavor* v. *Davenport*, 2 Sim. 227; *Benson* v. *Benson*, 1 P. W. 131; *Deg* v. *Deg*, 2 P. W. 414; *Turner* v. *Wardle*, 7 Sim. 80; *Primrose* v. *Bromley*, 1 Atk. 89; *Cummins* v. *Cummins*, 3 Jones & Lat. 64; see *Baily* v. *Ekins*, 2 Dick. 632; *Norris* v. *Sadleir*, 8 Ir. R. Eq. 161, 519.

(*b*) *Adey* v. *Arnold*, 2 De G. M. & G. 433; *Isaacson* v. *Harwood*, 3 L. R. Ch. App. 225; *Holland* v. *Holland*, 4 L. R. Ch. App. 449; *Newport* v. *Bryan*, 5 Ir. Ch. Rep. 119; *Marryat* v. *Marryat*, 6 Jur. N.S. 572; *Courtney* v. *Taylor*, 6 M. & Gr. 851; *Wynch* v. *Grant*, 2 Drew. 312. It appears from the latter case, that in *Adey* v. *Arnold*, the trustee had executed the deed, a circumstance not mentioned in the report of *Adey* v. *Arnold*.

(*c*) *Richardson* v. *Jenkins*, 1 Drew. 477; *Vincent* v. *Godson*, 1 Sm. & G. 384.

(*d*) *Westmoreland* v. *Tunnicliffe*, W. N. 1869, p. 182.

(*e*) *Richardson* v. *Jenkins*, 1 Drew. 477; and see *Saltoun* v. *Houston*, 1 Bing. N. C. 433; *Cummins* v. *Cummins*, 3 Jones & Lat. 64; 8 Ir. Eq. Rep. 723; *Jenkins* v. *Robertson*, 1 Eq. Rep. 123.

(*f*) *Isaacson* v. *Harwood*, 3 L. R. Ch. App. 225.

(*g*) *Wilson* v. *Knubley*, 7 East. 127.

[(*h*) The effect of sections 6 and 8 of this Act is that upon alienation by the devisee, the testator's debts become his debts to the extent of the value of the land. See *Re Hedgeley*, 34 Ch. D. 379, and *Re Hyatt*, 38 Ch. D. 609, at p. 619.]

contract under seal, and a bond or obligation under seal, made, or implied by virtue of the Act, since the 31st December, 1881, though not expressed to bind the heirs, operate in law to bind the heirs and real estate, as well as the executors and administrators, and personal estate, as if heirs were expressed (*a*). The effect of this section seems to be to extend the remedy given by 11 G. 4. & 1 W. 4. c. 47, to all specialty creditors, whether the heirs are named or not. By 3 & 4. W. 4. c. 104 it was] declared that the lands of a debtor should be liable to *all his debts*, whether on simple contract or on specialty; but specialties, where the heir was bound, were still made to take precedence of simple contract debts, and specialties where the heir was not bound. A subsequent statute (*b*) has now abolished the distinction between simple contract debts and specialty debts, and directed all debts to be paid *pari passu* in the administration of estates of testators or intestates who may have died on or after the 1st January, 1870.

Duties consequent on acceptance.

20. As soon as a trustee has accepted the office, he must bear in mind that he is not to sleep upon it, but is required to take an *active* part in the execution of the trust. The law knows no such person as a *passive* trustee. If, therefore, an unprofessional person be associated in the trust with a professional one, he must not argue, as is often done, that because the solicitor is better acquainted with business and with legal technicalities, the administration of the trust may be safely confided to him, and that the other need not interfere except by joining in what are called formal acts. If he sign a power of attorney for sale of stock, or execute a deed of reconveyance on repayment of a mortgage sum, he is as answerable for the money as if he were himself the solicitor and had the sole management of the transaction.

A trustee on acceptance must inform himself of the state of the trust.

21. Again, when a trustee has entered upon the trust, he is bound at once to acquaint himself with the nature and particular circumstances of the property, and to take such steps as may be necessary for the due protection of it (*c*). Thus he is not liable for the defaults of any predecessor in the trust, but if the fund is in danger and not in the state in which it ought to be, the Court will presume him to have made proper inquiries, and will

[(*a*) 44 & 45 Vict. c. 41, s. 59.]

(*b*) 32 & 33 Vict. c. 46.

[(*c*) A trustee who brings an action for the protection of the trust property under the advice of counsel, is not *absolutely* indemnified by such advice from liability to the costs of the action as between himself and his *cestuis que trust*, though such advice would go a long way to justify the proceedings, if instituted *bonâ fide: Stott* v. *Milne*, 25 Ch. Div. 710.]

hold him responsible if he does not take such measures as may be called for (*a*).

Covenant to settle future property.

22. But where a person was appointed new trustee of a marriage settlement, which contained a covenant by the husband for the settlement of the wife's future property, it was held that he was entitled to assume that the covenant had been duly performed up to the time of his becoming trustee, if he had no reason to suspect the contrary (*b*).

Inventory.

23. A trustee of chattels personal for the separate use of a wife must take care, on accepting the trust, to have the effects ascertained by a proper inventory, or in a suit for an account of the trust estate he may be deprived of his costs (*c*). [And where a tenant for life of chattels is let into possession he should sign an inventory (*d*).]

A trustee by mistake.

24. We may add in conclusion, that if a person by mistake or otherwise assume the character of trustee, when it really does not belong to him, and so becomes a *trustee de son tort*, he may be called to account by the *cestuis que trust*, for the monies he received under colour of the trust. Thus, where a testator devised an estate to W. Thompson upon certain trusts, with a power of sale to him, his heirs and assigns, and the trustee devised all his real estate to his sister Grace Thompson, charged with 50*l.* to his friend Watson, and died leaving his brother Jonas Thompson his heir-at-law, and, on the death of the trustee, Grace Thompson, assuming herself to be the devisee, sold the estate and received the money and paid it wrongfully to the tenant for life; in a suit against the representative of Grace Thompson, the Court held that, although she was neither heir nor devisee, yet as she had acted as trustee and received the money in that character, she was accountable for it to the *cestuis que trust* (*e*). [And in a recent case in the House of Lords the same principle was applied, and it was held (reversing

(*a*) See *Taylar* v. *Millington*, 4 Jur. N.S. 204; *Townley* v. *Bond*, 2 Conn. & Laws. 405; *James* v. *Frearson*, 1 Y. & C. C. C. 370; *Ex parte Geaves*, 25 L. J. Bank. 53; 2 Jur. N.S. 651; *Youde* v. *Cloud*, 18 L. R. Eq. 634; [*Hallows* v. *Lloyd*, 39 Ch. D. 686, 691]; and see *Malzy* v. *Edge*, 2 Jur N.S. 80; but this decision seems opposed to the current of authorities.

(*b*) *Geaves* v. *Strahan*, 8 De G. M. & G. 291.

(*c*) *England* v. *Downs*, 6 Beav. 269; see 279.

[(*d*) *Temple* v. *Thring*, 56 L. J. Ch. 767, 768; 56 L. T. N.S. 283, 284.]

(*e*) *Rackham* v. *Siddall*, 16 Sim. 297; affirmed by the Lord Chancellor on appeal as to the point under consideration, 1 Mac. & G. 607; *Pearce* v. *Pearce*, 22 Beav. 248; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58; *Hennessey* v. *Bray*, 33 Beav. 96; *Yardley* v. *Holland*, 20 L. R. Eq. 428; *Ex parte Norris*, 4 L. R. Ch. App. 280.

the judgment of the Court of Appeal) that a person who had assumed to act as agent and receiver for heirs who were unascertained remained, so long as he continued to act, chargeable in a fiduciary character, so that the Statute of Limitations would not run against them in his favour (*a*).]

[(*a*) *Lyell* v. *Kennedy*, 14 App. Cas. 437.]

CHAPTER XII.

OF THE LEGAL ESTATE IN THE TRUSTEE.

Upon this subject we propose to treat, *First.* Of vesting the legal estate in the trustee; *Secondly.* Of the properties and devolution of the legal estate; and *Thirdly.* What persons taking the legal estate will be bound by the trust.

SECTION I.

OF VESTING THE LEGAL ESTATE IN THE TRUSTEE.

I. With reference to the *Statute of Uses.*

Statute of uses.

1. In the case of a simple trust, as the statute of 27 Henry the Eighth operates upon the *first use*, whether designated in the instrument as a *use* or *trust*, if a conveyance or devise be to A. and his heirs "*in trust*" for B. and his heirs, the possession will be executed in B. (*a*); and the statute must operate, notwithstanding the intention of the settlor to the contrary, for the will of the subject cannot control the express enactment of the legislature (*b*). In order, therefore, to prevent the legal estate from being executed in the *cestui que trust*, it is necessary to vest in the trustee not only the ancient common law fee, but also the primary use, as, by conveying or devising "to the trustee and his heirs *to the use* of the trustee and his heirs" (*c*), or "unto and *to the use* of the trustee and his heirs" (*d*); for

(*a*) As in *Austen* v. *Taylor*, 1 Eden, 361; *Robinson* v. *Grey*, 9 East, 1; *William* v. *Waters*, 14 M. & W. 166, &c. See *Broughton* v. *Langley*, 2 Salk. 679; *Chapman* v. *Blissett*, Cas. *t.* Talb. 150.

(*b*) See *Carwardine* v. *Carwardine*, 1 Eden, 36. In *Gregory* v. *Henderson*, 4 Taunt. 772, Judges Chambre and Gibbs laid a stress on the testator's *intent*, but Judge Heath referred the case to the true principle, viz. that the trustees having a duty to perform, it was a trust special, and so out of the statute.

(*c*) *Robinson* v. *Comyns*, Cas. *t.* Talb. 164; *Attorney-General* v. *Scott*, id. 138; *Hopkins* v. *Hopkins*, 1 Atk. 589, *per* Lord Hardwicke.

(*d*) *Doe* v. *Passingham*, 6 B. & C.

although by the latter form of limitation the trustee will be *in* by the common law, yet, as the possession and the use are both vested in the trustee, the trust over, as not being the primary use, will not be effected by the statute.

Special trusts not within the Act.

2. *Special* trusts are not within the purview of the Act of Henry the Eighth (*a*); and therefore, if any agency be imposed on the trustee, as by a limitation to A. and his heirs, upon trust to *pay* the rents (*b*), or to *convey* the estate (*c*), or if any control is to be exercised, or duty is to be performed, as in the case of a trust to *apply* the rents to a person's *maintenance* (*d*), or in making *repairs* (*e*), or to *preserve contingent remainders* (*f*), and *à fortiori* if to *raise a sum of money* (*g*), or to *dispose of by sale* (*h*), in all these cases as the trust is of a special character, the operation of the statute of uses is effectually excluded. So if an estate be *devised* to trustees upon trust for a feme covert for her *sole and separate* use, and her *receipts alone to be discharges* (*i*). But if an estate be released by *deed* to A. and his heirs "upon trust," after the marriage of the relessor "for her and her assigns for life, for her *own sole and separate use*," but no *active* duty in respect of the separate use is expressed to be reposed in the trustee personally, a common law court has rejected the sole and separate use as an estate known only in equity, and held the legal estate for life to be executed in the *feme* (*j*).

Trust to "permit and suffer A. to receive," &c., executed by the Act.

3. And if the trust be simply to "*permit and suffer A. to receive* the rents" (*k*), the legal estate is executed in A. However, if the

305; *Doe* v. *Field*, 2 B. & Ad. 564; *Harris* v. *Pugh*, 12 Moore, 577; *S. C.* 4 Bing. 335; *Rackham* v. *Siddall*, 1 Mac. & G. 607.

(*a*) See Introduction, p. 5; and see *Wright* v. *Pearson*, 1 Eden, 125; *Mott* v. *Buxton*, 7 Ves. 201.

(*b*) *Robinson* v. *Grey*, 9 East, 1; *Symson* v. *Turner*, 1 Eq. Ca. Ab. 383, note, 3rd resolution; *Garth* v. *Baldwin*, 2 Ves. 646; *Chapman* v. *Blissett*, Cas. *t.* Talbot, 145; *Barker* v. *Greenwood*, 4 M. & W. 429; *Anthony* v. *Rees*, 2 Cr. & Jer. 75; *White* v. *Parker*, 1 Bing. N. C. 573; *Sherwin* v. *Kenny*, 16 Ir. Ch. Rep. 138; and see *Doe* v. *Homfray*, 6 Ad. & Ell. 206; *Kenrick* v. *Lord Beauclerk*, 3 Bos. & Pul. 178; *Nevil* v. *Saunders*, 1 Vern. 415; *Jones* v. *Lord Say & Sele*, 1 Eq. Ca. Ab 383.

(*c*) *Garth* v. *Baldwin*, 2 Ves. 646; *Doe* v. *Field*, 2 B. & Ad. 504; *Doe* v. *Edlin*, 4 Ad. & Ell. 582; *Doe* v. *Scott*, 4 Bing. 505.

(*d*) *Sylvester* v. *Wilson*, 2 T. R. 444; *Doe* v. *Edlin*, 4 Ad. & Ell. 582.

(*e*) *Shapland* v. *Smith*, 1 B. C. C. 75.

(*f*) *Biscoe* v. *Perkins*, 1 V. & B. 485; and see *Barker* v. *Greenwood*, 4 M. & W. 431.

(*g*) *Wright* v. *Pearson*, 1 Eden, 119; *Stanley* v. *Lennard*, 1 Eden, 87.

(*h*) *Bagshaw* v. *Spencer*, 1 Ves. 142.

(*i*) *Harton* v. *Harton*, 7 T. R. 652; and see *Hawkins* v. *Luscombe*, 2 Sw. 391; *Nevil* v. *Saunders*, 1 Vern. 415; *Jones* v. *Lord Say & Sele*, 1 Eq. Ca. Ab. 383; *Doe* v. *Claridge*, 6 C. B. 641; *Williams* v. *Waters*, 14 M. & W. 172.

(*j*) *Williams* v. *Waters*, 14 M. & W. 166. See *Nash* v. *Allen*, 1 H. & C. 167; and see *post*, p. 224.

(*k*) *Boughton* v. *Langley*, 1 Eq. Ca. Ab. 383; *S. C.* 2 Salk. 679, over-

lands be devised to three persons and their heirs in trust to permit A. to receive the *net* rents for her life for her own use, and after her death to permit B. to receive the *net* rents for her life for her sole and separate use, with remainder over and a power of sale to the trustees, it has been held that the legal estate is in the trustees, for they are to receive the rents, and thereout pay the land-tax and other charges on the estate, and hand over the *net* rents only to the tenant for life (*a*).

[Maintenance clause.]

[4. And where real estate was devised to trustees their heirs and assigns, to the use of A. for life with remainder to the use of such child or children of A. as should attain twenty-one as tenants in common in fee, with remainders over, and the testator "empowered his trustees to apply the income to which, under the disposition thereinbefore contained, any infant devisee should be presumptively or otherwise entitled towards the maintenance and education or otherwise for the benefit of such devisee during his minority," it was held by V. C. Hall that the legal fee was in the trustees, inasmuch as the provision for maintenance showed that the intention was that the trustees should, under the disposition to them their heirs and assigns, take an estate by virtue of which they would receive the rents and profits (*b*).]

Charge of debts.

5. If the legal estate be limited to the trustees *charged with debts,* or *annuities,* and subject thereto in trust for A., but no direction to the trustees personally to *pay* the debts or annuities (*c*), here, as the trustees have no agency assigned to them, but merely stand seised in trust, the statute will operate, and execute the possession in A.

Doe *v.* Nicholls.

6. And where copyholds were devised to trustees during the minority of the testator's son, "the same to be *transferred* to him" when he attained twenty-one, and if he died under twenty-one the testator gave the estate over, it was held that the trustees took a chattel interest only, until the son attained twenty-one, and that the copyholds then vested in the son. It was said, that if the devise were to the son on attaining twenty-one without the intervention of trustees, the *admission* of the

ruling *Burchett* v. *Durdant*, 2 Vent. 311; *Right* v. *Smith*, 12 East, 455; *Wagstaff* v. *Smith*, 9 Ves. 524, *per* Sir W. Grant; *Gregory* v. *Henderson*, 4 Taunt. 773, *per* Heath, J.; *Warter* v. *Hutchinson*, 5 Moore, 143; *S. C.* 1 B. & C. 721; *Barker* v. *Greenwood*, 4 M. & W. 429, *per* Parke, B.

(*a*) *Barker* v. *Greenwood*, 4 M. & W. 421; *White* v. *Parker*, 1 Bing. N. C. 573.

[(*b*) *Berry* v. *Berry*, 7 Ch. D. 657.]

(*c*) *Kenrick* v. *Lord Beauclerk*, 3 B. & P. 175; *Jones* v. *Lord Say & Sele*, 8 Vin. Ab. 262. But see *Creaton* v. *Creaton*, 3 Sm. & G. 386; *Baker* v. *White*, 20 L. R. Eq. 174; and see *Collier* v. *M'Bean*, 34 Beav. 426.

son as tenant on the rolls would operate as a *transfer* of the estate, and that the words "the same to be transferred" did not imply that the *trustees* were to transfer the legal estate (*a*). This construction, however, appears to be somewhat forced, and is not quite satisfactory.

Trust to pay, *or* permit, &c.

7. Where the trust is "to pay unto *or* permit and suffer a person to receive" the rents, as the former words would create a special trust, and the latter would be construed a use executed by the statute, the Court holds, for want of a better reason, that the former or latter words shall prevail, as the instrument, in which they are found, happens to be a deed or a will (*b*). But it may be asked, why might not the settlor have meant to vest a *discretion* in the trustees, either to receive the rents themselves, *or* to put the *cestui que trust* in possession, and if so, the intention would require that the legal estate should be in the trustee. However, numerous titles must have been accepted on the faith of the case referred to, and at this distance of time it might be dangerous to reverse it; and this is the view adopted by the Court (*c*). [But as the rule establishes no principle, it will readily yield to indication of a contrary intention; and where the trust was to "pay the rents unto, or permit the same to be received by" one of the trustees, the Court of Appeal were of opinion that, as effect could be given to both sets of words, there was no inconsistency, and held, upon the construction of the will, that the doctrine of *Doe* v. *Biggs* had no application, and that the legal estate remained in the trustees (*d*).]

II. Of the *quantity* of legal estate taken by the trustee with reference to the object and scope of the trust.

General rules.

As legal limitations are properly cognisable by a common-law court, it might be supposed that the construction put upon the instrument would stand wholly unaffected by the engraftment of a trust. But as the effect of the instrument is to be ruled by the intention, and as every person in limiting an estate to a trustee must be guided by the equity he proposes to raise upon it, the Courts as well of common law as of equity, and more particularly in the case of wills, have entered upon a consideration of the trust, in order to regulate within certain limits the

(*a*) *Doe* v. *Nicholls*, 1 B. & C. 336.

(*b*) *Doe* v. *Biggs*, 2 Taunt. 109; [*Re Tanqueray-Willaume and Landau*, 20 Ch. Div. 465, 478.]

(*c*) *Baker* v. *White*, 20 L. R. Eq. 171; [*Re Lashmar* (1891), 1 Ch. (C. A.) 258, 267.]

[(*d*) *Re Tanqueray-Willaume and Landau*, 20 Ch. Div. 465; and see *Re Lashmar*, *sup.*]

extent of the legal interest by the scope and object of the equitable (*a*).

The following rules of construction have been adopted by the Courts in reference to this branch of our subject in the case of wills, and, except so far as they are controlled by the positive enactments of the Wills Act (*b*), must still be resorted to for guidance.

First, *Wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied:* Secondly, *The legal estate limited to the trustee shall not be carried further than the complete execution of the trust necessarily requires.*

First. As to the former rule.

Legal estate supplied *in toto* on account of the trust.

1. The Court has in some instances *supplied the estate in toto;* as where a testator devised to a *feme covert* the issues and profits of certain lands *to be paid by his executors*, and it was held that the land itself was devised to the executors in trust to receive the rents and profits and apply them to the use of the wife (*c*).

Legal estates enlarged.

2. In *other* cases the Court has *extended the estate*, as where, before the Wills Act, the devise was to three trustees, and the survivor of them, and the executors and administrators of such survivor, upon trust to pay certain annuities for lives, and it was ruled that the trustees took an estate for the *several lives of the annuitants* (*d*).

Trust to sell confers a fee.

3. If land, said Lord Hardwicke, be devised to a man without the word *heirs*, and a trust be declared which can be satisfied in no other way but by the trustees taking an inheritance, it has been construed that a fee passes (*e*). Thus a trust to sell (*f*), even on a contingency (*g*), confers a fee simple as indispensable to the execution of the trust; and the construction is the same

(*a*) As to the cognisance of trusts by a court of law, see *Sims* v. *Marryatt*, 17 Q. B. 292; *May* v. *Taylor*, 6 Man. & Gr. 261; *Walker* v. *Richardson*, 2 M. & W. 891.

(*b*) 1 Vict. c. 26, ss. 30, 31.

(*c*) *Bush* v. *Allen*, 5 Mod. 63; *Doe* v. *Homfray*, 6 Ad. & Ell. 206; and see *Oates* v. *Cooke*, 3 Burr. 1684; Sir W. Black. 543; *Doe* v. *Woodhouse*, 4 T. R. 89; *Murphy* v. *Donnelly*, 4 I. R. Eq. 111; *Stevenson* v. *Mayor of Liverpool*, 10 L. R. Q. B. 81; [*Davies to Jones*, 24 Ch. D. 190.]

(*d*) *Doe* v. *Simpson*, 5 East, 162; and see *Atcherley* v. *Vernon*, 10 Mod. 523; *Oates* v. *Cooke*, 3 Burr. 1684; *Shaw* v. *Weigh*, 2 Str. 798; *Jenkins* v. *Jenkins*, Willes, 656. In *Doe* v. *Simpson*, a life estate only was implied, as the trustee was merely such; but in *Jenkins* v. *Jenkins*, the trustee being also interested beneficially, the construction was more liberal, and it was thought the fee simple passed.

(*e*) *Villiers* v. *Villiers*, 2 Atk. 72.

(*f*) *Shaw* v. *Weigh*, 2 Str. 798; *Bagshaw* v. *Spencer*, 1 Ves. 144, *per* Lord Hardwicke; and see *Glover* v. *Monckton*, 3 Bing. 113; 10 Moore, 453. As to *Hawker* v. *Hawker*, 3 B. & Ald. 537, and *Warter* v. *Hutchinson*, 5 Moore, 143, *S. C.* 1 B. & C. 721, *see* remarks, p. 229, note (*c*) *infrà*.

(*g*) *Gibson* v. *Lord Montfort*, 1 Ves. 485, see p. 491.

in a sale implied, as where the devise is upon trust out of the rents and profits of an estate to discharge certain legacies, made payable at a day inconsistent with the application of the annual profits only (*a*).

Charges not implying a power of sale.

4. But a power of selling will not be implied by a limitation to a trustee, or to a trustee his *executors and administrators* for and *until payment* of debts and legacies generally (*b*), or for raising a sum of money out of the *rents and profits* (*c*); and therefore, in such cases, before the Wills Act, where nothing in the context implied a limitation of the fee, a chattel interest only would have passed. But, if a greater estate be limited expressly, as by a devise to A. *and his heirs* upon trust to pay debts, the Court has no jurisdiction to cut down the expression and reduce the estate to a chattel (*d*); though if a chattel interest be carved out of the fee and be so limited, the word "heirs" may be rejected as inconsistent with the estate, as where lands are devised to trustees and their *heirs*, until an infant attains twenty-one, and then to the infant in fee (*e*).

Grant or devise to two and the heirs of the survivor.

5. If an estate be *granted* to two, and the survivor of them, and the heirs of such survivor, they are not joint tenants in fee, but take a freehold for their joint lives, with a contingent remainder to the one that may happen to survive. The same construction will be put upon a *devise* expressed simply in the same terms without any trust annexed, or even if there be a trust, provided the nature of it do not require the fee simple to be vested in the trustees (*f*). But if such a devise, even to beneficiaries, be coupled with words pointing to a joint tenancy, the construction will be a joint fee, as if the gift be to two and the survivor of them and *their heirs* (*g*), or to them as *joint tenants*, and the survivors and survivor of them, and the heirs and assigns of such survivor (*h*). And if the devise be to two and the survivor of them, and the heirs of such survivor upon trusts that

(*a*) *Gibson* v. *Lord Montfort*, 1 Ves. 485.

(*b*) Co. Lit. 42, a; *Cordal's case*, Cr. Eliz. 315; *Carter* v. *Barnardiston*, 1 P. W. 505; *Hitchens* v. *Hitchens*, 2 Vern. 403; *Doe* v. *Simpson* 5 East, 171, *per* Lord Ellenborough, C.J.; *Roberts* v. *Dixwell*, 1 Atk. 609, *per* Lord Hardwicke.

(*c*) *Doe* v. *Simpson*, 5 East, 162; and see *Bosworth* v. *Forard*, O. Bridg. Rep. 167; *Thomason* v. *Mackworth*, id. 507; Co. Lit. 42, a, note (7), Butler's ed.; *Collier* v. *Walters*, 17 L. R. Eq. 252.

(*d*) *Wright* v. *Pearson*, 1 Eden, 119, see p. 123.

(*e*) *Goodtitle* v. *Whitby*, 1 Burr. 228; *Doe* v. *Lea*, 3 T. R. 41; *Warter* v. *Hutchinson*, 1 B. & C. 721; and see *Ackland* v. *Lutley*, 9 Ad. & Ell. 879; but see *Lethieullier* v. *Tracy*, 3 Atk. 780, Fearne's C. R. 226, Butler's note.

(*f*) *Re Harrison*, 3 Anst. 836.

(*g*) *Doe* v. *Sotheron*, 2 B. & Ad. 628; *Oakley* v. *Young*, 2 Eq. Ca. Ab. 537.

(*h*) *Goodtitle* v. *Layman*, Fearne's C. R. 358.

require the fee simple to be vested in the trustees, or upon trust for *sale*, the prevailing opinion is, that notwithstanding the old case of *Vick* v. *Edwards* (*a*) to the contrary, the Courts would compel a purchaser to accept a title on the assumption that the trustees took the fee simple (*b*). "Whatever doubts," observes Butler, "were formerly entertained, it now appears to be the settled opinion of the profession that a devise to two and the survivor of them, and the heirs and assigns of such survivor, enables the trustees to vest the fee in the purchaser, and that titles under such a devise are accepted with a conveyance from the trustees and without the concurrence of the heir" (*c*).

Implied devise in the word "trustee."

6. If a testator simply appoint a person his executor and *trustee*, it seems the latter word is not so exclusively applied to real estate, as to carry by implication to the executor a devise of the testator's freeholds, but if the testator direct certain acts to be done by the trustee, [or by the executor,] which belong to the owner of the freeholds, [or which require that the trustee or executor should have dominion over the real estate,] such a devise will be implied (*d*); [but the implication will only arise when it is necessary to make the words used by the testator sensible (*e*)]. And so if a testator appoint a person his "trustee of inheritance," which is equivalent to making him the trustee of his inheritable property (*f*); or if a testator appoint "A. and B. trustees as also their *heirs* or assigns, not making them accountable for any losses except by their own neglect, and the one not to suffer for the other's negligence" (*g*). And if a testator constitute a trustee by will, and devise the legal estate to him, and then by a codicil "nominates and appoints another person to be *trustee*" in his place, the codicil not only confers the office of the trusteeship, but also carries the legal estate with it (*h*).

If a testator by will devises to several persons upon trust, and nominates them his *trustees and executors*, and then by codicil

(*a*) 3 P. W. 372.

(*b*) See *Doe* v. *Ewart*, 7 Ad. & Ell. 636; *Doe* v. *Sotheron*, 2 B. & Ad. 628.

(*c*) Co. Lit. 191 a, note 1; and see Fearne's C. R. 358.

(*d*) *Oates* v. *Cooke*, 3 Burr. 1684; *Bush* v. *Allen*, 5 Mod. 63; *Anthony* v. *Rees*, 2 Cr. & Jer. 75; *Doe* v. *Shotter*, 8 Ad. & Ell. 905; [*Davies to Jones*, 24 Ch. D. 190; *Re Fisher and Haslett*, 13 L. R. Ir. 546.] If a testator appoint his solicitor sole trustee of his will, with a direction that the solicitor is to be paid as a solicitor as if he were not a trustee, it constitutes him a *trustee* only and not an *executor*, according to the tenor of the will. *Re Goods of Lowry*, 3 L. R. P. & D. 157.

[(*e*) *Re Cameron*, 26 Ch. D. 19, 25.]

(*f*) *Trent* v. *Hanning*, 1 B. & P. New Rep. 116; 10 Ves. 495; 7 East, 95; 1 Dow, 102; *Doe* v. *Pratt*, 6 Ad. & Ell. 180.

(*g*) *Bennett* v. *Bennett*, 2 Dr. & Sm. 266.

(*h*) *Re Hough's Will*, 4 De G. & Sm. 371; *Re Turner*, 2 De G. F. & J. 527.

revokes the appointment of one of them as *executor*, and substitutes another person as *executor* in his place, such revocation and new appointment extends only to the *executorship*, and does not by implication affect the *trusteeship* (*a*).

Legal estate curtailed from the nature of the trust.

Secondly, we proceed to illustrate the rule, that the legal estate limited to the trustee shall not be greater than is required by the trust.

1. If a freehold estate be devised to A. and his heirs upon trust to *permit* B. *to receive* the rents during his life, and on his death to *convey* to C. in fee; here, as during the life of B. the trustees are to be merely passive, but after his death are to do an act, the legal estate for the life of B. is vested in B., and the remainder only in the trustee (*b*). On the other hand, if an estate be devised to A. and his heirs in trust, to *pay* the rents to B. for his life, and on his death, the testator devises the estate to C. in fee, here the legal estate for the life of B. is in the trustee, and the legal estate of the remainder is vested in C. (*c*). So where a *copyhold* was *devised to A. and his heirs* upon trust for the separate use of B. a *feme covert* during her life, and after her decease the testatrix devised the same to such uses as B. should appoint, and in default of appointment to the right heirs of B., it was thought by Judge Heath that the trustee took a base fee determinable by an executory devise over on the death of the *feme covert*, and by Judge Chambre that the devise amounted only to an estate *pur autre vie* (*d*). So where a testator devised *leaseholds for years* to trustees upon trust for A. for life, and after the death of A. the testator bequeathed them to B., it was held that the trustees had the legal estate during the life of A. only (*e*). Thus in freeholds, copyholds, and leaseholds, where there is an

(*a*) *Worley* v. *Worley*, 18 Beav. 58; *Graham* v. *Graham*, 16 Beav. 550; *Cartwright* v. *Shepheard*, 17 Beav. 301; *Barrett* v. *Wilkins*, 5 Jur. N. S. 687.

(*b*) *Doe* v. *Bolton*, 11 Ad. & Ell. 188; *Adams* v. *Adams*, 6 Q. B. 860.

(*c*) *Adams* v. *Adams*, 6 Q. B. 860; *Cooke* v. *Blake*, 1 Exch. 220; *Jones* v. *Lord Say & Sele*, 8 Vin. Ab. 262; *Doe* v. *Simpson*, 5 East, 171, *per* Lord Ellenborough; *Robinson* v. *Grey*, 9 East, 1; *Doe* v. *Ironmonger*, 3 East, 533; *Warter* v. *Hutchison*, 5 Moore, 143; *S. C.* 1 B. & C. 721; and see *Nash* v. *Coates*, 3 B. & Ad. 839; *Ward* v. *Burbury*, 18 Beav. 190; *Doe* v. *Cafe*, 7 Exch. 675; [*Re Lashmar* (1891), 1 Ch. (C. A.) 258, 269.] Note *Harton* v. *Harton*, 7 T. R. 652, can scarcely be reconciled with principle, and seems to have been disapproved by Lord Eldon in *Hawkins* v. *Luscombe*, 2 Sw. 391; but Sir J. Wigram considered himself bound by it in *Brown* v. *Whiteway*, 8 Hare, 145, and the Court of Q. B. recognised its authority, at least to a partial extent, in *Toller* v. *Attwood*, 15 Q. B. 951.

(*d*) *Doe* v. *Barthorp*, 5 Taunt. 382; *Baker* v. *White*, 20 L. R. Eq. 166; and see *Ward* v. *Burbury*, 18 Beav. 190 *Doe d. Players* v. *Nicholls*, 1 B. & C. 342; *Doe* v. *Cafe*, 7 Exch. 675.

(*e*) *Stevenson* v. *Mayor of Liverpool*, 10 L. R. Q. B. 81.

indefinite devise to trustees and their heirs, executors, or administrators, upon certain trusts confined to the life of one person, followed by a simple devise to another for the absolute interest, in each case the estate of the trustees is limited by implication to the life of the person who takes the life interest (*a*).

It has sometimes been argued that where *freeholds* are coupled with *copyholds* or *leaseholds* upon certain trusts, if the legal estate of the copyholds or leaseholds be vested in the trustees, there is a kind of attraction which will cause the legal estate of the freeholds also to be vested in the trustees; but whatever attraction may arise from the presumption that the different kinds of property were meant to be held together during the continuance of the trusts affecting them, there is no such attraction as will keep the legal estates of any species of property vested in the trustees beyond the period limited for the trusts of that property (*b*). It seems, however, that in a *deed*, where the construction adheres more strictly to the letter, a limitation to trustees and *their heirs* upon trust to pay an annuity for life only, with remainders over, would have conferred the fee simple (*c*).

Limitation to trustees and their heirs to preserve contingent remainders, the words "during the life of," &c., being omitted.

2. In a *devise* to A. for life, remainder to trustees and their heirs to preserve contingent remainders (the words "during the life of A." being omitted), with remainders over, the trustees are construed to take not a fee simple, but an estate for the life of A. (*d*). And Sir W. Grant expressed himself in favour of a similar construction where the instrument was a deed (*e*); but it has since been decided that in the latter case a fee simple passes (*f*), unless it be quite clear upon the face of the deed itself that the words "during the life of A." were meant to be in the deed, and were wanting through inadvertence (*g*). Of course there can be no such restriction of the estate by implication where the natural sense of the words admits of a fair and reasonable construction; as if before the Act of 1845 (*h*) the fee simple in the trustees would have supported contingent limitations that

(*a*) *Baker* v. *White*, 20 L.R.Eq. 177, *per cur.*

(*b*) *Baker* v. *White*, 20 L. R. Eq. 166.

(*c*) *Wykham* v. *Wykham*, 11 East, 458; see *S. C.* 18 Ves. 419, and following pages; 3 Taunt. 316.

(*d*) *Doe* v. *Hicks*, 7 T. R. 433; *Haddelsley* v. *Adams*, 22 Beav. 267; as to *Boteler* v. *Allington*, 1 B. C. C. 72, see *Doe* v. *Hicks*, 7 T. R. 435, and *Wykham* v. *Wykham*, 18 Ves. 418; and see *Nash* v. *Coates*, 3 B. & Ad. 839.

(*e*) *Curtis* v. *Price*, 12 Ves. 89; but see *Wykham* v. *Wykham*, 18 Ves. 419, and following pages.

(*f*) *Colmore* v. *Tyndall*, 2 Y. & J. 605; *Lewis* v. *Rees*, 3 K. & J. 132; *Cooper* v. *Kynock*, 7 L. R. Ch. App. 398.

(*g*) *Beaumont* v. *Marquis of Salisbury*, 19 Beav. 198.

(*h*) 8 & 9 Vict. c. 106, s. 8.

would otherwise have been left at the mercy of the tenant for life (*a*).

Trust to lease, &c., confers fee simple.

3. But if a devise be to trustees and their heirs upon a trust that cannot be executed without an absolute control over the property, as in trust to lease for an indefinite number of years (*b*), or to raise a sum of money by sale (*c*), and subject thereto to uses in strict settlement, the trustees will not be held to take a mere *power* so as to let in the statute to execute the uses in strict settlement, but will be construed to take the legal *estate* in fee, and the uses that are limited will stand as equitable interests.

Charge of debts.

So if copyholds be devised to *trustees* (*who are also appointed executors of the testator*) and the survivor of them, and the heirs of such survivor, charged with debts, and subject thereto upon trust to pay the rents to the testator's daughter for life, and after her death, the copyholds are devised by the testator directly to the heirs of the body of such tenant for life, here, as the charge of debts may require the fee simple to be in the trustees, they take the legal estate not only for the life of the tenant for life but absolutely, and the issue in tail take only equitable estates (*d*).

[So where a testator directs his debts to be paid, or directs them to be paid by his executors, and devises real estate to trustees and their heirs upon trusts which do not exhaust the fee, and then devises the real estate after the determination of

(*a*) *Venables* v. *Morris*, 7 T. R. 342, 438; and see *Curtis* v. *Price*, 12 Ves. 100; *Doe* v. *Hicks*, 7 T. R. 437; *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 169; 2 Dr. & War. 16.

(*b*) *Doe* v. *Willan*, 2 B. & Ald. 84; but see *Heardson* v. *Williamson*, 1 Keen, 33; *Ackland* v. *Lutley*, 9 Ad. & Ell. 879.

(*c*) *Wright* v. *Pearson*, 1 Eden, 123; *Bagshaw* v. *Spencer*, 1 Ves. 142; *Glover* v. *Monckton*, 3 Bing. 13; *Bale* v. *Coleman*, 2 Eq. Ca. Ab. 309; note (*e*); *Sandford* v. *Irby*, 3 B. & Ald. 654; *Jones* v. *Morgan*, 1 B. C. C. 206; for a correct report of the will, see Fearne's C. R. Appendix, No. 3. It has been observed in the "Treatise of Powers" (Sug. Pow. 111, 8th edit.), that this rule was not attended to in the case of *Hawker* v. *Hawker*, 3 B. & Ald. 537. The devise was probably considered to be of a double aspect, viz. to the trustees and their heirs upon trust to sell, &c., if one event happened, and upon trust for the daughter, &c., if another event happened, and as the latter series of limitations took effect, and therefore no power of sale was to be exercised by the trustees, it was not necessary under the circumstances to arm them with the inheritance. The case of *Warter* v. *Hutchinson*, 5 Moore, 143, 1 B. & C. 721, is more difficult to be reconciled with the rule we are discussing. The construction appears to have been, that, as the limitation to the trustees and their heirs was expressly limited to the period *until A. attained twenty-one*, the estate was intended to be a chattel interest only, and the charges were to be raised either by sale or mortgage of that chattel interest, or out of the inheritance by virtue of an implied power.

(*d*) *Creaton* v. *Creaton*, 3 Sm. & G. 386.

the preceding trusts directly to a third person, and *appoints the trustees his executors*, the trustees take the entire legal fee by virtue of the charge of debts (*a*).]

Present rule regulating devises to trustees.

4. Recent cases have established the following important qualification of the rule now under consideration, viz., that where an estate is in the first instance given to trustees and their heirs upon trusts which do not exhaust the equitable fee simple, and for which a particular estate short of the legal fee in the trustees would be sufficient, but discretionary powers are superadded which cannot be exercised by the trustees without arming them with the means of passing the fee simple, there the trustees do not take a particular estate by way of vested interest with a power under the Statute of Uses or by a common law authority of passing the fee, but they retain the legal fee simple given to them in the first instance, on the footing that they were meant to exercise the discretion given to them by virtue of their *ownership* and not by the mere operation of a *power* (*b*). Baron Parke observed, in the leading case (*c*), "When an estate is given to trustees, all the trusts must *primâ facie* at least be performed by them by virtue and in respect of the estate vested in them.—The fee is in terms devised to them, and it would be a very strained and artificial construction to hold first that the natural meaning of the words is to be cut down, because they would give an estate more extensive than the trust required, and then when the trust does require the whole fee simple, to hold that that must be supplied by way of *power* defeating the estate to the subsequent devisees, and not out of the *interest* of the trustees."

Devise to uses.

5. The rule of construction laid down in this case has since been followed, even where the language of the subsequent limitations has been peculiarly applicable to a devise of the legal estate, as where after the primary devise to the trustees and their heirs upon limited trusts with discretionary powers the estate was expressed to be limited in strict settlement, by a declaration of *uses* to that effect (*d*).

[(*a*) *Creaton* v. *Creaton*, 3 Sm. & G. 386; *Re Tanqueray-Willaume & Landau*, 20 Ch. Div. 465; *Marshall* v. *Gingell*, 21 Ch. D. 790; *Spence* v. *Spence*, 12 C. B. N. S. 199; *Re Lashmar* (1891), 1 Ch. 258, 265.]

(*b*) *Watson* v. *Pearson*, 2 Exch. 581; *Blagrave* v. *Blagrave*, 4 Exch. 550; *Davies* v. *Davies*, 1 Q. B. 430; *Doe* v. *Cadogan*, 7 Ad. & Ell. 636; *Rackham* v. *Siddall*, 1 Mac. & G. 607; *Poad* v. *Watson*, 6 Ell. & Bl. 606; and see *Watkins* v. *Frederick*, 11 H. L. Cas. 358.

(*c*) *Watson* v. *Pearson*, 2 Exch. 593.

(*d*) *Blagrave* v. *Blagrave*, 4 Exch. 550; *Rackham* v. *Siddall*, 1 Mac. & G.

Where the powers do not affect the fee.

6. But where the devise, before the Wills Act, was to trustees and their heirs upon trust for a person for life, and after her death upon certain trusts during the minority of her children, followed by a direct devise to the children on the youngest attaining 21, without words of limitation (and therefore construed to give life estates only) with a *mere power of leasing for* 21 *years*, to be exercised during the continuance of the trust without any purpose affecting the fee simple, and which power of leasing extended to other estates also, which were clearly devised to the beneficiaries directly, it was held that the mere power of leasing was not sufficient to countervail the rule that the legal estate was not to be extended beyond the necessity of the trust, and that under all the circumstances the trustees took an estate for the life of the mother and the minority of the children with a *power* of leasing (*a*).

Wills Act.

7. The law upon the subject has undergone some alteration from the provisions of the Act (7 W. 4. and 1 Vict. c. 26) for the amendment of the law of wills.

By the 30th section it is declared, "that where any real estate (other than or not being a presentation to a church) shall be devised to any *trustee or executor*, such devise shall be construed to pass *the fee simple*, or other the *whole estate or interest* which the testator had power to dispose of by will in such real estate, unless a *definite term of years*, absolute or determinable, or an *estate of freehold* shall thereby be given to him, *expressly* or by *implication*."

And by the following section it is enacted, "that where any real estate shall be devised to a trustee *without any express limitation of the estate* to be taken by such trustee, and the beneficial interest in such real estate or in the surplus rents and profits thereof shall not be given to any person for life, or shall be given for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee *the fee simple* or other the whole legal estate which the testator had power to dispose of by will, and not an estate determinable when the purposes of the trust shall be satisfied."

Effect of the Act.

The effect of these provisions is by no means clear, but it is conceived that a *definite* chattel interest, as a term of 99 years, or a simple *freehold*, as an estate for the life of A., may still either be

607; [and see *Berry* v. *Berry*, 7 Ch. D. 657.]

(*a*) *Doe* v. *Cafe*, 7 Exch. 675; and see *Adams* v. *Adams*, 6 Q. B. 860; *Lambert* v. *Browne*, 5 Ir. R. C. L. 218.

limited expressly to trustees or be raised by implication; and that in cases where before the Act an *indefinite* chattel interest would have passed, as in a devise to trustees (without the word "heirs") to pay debts, or a freehold with an indefinite interest superadded, as in *Doe* v. *Simpson* (*a*), there the words of the will are for the future made to pass the fee simple (*b*).

SECTION II.

THE PROPERTIES AND DEVOLUTION OF THE LEGAL ESTATE IN THE TRUSTEE.

THIS branch of our subject we propose to consider, First, with reference to the common law; and, Secondly, with reference to the construction of particular statutes.

First. Of the legal estate at common law.

Legal estate at common law.

1. It may be stated as a general rule, that the legal estate in the hands of the trustee has at common law precisely the same properties and incidents as if the trustee were the usufructuary owner.

Of dower, courtesy, &c.

If real estate be put in trust it is subject at law in the hands of the trustee to curtesy (*c*), and dower (*d*), and in the case of copyhold to freebench (*e*); and until a late Act the trust estate was liable to forfeiture (*f*), and on the decease of the trustee, if there was no heir, it fell by escheat to the lord (*g*); but by 13 & 14 Vict. c. 60, ss. 15, 46, (substituted for 4 & 5 W. 4. c. 23,) the legal estate of trust property was protected from forfeiture and escheat (*h*). And by another Act (*i*), it was enacted that, "Upon

(*a*) 5 East. 162.

(*b*) See the observations on the above clauses, H. Sugden on Wills, p. 119; 2 Jarm. on Wills, 4th Ed. p. 320.

(*c*) *Bennet* v. *Davis*, 2 P. W. 319.

(*d*) *Noel* v. *Jevon*, Freem. 43; *Nash* v. *Preston*, Cro. Car. 190.

(*e*) *Hinton* v. *Hinton*, 2 Ves. sen. 631, 638; *Bevant* v. *Pope*, Freem. 71; and see *Brown* v. *Raindle*, 3 Ves. 256.

(*f*) *Pawlett* v. *Attorney-General*, Hard. 466, *per* Lord Hale; *Geary* v. *Bearcroft*, Cart. 67, *per Cur.*; *King* v. *Mildmay*, 5 B. & Ad. 254.

(*g*) Jenk. 190, c. 92.

(*h*) See *infra*.

(*i*) 38 & 39 Vict. c. 87, s. 48 (repealing 37 & 38 Vict. c. 78, s. 5). In a recent case a discussion arose as to the meaning of the expression a *bare trustee*. V. C. Hall observed, "Where there is a trustee whose trust is to convey and the time has arrived for a conveyance by him, he is, I think, a bare trustee," and then adverting to Dart's "Vendors and Purchasers," in which it is laid down, that "a *bare trustee* would probably be held to mean a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestui que trust*, be compellable in equity to convey the estate to them or by their direction, and has been *requested by them so to convey it*," the V. C. approved

the death of a bare trustee, *intestate* as to any corporeal or incorporeal hereditament, of which such trustee was seised in fee simple, such hereditament should vest, like a chattel real, in the legal personal representative from time to time of such trustee." But the Act was not to apply to lands registered under the same Act. [This enactment is, however, in the case of deaths occurring after the 31st December, 1881, repealed and its place supplied by a provision that "where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage (*a*), in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and

[Under 44 & 45 Vict. c. 41, legal estate devolves to personal representative.]

of the statement, save only that the words, "and has been requested by them so to convey it," should be left out, inasmuch as they were not an important or necessary ingredient. But [the late author of this work has doubted the propriety of this omission on the ground that] if an estate be vested in trustees in trust to sell and divide the proceeds amongst a class, the trustees are bound to convey by the direction of the class if *sui juris*, but are not bare trustees until the joint request to convey has countermanded the trust for sale. *Christie* v. *Ovington*, 1 Ch. D. 279. [In a subsequent case, Sir G. Jessel, M.R., withheld his approval of the above definition of a "bare trustee," and, while expressly abstaining from deciding the point, intimated an opinion that a "bare trustee," meant a trustee without any beneficial interest, whether he had active duties to perform or not. See *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582. But in a still later case V. C. Bacon held that trustees of real estate devised upon trust for sale, the sale of which had been ordered in an action to administer the testator's estate were bare trustees, although they took *beneficial interests* in the proceeds of sale; *Re Docwra*, 29 Ch. D. 693; and yet more recently Stirling, J., has preferred to follow *Christie* v. *Ovington* rather than *Morgan* v. *Swansea Urban Sanitary Authority*; see *Re Cunningham*, W. N., 1891, p. 77; 39 W. R. 469.]

[(*a*) By 37 & 38 Vict. c. 78, s. 4, the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee was admitted, was empowered on payment of all sums secured by the mortgage to convey or surrender the mortgaged estate. This section was held not to apply to a transfer of a mortgage of a freehold estate, *Re Spradbery's Mortgage*, 14 Ch. D. 514; or to a sale by the executors, under a power in the mortgage deed, *Re White's Mortgage*, 51 L. J. N. S. Ch. 856; and has in the case of a death occurring after the 31st December, 1881, been repealed by 44 & 45 Vict. c. 41, s. 30.]

obligations, as if the same were a chattel real vesting in them or him; and for the purposes of this section the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers" (*a*). The section was held, to apply to copyholds (*b*), but it is now enacted by the Copyhold Act, 1887, which was passed on the 16th of September, 1887, that the section "shall not apply to land of copyhold or customary tenure *vested in the tenant on the court rolls* of any manor upon any trust or by way of mortgage" (*c*). The effect of this provision has been held to be retrospective, so that the legal estate in copyholds which has devolved upon the personal representatives of a sole trustee dying after the 31st of December, 1881, and before the passing of the Act of 1887, is divested from them, and vests in the customary heir or devisee, but the validity of any disposition previously made by such representatives is unaffected (*d*).]

Trust chattels subject to forfeiture, &c.

2. So chattels real and personal held upon trust were forfeitable until the Act of 4 & 5 W. 4. c. 23 (which extends to personal as well as real estate), for the offence of the trustee (*e*); but in

[(*a*) 44 & 45 Vict. c. 41, s. 30. If upon the death, intestate, of a sole surviving trustee new trustees are appointed under the Trustee Acts, the vesting order is sometimes made so as to vest the trust estates in them "for the estate therein which would now be vested in (the intestate) if now living," Set. on Dec., 4th Ed. p. 539, [or "for all the estate and interest which the deceased trustee had in him immediately before (or at the time of) his death," *Re Rackstraw's Trusts*, 52 L. T. N.S. 612; 33 W. R. 559. But this form of order will only be adopted in exceptional cases, where it is difficult or impossible to identify the heir; or where the Court is satisfied that the estate has not been dealt with since the death of the last surviving trustee in such a manner that parties not before the Court might be prejudiced by an order in that form; *Re Bishop of Sarum*, W. N., 1886, p. 140; 55 L. T. N.S. 313.] Where the order was made vesting the property in the new trustees "for the estate therein now vested in the heir-at-law of the deceased trustee," and letters of administration were subsequently taken out to the estate of the deceased trustee, the question arose whether the vesting order had any effect, having regard to the 30th sect. of the recent Act, and the Court, upon motion, directed that "notwithstanding the previous order, the land should vest in the new trustees for all the estate therein vested in the legal personal representative," *Re Pilling's Trusts*, 26 Ch. D. 432. Where the sole heiress-at-law of a testator had died intestate subsequently to the Act, and it was desired to appoint new trustees of the will on a petition served only on the heir-at-law, North, J., made an order vesting the property in the new trustees for all such estate as was vested in the heiress at the time of her death. *Re Williams's Trusts*, 36 Ch. D. 231.]

[(*b*) *Re Hughes*, W. N., 1884, p. 53.]

[(*c*) 50 & 51 Vict. c. 73, s. 45.]

[(*d*) In *re Mill's Trusts*, 37 Ch. D. 312; *i.e.* on appeal, 40 Ch. Div. 14, where however there was no decision upon this point, but see the queries of Lindley, L.J., at p. 18.]

(*e*) *Pawlett* v. *Attorney-General*, Hard. 466, *per* Lord Hale; *Wikes's case*, Lane, 54; *Scounden* v. *Hawley*, Comb. 172, *per* Dolben, J.; Jenk. 219, c. 66; Ib. 245, c. 30.

the case of two joint trustees, a moiety only was forfeited, and the King and the other trustee were tenants in common (*a*).

Devolve on executor.

On the decease of the trustee the chattel, as part of his personal estate at law, devolves on his executor or administrator. And if the executor die after probate, having appointed an executor, the chattel becomes vested in that executor.

Renunciation by one executor.

3. Until a late Act, if an executor had renounced probate, the renunciation, though *primâ facie* absolute (*b*), might have been retracted at any time before a new administration was granted. Hence where two executors were named and one renounced, and the acting executor died having appointed executors, but predeceased his co-executor, it was necessary to take out letters of administration to the original testator, for the acting executor not being the survivor did not transmit the interest, and the renouncing executor declined to act (*c*). But now by 20 & 21 Vict. c. 77, s. 79, where an executor *renounces probate*, the rights of such executor are made to cease; and the representation to the testator and the administration of his effects, without further renunciation, go, devolve and are committed as if such person had not been appointed executor (*d*). But the Act does not apply to the case of a person who renounced before the Act came into operation, and if he renounced before the Act, any second renunciation after the Act for the purpose of bringing himself within it is *ultra vires* and nugatory (*e*), and a disclaimer, or renunciation by answer in chancery was held not to operate as a renunciation within the Act (*f*), and a renunciation is not complete until it has been entered and recorded in the proper office (*g*). But it has not been settled that an executor after renunciation may not on proper grounds retract his renunciation (*h*). By 21 & 22 Vict. c. 95, s. 22, whenever an executor survives the testator, but dies without having taken probate, or is cited to take probate and does not appear, the right of such person in respect of the executorship shall wholly cease, and representation to the testator and the administration of his effects shall and may, without any further renunciation, go,

(*a*) *Wikes's case*, Lane, 54.
(*b*) *Venables* v. *East India Company*, 2 Exch. 633.
(*c*) *Arnold* v. *Blencowe*, 1 Cox, 426.
(*d*) *In re Goods of C. Lorrimer*, 10 W. R. 809; 2 S. & T. 471.
(*e*) *Re Whitham*, 1 L. R. P. & D. 303; *In the Goods of Delacour*, 9 Ir. R. Eq. 86.
(*f*) *Chalon* v. *Webster*, W. N., 1873, p. 189.
(*g*) *In the Goods of Morant*, 3 L. R. P. & D. 151.
(*h*) *In the Goods of Gill*, 3 L. R. P. & D. 113.

devolve and be committed in like manner as if such person had not been appointed executor.

Whether term in a trustee requires a prerogative probate.

4. If the lands comprised in a trust term were situate in a different diocese from that in which the trustee was domiciled, it seems that previously to 20 & 21 Vict. c. 77, which created the Court of Probate, a *prerogative* probate or limited administration was necessary before the term could have been legally transferred (*a*). If there be a difficulty in the way of probate or grant of *general* letters of administration, *special* letters of administration limited to the *trust property* may be taken out (*b*).

Administration limited to trust property.

Whether a chattel may be taken in execution for the *debt* of the trustee.

5. A chattel found by the sheriff in the possession of a debtor is *primâ facie* the debtor's own property, and as such is liable to be taken in execution for his debt, but if the sheriff knowing the chattel to be bound by a clear trust for another were to sell it for the debt of the trustee, it would be a tortious act in him (*c*), and the creditor who received the proceeds would be accountable as a trustee (*d*), and the *cestui que trust* might, upon seizure by the sheriff, establish his equitable title at law upon an interpleader summons (*e*).

On the other hand, if a person be the *cestui que trust* of an equitable chattel, the sheriff may take it in execution for the debt of the *cestui que trust;* and this is so even when the *cestui que trust* claims under an agreement for valuable consideration for the settlement of after-acquired property (*f*). But such an agreement is a roving one and executory, and does not give the *cestui que trust* the privileges of the specific purchaser until actual possession of the chattel under the agreement, and the interest of the *cestui que trust* may therefore be defeated by a judgment creditor of the settlor, who takes out execution before actual possession by the *cestui que trust* (*g*).

The common law recognises assets in the hands of an executor to be trust property.

6. *Assets* in the hands of an *executor* are regarded as a species of trust property, even by the common law, which in respect of them has engrafted upon itself a *quasi* equitable jurisdiction: as, if an executrix marry, she may by will, without the consent of her husband, appoint an executor in whom the assets will vest,

(*a*) See *Crosley* v. *Archdeacon of Sudbury*, 3 Hagg. 201.

(*b*) *In the Goods of Prothero*, 3 L. R. P. & D. 209.

(*c*) *Farr* v. *Newman*, 4 T. R. 621, *per* Ashurst, J., and see *Blake* v. *Done*, 7 H. and N. 465, and p. 259, *post*, as to judgments. See now 36 & 37 Vict. c. 66, s. 24.

(*d*) *Foley* v. *Burnell*, 1 B. C. C. 278.

(*e*) *Duncan* v. *Cashin*, 10 L. R. C. P. 554.

(*f*) *Interpleader Summons*, W. N. 1875, p. 203; W. N. 1876, p. 64.

(*g*) *Holroyd* v. *Marshall*, 2 De G. F. & J. 596; [and see *Re Malet's Trusts*, 17 L. R. Ir. 424.]

and who will thus become the executor of the original testator (*a*); and though the husband during the coverture has power to dispose of the assets in the course of administration (*b*), he will not be entitled to them in his marital right by survivorship (*c*); and if the wife survive she is liable for the devastavit committed by her husband (*d*); nor can the assets be taken in execution for the debt of the executor (*e*), [unless under such special circumstances as give the creditors of the executor a better equity than the creditors of the testator, as where the executor has been allowed to retain the assets for a considerable time and deal with them as his absolute property (*f*); but possession by the executor of the assets for a long time, if in accordance with the trusts, will not raise such an equity (*g*); and if, under the old law as to forfeiture, the executor] committed felony or treason, the assets were exempted from forfeiture to the crown (*h*); and if the executor die intestate instead of vesting in his administrator, they vest in the administrator *de bonis non* of the testator (*i*).

Attachment.

7. Attachment by the custom of the City of London does not apply to debts [where the beneficial interest is vested in a person other than the defendant sued in the Mayor's Court, and the garnishee has notice of the trust (*j*).]

Trustee may deal with the trust estate by act *inter vivos*.

8. A trust estate, whether real or personal, may, *at law*, be conveyed, assigned, or encumbered by the trustee, like a beneficial estate; and, if there be co-trustees, each may exercise the like powers of ownership over his own proportion. Thus if lands be vested in trustees as joint-tenants, each may at law receive the rents (*k*), and each may at law sever the joint-tenancy by a conveyance of his share (*l*); and if the trust estate be stock each

(*a*) *Scammel* v. *Wilkinson*, 2 East, 552; *Hodsden* v. *Lloyd*, 2 B. C. C. 543, *per* Lord Thurlow.

(*b*) *Thrustout* v. *Coppin*, 2 W. Black. Rep. 801; [this will not be the case where the marriage has taken place or the executorship has arisen since 1st January, 1883, 45 & 46 Vict. c. 75.]

(*c*) Co. Lit. 351 a, 351 b.; *Stow* v. *Drinkwater*, Lofft, 83.

(*d*) *Soady* v. *Turnbull*, 1 L. R. Ch. App. 494.

(*e*) *Farr* v. *Newman*, 4 T. R. 621; [*Re Morgan*, 18 Ch. Div. 93.]

[(*f*) *Ray* v. *Ray*, G. Coop. 264; *Kitchen* v. *Ibbetson*, 17 L. R. Eq. 46; and see *In re Fells*, 4 Ch. D. 509; *Re Morgan*, 18 Ch. Div. 93.]

[(*g*) *Fenwick* v. *Laycock*, 2 Q. B. 108; *Re Morgan*, 18 Ch. Div. 93; and see *Ex parte Barber*, 42 L. T. N.S. 411; 28 W. R. 522.]

(*h*) *Farr* v. *Newman*, 4 T. R. 628, *per* Grose, J.; [see now 33 & 34 Vict. c. 23.]

(*i*) Ib. *per eundem*; *Rachfield* v. *Careless*, 2 P. W. 161, *per* Powis, J.

(*j*) *Westoby* v. *Day*, 2 Ell. & Bl. 605; *Lewis* v. *Wallis*, Sir T. Jones, 222.

(*k*) *Townley* v. *Sherborne*, Bridge. 35.

(*l*) *Boursot* v. *Savage*, 2 L. R. Eq. 134.

may receive the dividends without any authority from the co-trustee.

General words.

But, in dealings with the trust estate, the Court has regard to the trust, and will not construe *general* words to pass the trust estate where the assurance, if so construed, would amount to a breach of trust (*a*).

Might devise or bequeath it.

9. As the trustee might at law dispose of the property in his lifetime, so he might devise or bequeath it at his death; [but in the case of a trustee or mortgagee (*b*) dying after the 31st December, 1881, "any estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal," will, *notwithstanding any testamentary disposition* devolve on the personal representative of the trustee or mortgagee, in the same manner as if it were a chattel real (*c*). The title therefore to such property must now be made through the legal personal representative.]

But a trust estate will not in all cases *pass by the same words* in a will as a beneficial ownership would, for wherever the estate does not pass by operation of law solely, but through the medium of the intention, it becomes necessary, in order to ascertain the effect of the instrument, to take into consideration the particular circumstances of the trust.

In what cases the trust estate will pass by a general devise.

10. Whether a trust estate shall pass inclusively in a *general devise*, is a question that has been frequently under discussion, [and notwithstanding the change in the law introduced by the Conveyancing and Law of Property Act, 1881 (*d*), is still a question of importance where the death of the trustee occurred prior to the commencement of that Act.] The rule as originally established was, that a general expression would carry a dry trust estate (*e*), but afterwards there were some misgivings upon the subject (*f*) (1); and the Court at last acceded to the propo-

(*a*) *Fausset* v. *Carpenter*, 2 Dow. & Cl. 232; 5 Bligh, N. S. 75; and see St. Leonards' H. L. Cases, 76; *Re Waley's Trust*, 3 Eq. R. 380.

(*b*) [Other than a trustee of copyholds admitted tenant on the court rolls, 50 & 51 Vict. c. 73, s. 45, *ante* p. 234.]

[(*c*) 44 & 45 Vict. c. 41, s. 30, and see *ante* p. 233.]

[(*d*) 44 & 45 Vict. c. 41, s. 30.]

(*e*) *Marlow* v. *Smith*, 2 P. W. 198.

(*f*) See *Braybroke* v. *Inskip*, 8 Ves. 437.

How the opinion arose that a general devise would not pass a trust estate.

(1) The doubt appears to have originated in part from an expression of Lord Hardwicke in *Casborne* v. *Scarfe*, 1 Atk. 605, that by a devise of all lands, tenements and hereditaments, a mortgage in fee would not pass, unless the equity of redemption were foreclosed. But Lord Hardwicke was not speaking here of the legal estate, but of the beneficial interest in the mortgage. The same thing was said in the same sense in *Strode* v. *Russel*, 2 Vern. 625. Lord Hardwicke's

sition, that general words would *not* pass trust estates, unless there appeared a positive intention that they should so pass (*a*). The question was reconsidered before Lord Eldon, when the result of the cases, after a careful examination of them, was declared to be, that, *where the will contained words large enough, and there was no expression authorising a narrower construction, nor any such disposition of the estate as it was unlikely a testator would make of property not his own (as complicated limitations, or any purpose inconsistent with as probable intention to devise as to let it descend), in such a case the trust estate would pass* (*b*).

Charge of debts, &c., will exclude the trust estate.

11. A *charge* of debts, legacies, annuities, &c., and *à fortiori*, a direction to *sell*, is considered a sufficient indication of an intention not to include a mere trust estate (*c*); as where a testator having a trust estate and also estates of his own, gave and devised "all his real estate, whatsoever and wheresoever, to G. T., her heirs and assigns for ever, charged with 50*l.* to his friend W.", it was held that the trust estate did not pass (*d*). And so where a testator gave, devised, and bequeathed to trustees all such real estates as were then vested in him by way of mortgage, the better to enable his said trustees to recover, get in, and receive the principal monies and interest which might be due thereon, it was ruled that the devise extended only to mortgages vested in the testator beneficially, and did not pass the legal estate in fee vested in the testator *upon trust* for another (*e*).

What expressions will or will not exclude the trust estate.

12. The expression "*my* real estates" will not restrict the

(*a*) *Attorney-General* v. *Buller*, 5 Ves. 340.

(*b*) *Braybroke* v. *Inskip*, 8 Ves. 436; see *Roe* v. *Reade*, 8 T. R. 118; *Ex parte Morgan*, 10 Ves. 101; *Langford* v. *Auger*, 4 Hare, 313.

(*c*) *Roe* v. *Reade*, 8 T. R. 118; *Duke of Leeds* v. *Munday*, 3 Ves. 348; *Attorney-General* v. *Buller*, 5 Ves. 339; *Ex parte Marshall*, 9 Sim. 555; *Ex parte Morgan*, 10 Ves. 101; *Sylvester* v. *Jarman*, 10 Price, 78; *Re Morley's Trust*, 10 Hare, 293; [*Re Smith's Estate*, 4 Ch. D. 70; *Re Bellis's Trusts*, 5 Ch. D. 504;] see *Wall* v. *Bright*, 1 J. & W. 494; [see, however, *Re Brown & Sibly's Contract*, 3 Ch. D. 156, where V. C. Malins was of opinion that where there was a general devise of real estate charged with debts and legacies, the legal estate in trust property would pass, notwithstanding the charge, which attached only on property which the testator was competent to charge with debts and legacies; and see as to this case *Re Bellis's Trusts*, *ubi sup.*]

(*d*) *Rackham* v. *Siddall*, 16 Sim. 297, 1 Mac. & G. 607; *Hope* v. *Liddell*, 21 Beav. 183; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58.

(*e*) *Ex parte Morgan*, 10 Ves. 101;

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authority has been cited on both sides of the question (compare *Duke of Leeds* v. *Munday*, 3 Ves. 348, with *Ex parte Sergison*, 4 Ves. 147); but that he approved of the old rule is evident from *Ex parte Bowes*, cited in Mr. Sanders's note to *Casborne* v. *Scarfe*, 1 Atk. 605. Lord Northington and Lord Thurlow are said to have entertained the same opinion. (See *Ex parte Sergison*, 4 Ves. 147; but, as to Lord Thurlow, see an *obiter dictum*, *Pickering* v. *Vowles*, 1 B. C. C. 198.)

meaning to those vested in the testator beneficially (*a*), nor will a devise to A., his heirs and assigns, "to and for *his and their own use and benefit*" (*b*), nor a devise to A. and her heirs, to be disposed of by her by will or otherwise, as she may think fit (*c*): though under a devise to a woman for her *separate use*, as the words import a beneficial enjoyment, a dry legal estate will not pass (*d*); but a devise to a woman, "her heirs and assigns, for her and *their* own sole and absolute use," expresses only the absolute interest, and does not create a separate estate (*e*). Whether a residuary devise of lands to persons as tenants in common in *equal shares*, will pass a trust estate, has never been expressly decided, but a judicial opinion has been expressed that such a devise would not pass a dry trust estate (*f*). A devise to the testator's *nephews and nieces* share and share alike as tenants in common, and not as joint-tenants, as the class is unascertained at the date of the will, does not pass a trust estate (*g*). And if the devise be for A. for life or in tail, with remainders over, in strict settlement, the trust estate will not pass (*h*). "Where there is a limitation of real estate," said Lord Eldon, "in strict settlement, with a vast number of limitations, contingent remainders, executory devises, powers of jointuring, leasing, and raising sums of money, it is impossible to say the intention could be to give a dry trust estate" (*i*).

Distinction as to legal estate in mortgages.

13. The question whether the legal estate in a *mortgage in fee* passes by a general devise in the will of the mortgagee, stands on a different footing. The mortgagee has a *beneficial* interest in the property as a security, a distinction not always sufficiently adverted to, but which is strongly in favour of the legal estate passing to the person who is to receive the mortgage money (*j*). It is clear that the legal estate passes by a general devise of *securities for money* (*k*), and neither a general trust to sell and

and see *Sylvester* v. *Jarman*, 10 Price, 78; *Ex parte Brettel*, 6 Ves. 577.

(*a*) *Braybroke* v. *Inskip*, 8 Ves. 425,

(*b*) *Ex parte Shaw*, 8 Sim. 159; *Bainbridge* v. *Lord Ashburton*, 2 Y. & C. 347; *Sharpe* v. *Sharpe*, 12 Jur. 598; and compare *Ex parte Brettel*, 6 Ves. 577, with *Braybroke* v. *Inskip*, 8 Ves. 434.

(*c*) *Ex parte Shaw*, 8 Sim. 159.

(*d*) *Lindsell* v. *Thacker*, 12 Sim. 178. The marginal note of the Report is quite contrary to the decision.

(*e*) *Lewis* v. *Mathews*, 2 L. R. Eq. 177.

(*f*) *Martin* v. *Laverton*, 9 L. R. Eq. 568, *per* V. C. Malins; and see cases there referred to; [*Re Morley's Trust*, 10 Hare, 293.]

(*g*) *Re Finney's Estate*, 3 Giff. 465.

(*h*) *Thompson* v. *Grant*, 4 Madd. 438; *Re Horsfall*, 1 Maclel. & Younge, 292; *Galliers* v. *Moss*, 9 B. & C. 267; *Ex parte Bowes*, cited in Mr. Sanders's note to *Casborne* v. *Scarfe*, 1 Atk. 603.

(*i*) *Braybroke* v. *Inskip*, 8 Ves. 434.

(*j*) *Doe* v. *Bennett*, 6 Exch. 892; and comments of Vice Chancellor Kindersley on this case, *Re Cantley*, 17 Jur. 124; [and see *Heath* v. *Pugh*, 6 Q. B. D. 345, 360.]

(*k*) *King's Mortgage*, 5 De G. & Sm.

convert(*a*), nor a charge of debts(*b*), will prevent it from so passing. And it is conceived, notwithstanding a former decision of the Court of Exchequer (*c*), that the case of a *general devise and bequest* of real and personal estate charged with debts or legacies admits of no substantial distinction (*d*). But the legal estate will not pass by a general devise of real estate, if there be *special trusts* for sale or other limitations, &c., which would be inapplicable to an estate in mortgage (*e*). [The distinction between mortgaged estates and trust estates has ceased (except as to copyholds) to be material where the mortgagee or trustee dies after the 31st December, 1881; as in either case the power of disposing of the legal estate is now vested in the personal representatives of the mortgagee or trustee so dying (*f*).]

[Distinction now not material.]

14. The rule that trust estates passed under a general devise assumed that a testator by making such a devise did not commit a breach of trust, otherwise general words would not have been construed to carry the trust estate (*g*). However, it was observed in one case by the late Vice-Chancellor of England that in his opinion it was not lawful for a trustee to dispose of the estate, but that he ought to permit it to descend; and that there was no material difference between a conveyance *inter vivos* and a devise, for the latter was nothing but a *post mortem* conveyance (*h*). But Lord Langdale considered that there was a wide distinction between a conveyance in the trustee's lifetime and a devise by his will; for during his life he had a personal discretion confided to him, which he could not delegate, but the settlor could not have reposed any personal confidence in the trustee's heir, for it could not be known beforehand, who such heir would be; and that if the estate were allowed to descend, it might become vested in married women, infants, or bankrupts, or persons out of the jurisdiction; and he could not therefore hold it to be a breach of trust to transmit

Power of a trustee in equity to devise the trust estate.

644, and cases there reviewed; *Knight* v. *Robinson*, 2 K. & J. 503; *Rippen* v. *Priest*, 13 C. B. N.S. 308; *Ex parte Whitacre*, cited 1 Sand. Uses and Trusts, 359, 4th edition.

(*a*) *Ex parte Barber*, 5 Sim. 451; *Mather* v. *Thomas*, 6 Sim. 115.

(*b*) *Field's Mortgage*, 9 Hare, 414; overruling *Renvoize* v. *Cooper*, 10 Price, 78.

(*c*) *Doe* v. *Lightfoot*, 8 M. & W. 553.

(*d*) Now so decided. *Re Stevens' Trusts*, 6 L. R. Eq. 597; [*In re Brown and Sibly's Contract*, 3 Ch. D. 163.] But see *In re Packman and Moss*, 1 Ch. D. 214.

(*e*) *Re Cantley*, 17 Jur. 124; *Martin* v. *Laverton*, 9 L. R. Eq. 563; *Thirtle* v. *Vaughan*, 24 L. T. 5; *Re Finney's Estate*, 3 Giff. 465; [*Re Smith's Estate*, 4 Ch. D. 70.]

[(*f*) 44 & 45 Vict. c. 41, s. 30; but as to copyholds see 50 & 51 Vict. c. 73, s. 45, *ante* p. 234.]

(*g*) See *ante*, p. 238, and the authorities cited in note (*a*) Ib.

(*h*) *Cooke* v. *Crawford*, 13 Sim. 98; and see *Beasley* v. *Wilkinson*, 13 Jur. 649.

the estate by will to trustworthy devisees (*a*). [But this question has since the recent alteration in the law under which the trust estate (*b*) devolves as a chattel real ceased to be of much practical interest.]

Whether a devisee can execute the trust.

15. How far a *devisee* of the trust estate can execute the trust, will depend on the intention of the settlor, to be collected from the terms in which the instrument is expressed. Thus, real or personal estate *may* be so vested in A. that A. alone shall *personally* execute the trust; and in such a case, the *heir* or *executor* of A. though he took the legal estate, could not act as trustee (*c*); and *à fortiori* in such a case the *devisee*, though made the depositary of the legal estate, would have no authority to execute the trust (*d*). [It was laid down in former editions of this work that] if a settlor vested an estate in A. upon trust, that A. and his *heirs* should sell, and A. devised the estate, neither the heir nor devisee could sell; not the *heir*, for as regards this estate the descent had been intercepted and there was no heir, and not the *devisee*, for he was not the person to whom the execution of the trust was committed (*e*). [This proposition was founded upon *Cooke* v. *Crawford*, and subsequent cases, but in the recent case of *Osborne to Rowlett* (*f*), the late M. R., after an elaborate discussion of the cases, came to the conclusion that *Cooke* v. *Crawford* was wrongly decided, and he held that where real estate was devised to trustees and their heirs, in trust for sale, the trust was annexed to the estate, and that as the surviving trustee might have lawfully devised the trust estate the devisee might execute the trust, and he expressly overruled *Cooke* v. *Crawford*. In a subsequent case, however, before the Court of Appeal (*g*), in which the precise point did not arise, L. JJ. James and Baggallay expressed a doubt whether *Osborne to Rowlett* was rightly decided, and the question must in the present state of the authorities be considered as an open one. It may be observed that the M. R. justified his decision on the ground that the decision in *Cooke* v. *Crawford*, was, in his opinion, based on

(*a*) *Titley* v. *Wolstenholme*, 7 Beav. 435; and see *Macdonald* v. *Walker*, 14 Beav. 556; *Wilson* v. *Bennett*, 4 De G. & Sm. 479.

[(*b*) Except as to copyholds where the trustee has been admitted, *ante*, p. 234.]

(*c*) See *Mortimer* v. *Ireland*, 11 Jur. 721.

(*d*) *Mortimer* v. *Ireland*, 11 Jur. 721; *S. C.* before Vice-Chancellor Wigram, 6 Hare, 196.

(*e*) *Cooke* v. *Crawford*, 13 Sim. 91; *Wilson* v. *Bennett*, 5 De G. & Sm. 475; *Stevens* v. *Austen*, 7 Jur. N. S. 873; 3 E. & E. 685.

[(*f*) 13 Ch. D. 774.]

[(*g*) *Re Morton and Hallett*, 15 Ch. Div. 143; and see *Re Ingleby and Boak, &c., Insurance Company*, 13 L. R. Ir. 326.]

the assumed principle that a trustee, unless authorized so to do, could not lawfully devise the trust estate, and that, as that principle has been overruled by subsequent cases, *Cooke* v. *Crawford* has ceased to be a binding authority, but it is submitted that the real ground for the decision in *Cooke* v. *Crawford* was that the authority to execute the trust must be directly given by the original settlor or testator, and that the surviving trustee by devising the estate to a person not so authorized did not enable the devisee to execute the trust (*a*). It is submitted that this principle has not been called in question, whatever exceptions have been taken to the observations in *Cooke* v. *Crawford*, as to the duty of a trustee to let trust estates descend, and that however strong the argument might be (if the matter were one of first impression) in favour of holding that the trust may be executed by any person to whom the estate comes consistently with the provision of the original settlement or will, it is too late now to overrule *Cooke* v. *Crawford*, and the subsequent cases, and to introduce a new principle. And in a subsequent case in Ireland where a testatrix appointed A. and B. executors and trustees of her will, and devised real estate to them upon trust that they or the survivor should pay the rents to A. for his life, and after his death sell the estate, it was held that the executors of B., who survived A., could not make a title, notwithstanding the 30th section of the Conveyancing and Law of Property Act, 1881 (*b*).]

16. In another case (*c*), where leaseholds were assigned to two trustees, *their executors and administrators*, upon trust; and the surviving trustee devised the leaseholds to *A. and B. upon the same trusts*, and appointed *A. B. and C. executors;* on a petition by A. and B. to the Court to have the trust fund, the proceeds of the leaseholds, paid out to them, Vice-Chancellor Kindersley refused, observing, that the surviving trustee had no authority to bequeath the execution of the trust, but could only pass the legal estate. The petition was then amended by joining C. as a co-petitioner, so that the petition was now that of the legatees, and also of the *executors;* but the Vice-Chancellor still refused, on the ground that the testator had himself declared, that his executors as such should not be trustees, and, therefore, since, by the bequest, he had taken the legal estate from those who ought Re Burtt's estate.

[(*a*) See Sugd. V. & P. 14th Ed. p. 665.]

[(*b*) *Re Ingleby and Boak, &c., Insurance Company*, 13 L. R. Ir. 326.]

(*c*) *Re Burtt's Estate*, 1 Drew. 319.

to have been trustees, there must be an appointment of new trustees.

Where the trust is confided to the trustee and his assigns.

17. But it most frequently happens that an estate is vested in A. upon trust, that A., his heirs, executors, administrators, and *assigns*, shall hold upon the trust; and the question then is, whether a *devisee* of A. may, as falling under the description of *assigns*, not only take the estate, but also execute the trust? In *Titley* v. *Wolstenholme* (*a*), where the settlement *contained no power of appointment of new trustees*, it was held, that as a conveyance in the lifetime of the trustee to a stranger would have been a breach of trust, the word assign could mean only a devisee taking under a *post mortem* conveyance, when the personal confidence in the trustee necessarily ceased; and consequently that the devisees had not only the legal estate, but were properly trustees within the scope of the settlor's intention.

Titley *v.* Wolstenholme, doubted.

18. This case seems to have raised some scruple in the mind of V. C. afterwards L. J. Knight Bruce, for he observed that "What he should have done if *Titley* v. *Wolstenholme* had come before him he need not say, nor was he sure" (*b*). And the reasoning upon which Lord Langdale proceeded is not quite conclusive, for the word "*assigns*" does not necessarily imply a devise, as it would be satisfied by holding it to refer to a tenant by the curtesy or dowress, who would be assigns in law. However, the case was referred to, without disapprobation, by Lord Cottenham (*c*), and was approved by V. C. Stuart (*d*).

Hall *v.* May.

19. In *Hall* v. *May* (*e*), V. C. Wood went further, and held that under a trust containing the word *assigns*, and *also a power to appoint new trustees*, the devisee could make a title. It was conceded that the word "assigns" would not have enabled a trustee to transfer the trust by act *inter vivos*, and it could not be disputed that, as the instrument contained a power of appointment of new trustees, the assigns introduced by virtue of the power would give a meaning to the word "assigns" without having recourse to a devise. It was therefore necessary to lay down a broader principle than that acted upon in *Titley* v. *Wolstenholme*, and the doctrines upon which the Vice-Chancellor proceeded appear to have been substantially these—"That a settlor must have intended to provide a permanent machinery for

(*a*) 7 Beav. 425. See *Saloway* v. *Strawbridge*, 1 K. & J. 371; 7 De G. M. & G. 594, which however was the case of a mortgage.

(*b*) *Ockelston* v. *Heap*, 1 De G. & Sm. 642.

(*c*) *Mortimer* v. *Ireland*, 11 Jur. 721.

(*d*) *Ashton* v. *Wood*, 3 Sm. & G. 436.

(*e*) 3 K. & J. 585.

the execution of the trust; that he could not have reposed any personal confidence in the trustee's heir, who was unknown, and could not be ascertained beforehand; that the settlor must have contemplated the possibility that on the death of the trustee the heir might be an infant, or lunatic, or bankrupt, or insolvent, and so either incapable or unfit to discharge the office; that it might therefore be reasonably inferred that the settlor meant by confiding the trust to the trustee, his heirs and *assigns*, to give the trustee a discretionary power of preventing these inconveniences by vesting the estate in a devisee; and that the circumstance that the settlor had given to the surviving trustee a power of appointing new trustees by *deed*, rather favoured the view that he also intended, when using the word 'assigns,' to confer on the trustee a right to devise the trust estate." The Court was also actuated by the feeling that many titles must have been accepted upon the footing of this enlarged construction. The decision was perhaps a bold one, but having been made it is not likely to be disturbed.

[20. Where a testator devised freehold and copyhold estates to trustees and their heirs upon trust that they "his said trustees or the trustees or trustee for the time being of that his will" should sell the estates, it was held that the copyhold heir of the surviving trustee to whom the estates had descended could execute the trust (*a*). [Sale by heir.]

21. Where under the 30th sect. of the Conveyancing and Law of Property Act, 1881, trust or mortgage estates become vested in the personal representatives of a trustee or mortagee, they are for the purposes of the section to "be deemed in law his heirs and assigns within the meaning of all trusts and powers." The wording of this section is not clear, but it is conceived that it enables the personal representatives to execute the trusts and powers which were originally reposed in the trustee, his heirs and assigns, and they may therefore sell in any case where there was a trust for sale or power of sale in the heirs and assigns of the last surviving trustee. [44 & 45 Vict. c. 41.]

By the Copyhold Act, 1887, s. 45 (*b*), it is provided that section 30 of the Conveyancing Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls of any manor upon any trust or by way of mortgage.]

22. A vendor, after the contract for sale, but before the An estate contracted to be sold will be included in a general devise.

[(*a*) *Re Morton and Hallett*, 15 Ch. Div. 143; *Re Cunningham*, 39 W. R. 469.]

[(*b*) 50 & 51 Vict. c. 73.]

completion of it, is a trustee for the purchaser *sub modo* only, and the estate may pass by a general devise in his will, where it would not have been included had the testator been a mere and express trustee (*a*). [But by the Conveyancing and Law of Property Act, 1881, s. 4, it is enacted that where at the death of any person there is subsisting a contract *enforceable against his heir or devisee* for the sale of the fee simple or other freehold interest descendible to his heirs general in any land, his personal representatives shall, by virtue of the Act, have power to convey the land for all the estate and interest vested in him at his death in any manner proper for giving effect to the contract. But a conveyance made under this section is not to affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate, and the section applies only in cases of death after the 31st December, 1881 (*b*).]

[Personal representative can convey.]

23. As the dry legal estate in the hands of the trustee is [subject to the statutory modifications above referred to] affected by the operation of law, and may be disposed of by the act of the trustee, precisely in the same manner as if it were vested in him beneficially, so it confers upon him all the *legal* privileges and subjects him to all the *legal* burdens, that are incident to the usufructuary possession (*c*).

Trustee has the privileges and burdens of the legal estate.

Thus the trustee can bring any action respecting the trust estate in a court of law, the *cestui que trust*, though the absolute owner in equity, being at law regarded in the light of a stranger (*d*). So the trustee of a manor is the person to appoint the steward of it (*e*), and the trustee of an advowson to present to the church (*f*), but in either case he has the mere *legal right*, and is bound in *equity* to observe the directions of his *cestui que trust* (*g*).

Trustee must bring actions, &c.

(*a*) *Wall* v. *Bright*, 1 J. & W. 494; [considered and explained in *Lysaght* v. *Edwards*, 2 Ch. D. 499, where the contract having become binding by acceptance of the title before the death of the vendor, the land was held to pass under a devisee of trust estates, and see *Re Thomas*, 34 Ch. D. 166. In *Surrey Commercial Docks* v. *Kerr*, W. N., 1878, p. 163, the legal estate in a property which the testator had in his lifetime contracted to sell was held to pass under a residuary devise to trustees upon trust to sell.]

[(*b*) Cf. Sect. 30 of the same Act, 44 & 45 Vict. c. 41.]

(*c*) *Burgess* v. *Wheate* 1 Eden, 251, *per* Lord Northington.

(*d*) See *Allen* v. *Imlett*, Holt, 641; *Gibson* v. *Winter*, 4 B. & Ad. 96; *May* v. *Taylor*, 6 M. & Gr. 261. But see now 36 & 37 Vict. c. 66.

(*e*) *Mott* v. *Buxton*, 7 Ves. 201; and see Cary, 14.

(*f*) See *Re Shrewsbury School*, 1 M. & Cr. 647; *Hill* v. *Bishop of London*, 1 Atk. 618.

(*g*) *Attorney-General* v. *Parker*, 3 Atk. 577, *per* Lord Hardwicke; *Attorney-General* v. *Forster*, 10 Ves. 338, *per* Lord Eldon; *Attorney-General* v. *Newcombe*, 14 Ves. 7, *per eundem*;

Trustee must prove in bankruptcy.

24. So where a debtor to the trust estate becomes bankrupt, the trustee may prove for the debt, and that without the concurrence of the *cestui que trust* (*a*), unless it be such a simple trust as where A. is trustee for B. absolutely, and then it rests in the discretion of the judge to require the concurrence of the *cestui que trust*, for who knows but that B. may have already received the money (*b*). If the *trustee* himself become *bankrupt* a *cestui que trust* may obtain an order to prove for the whole sum and will be entitled to vote at the choice of the creditors' trustee (*c*). [A mere trustee of a debt for a person absolutely entitled and under no disability, cannot present a bankruptcy petition against the debtor without the concurrence of his *cestui que trust;* for as the *cestui que trust* who was competent to do so might have released the debt, "it might well happen that there was no real debt at all, although in legal parlance there might be a debt" (*d*); and it makes no difference that the trustee has obtained final judgment against the debtor for the amount, and has served a bankruptcy notice on the debtor under sect. 4, sub.-sect. (*g*) of the Bankruptcy Act, 1883 (*e*). But the trustee can serve a good bankruptcy notice without the concurrence of the *cestui que trust* (*f*).]

Case of trustee a bankrupt.

Trustee if in possession votes for coroners.

25. The trustee as the legal proprietor had originally the right of voting for *coroners* (*g*) (1); but by 58 G. 3. c. 95, sect. 2, it was transferred to the *cestui que trust* in possession. This Act, however, was afterwards repealed (*h*), [and now under the Local Government Act, 1888, coroners are no longer elected by the freeholders (*i*).]

Trustee's right to vote for a member of parliament.

26. So the trustee was the person entitled at *common law to*

Kensey v. *Langham*, Cas. *t.* Talb. 144, *per* Lord Talbot; *Amhurst* v. *Dawling*, 2 Vern. 401; *Barret* v. *Glubb*, Sir W. Black. Rep. 1053, *per* De Grey, J.; and see *post.* [A trustee of a second mortgage who is bankrupt does not sufficiently represent his *cestui que trust* for the purpose of a *foreclosure* action, and quære whether he would even if solvent; *Francis* v. *Harrison*, 43 Ch. D. 183; and see *Griffith* v. *Pound*, 45 Ch. D. 553, 567.]

(*a*) *Ex parte Green*, 2 D. & Ch. 116, *per Cur.*

(*b*) *Ex parte Dubois*, 1 Cox. 310; and see *Ex parte Battier*, Buck, 426; *Ex parte Gray*, 4 D. & Ch. 778; [*Ex parte Culley*, 9 Ch. Div. 307.]

(*c*) *Ex parte Cadwallader*, 4 De G. F. & J. 499.

[(*d*) *Ex parte Culley*, 9 Ch. Div. 307; *Ex parte Dearle*, 14 Q. B. Div. 184, 191.]

[(*e*) *Ex parte Dearle*, *sup.*]

[(*f*) S. C.]

(*g*) *Burgess* v. *Wheate*, 1 Eden, 251.

(*h*) 7 & 8 Vict. c. 92; *Regina* v. *Day*, 2 Ell. & Bl. 859.

(*i*) [51 & 52 Vict. c. 41, s. 5.]

(1) And Lord Northington added for "sheriffs" (*Burgess* v. *Wheate*, 1 Eden, 251) but the election of sheriffs had been transferred from the people to the Chancellor, Treasurer, and Judges, by 9 E. 2, st. 2, before the establishment of trusts.

vote for *members of Parliament* (*a*). But by the 74th section of 6 & 7 Vict. c. 18 (*b*), it is enacted, that "no trustee of any lands or tenements shall in any case have a right to vote in any such election for or by reason of any trust estate therein, but that the *cestui que trust* in actual possession or in the receipt of the rents and profits thereof, *though he may receive the same through the hands of the trustee*, shall and may vote for the same notwithstanding such trust," and by the 5th section of 30 & 31 Vict. c. 102, the right of voting is conferred upon persons who are seised at law or *in equity*, of lands or tenements of the yearly value of five pounds. [But a person entitled to a share of the proceeds of the sale of real estate held on a trust for conversion has not such an estate as will entitle him to vote (*c*).]

Trustees liable to rates.

27. Again, trustees are liable to be *rated* for the property vested in them (*d*), unless they are trustees *exclusively* for public purposes without any profit to themselves or a particular class, as trustees of court houses, prisons, or the like (*e*).

Trustee pays the fine on admission to copyholds.

28. The trustee of a *copyhold* must pay a fine on his admission (*f*), but as the fine follows the admission the lord cannot refuse admission until the fine is paid (*g*); and on the decease of a trustee a heriot becomes due to the lord (*h*); and where the trustee died intestate, and the customary heir *before admission* devised the estate, the lord was held to be entitled to a double fine on the admission of the devisee, as it carried with it also the admission of the devisor (*i*). [But the lord is only entitled to a fine in respect of transmission of the legal interest, and not in respect of a devolution of the equitable title so long as the legal estate remains in a tenant on the rolls (*j*), and] where a trustee died intestate, and the Court under the Trustee Acts appointed a new trustee in the place of the deceased trustee, and the lord demanded two fines, one for the admission of the customary heir

(*a*) *Burgess* v. *Wheate*, 1 Eden, 251, *per* Lord Northington.

(*b*) As to the effect of certain intermediate statutes see 3rd Ed. p. 270.

[(*c*) *Spencer* v. *Harrison*, 5 C. P. D. 97.]

(*d*) *Regina* v. *Sterry*, 12 Ad. & Ell. 84; *Queen* v. *Stapleton*, 4 B. & S. 629.

(*e*) *Regina* v. *Shee*, 4 Q. B. 2; *Mayor of Manchester* v. *Overseers of Manchester*, 17 Q. B. 859; *Queen* v. *Harrogate Commissioners*, 15 Q. B. 1012; [and see *West Bromich School Board* v. *Overseers of West Bromich*, 13 Q. B. Div. 929; *Tunnicliffe* v. *Birkdale Overseers*, 20 Q. B. Div. 450.]

(*f*) *Earl of Bath* v. *Abney*, 1 Dick. 260; *S. C.* 1 Burr. 206. [A trustee entitled to admission to a copyholds may now be admitted by himself or by his attorney duly appointed, whether orally or in writing; 50 & 51 Vict. c. 73, s. 2.]

(*g*) *Regina* v. *Wellesley*, 2 Ell. & Bl. 924.

(*h*) *Trinity College* v. *Browne*, 1 Vern. 441; see *Car* v. *Ellison*, 3 Atk. 77.

(*i*) *Lord Londesborough* v. *Foster*, 3 B. & S. 805; 9 Jur. (N.S.) 1173.

(*j*) *Hall* v. *Bromley*, 35 Ch. Div. 642.

of the old trustee, and another for the admission of the new trustee, it was held that he could claim but one fine, viz., for the admission of the new trustee (*a*); and where two or more trustees have been admitted *jointly*, on the decease of *one* neither fine nor heriot is due; not a fine for admission, because, joint tenants being seised *per my et per tout*, the estate is vested in the survivors or survivor by the original grant, and not a heriot, because, however many in number the trustees may be, they all form but one tenant to the lord, and therefore no heriot is demandable until the death of the longest liver (*b*). [On the death of a sole trustee of copyholds, who has not been admitted, and is therefore not the tenant on the court rolls, the copyholds vest, under section 30 of the Conveyancing and Law of Property Act, 1881, in his legal personal representatives (*c*), who must pay the ordinary fines on their admission. But if the trustee has been admitted and is therefore tenant on the court rolls, this enactment does not apply, having to this extent been repealed by section 45 of the Copyhold Act, 1887 (*d*), and therefore on the death of such sole trustee of copyholds they vest in the *customary heir or the* devisee of trust estates. Where the equitable tenant for life of copyholds sells under the powers of the Settled Land Act, 1882, section 20, the lord is only entitled to one fine (*e*).] If a copyhold be devised to trustees for *five hundred years* on certain trusts, with remainder to A. B. in fee, and the lord admits A. B. not as remainderman, but as a present tenant and upon payment of a full fine, the lord has a perfect tenant, and cannot compel the *termors* to be admitted (*f*). The Court in this case adverted to several points of practical importance, which are worth noticing. Thus: 1. It is commonly said that an admission is void, except so far as it follows the uses of the surrender or will; but the Court held that the excess of the admission is void only as against the parties interested, and that the lord may be estopped by his own act. 2. Where the termors have been admitted, the lord may require the admission of the executor of the last survivor, for the lord is entitled to a tenant or to possession. 3. The admission of the tenant for life or for years is a constructive

(*a*) *Bristow* v. *Booth*, 5 L. R. C. P. 81.

(*b*) See 2 Watk. Cop. 147.

[(*c*) 44 & 45 Vict. c. 41, s. 30; *Re Hughes*, W. N., 1884, p. 53.]

[(*d*) 50 & 51 Vict. c. 73; and see *Re Mill's Trusts*, 37 Ch. D. 312, S. C. on appeal, 40 Ch. Div. 18, and *sup.* p. 234.]

[(*e*) *Re Naylor and Spendla's Contract*, 34 Ch. Div. 217.]

(*f*) *Everingham* v. *Ivatt*, 7 L. R. Q. B. 683; affirmed 8 L. R. Q. B. 388.

admission of the remainderman, but such an admission does not disentitle the lord to call for a subsequent admission of the remainderman, where the custom of the manor gives the lord a fine in respect of the remainder. 4. The lord is not bound to admit a remainderman, but if he do admit him *as such remainderman*, although this admission may be a constructive admission of the particular estate, the lord may afterwards require the tenant for life or years to be admitted for the purposes of a new fine.

Principle on which the fine is assessed.

Where a number of trustees are admitted as the joint owners of the trust estate, the fine is to be assessed upon the following principle: for the first life is to be allowed the fine usually paid on the admission of a single tenant, for the second life one-half the sum taken for the first, and for the third one-half the sum taken for the second, &c.; the result of which will be, that, however great the number of trustees admitted, the amount of the whole fine will never be double of that paid upon the first life (*a*). And on every change of trustees the same fine is demandable, even where some of the surrenderees are the survivors of the old trustees, for they take a new estate (*b*). In order to avoid these onerous fines, where the estate devolves on several trustees, all the trustees but one may disclaim or release to that one, who can then be admitted, and the lord can then claim only a single fine (*c*). But there may be some risk in adopting this course otherwise than with the sanction of the Court, since to vest the legal estate in one trustee alone must in strictness be viewed as a breach of trust, and the expected pecuniary advantage might, by the early death of the trustee who is admitted in the lifetime of his co-trustees, be turned into a loss, and then the trustees might be held liable for the detriment to the trust estate. The last contingency might be guarded against by an insurance, effected either at an annual premium or for a gross sum payable in advance. But besides this, where discretionary powers are annexed to the trusteeship, the severance of the estate from the ordinary devolution of the *trust* might affect the powers; as, if a power of sale be given to the *heir* of the *survivor*, and A. is admitted and B. survives, can the heir [or legal personal representative (*d*)] of B. sell? (*e*).

(*a*) *Wilson* v. *Hoare*, 2 B. & Ad. 350, see 360; 10 Ad. & Ell. 236, and 1 Scriven, Copyh. 164, 165, 6th edit.

(*b*) *Sheppard* v. *Woodford*, 5 M. & W. 608; but see *Wilson* v. *Hoare*, 10 Ad. & Ell. 236.

(*c*) *Wellesley* v. *Withers*, 4 Ell. & Bl. 750; and see *Paterson* v. *Paterson*, 2 L. R. Eq. 31; *S. C.* 35 Beav. 506; *Re Flitcroft*, 1 Jur. N. S. 418.

[(*d*) See 44 & 45 Vict. c. 41, s. 30; and see *ante*, p. 233.]

(*e*) *Wilson* v. *Bennett*, 5 De G. & Sm. 475.

Where a copyhold has been surrendered to several trustees, there can be no disclaimer by one trustee, for the purpose of vesting the entire estate in the co-trustees, where that one trustee, by having acted as owner, has virtually accepted the estate (*a*). And where a testator devised to three trustees, whom he appointed executors, and one disclaimed and the two others proved the will, but, wishing to escape the double fine, put forward the heir to be admitted as the person upon whom the estate descended until the devisees were admitted, it was held that the lord was justified in refusing to admit the heir; and the Court, in the exercise of its discretionary power, would not issue a mandamus to compel him (*b*). But in the same case, the lord having made the usual proclamation, and the heir having tendered himself for admission, and the lord having refused to admit him on the ground that the estate was in the devisees, who refused to come in, it was ruled that, as the devisees had no title until admittance and the estate descended to the heir, the lord was not justified in seizing for want of a tenant (*c*). Disclaimer to avoid a fine.

29. Though the manorial burdens in respect of copyholds fall upon the trustee personally at law, he is of course entitled in equity to reimburse himself the expenditure out of the trust estate (*d*). Reimbursement.

30. The trustee of a *leasehold* estate is liable upon the covenants of the lease just as if he were the real owner (*e*). But the trust estate must indemnify him in equity. [It is the duty of a trustee of a leasehold property to keep it free from the risk of forfeiture; and for that purpose he is entitled to have the covenants in the lease performed out of the rents of the property which come to his hands, and is not bound to be satisfied with an indemnity against the consequences of a breach of the covenants. And where a tenant for life of leasehold houses had been allowed by the trustees to receive the rents and profits, and the houses had not been kept in a proper state of repair, the Court, at the instance of one of the trustees, appointed a receiver (*f*). But this case turned upon the special wording of the will, and did not lay down any general principle as to the mutual rights of tenants for life and remaindermen, and in the absence of any directions in the will there is no obligation on a tenant for life Trustee of leaseholds.

(*a*) *Bence* v. *Gilpin*, 3 L. R. Ex. 76.
(*b*) *Queen* v. *Garland*, 5 L. R. Q. B. 269; [and see now 44 & 45 Vict. c. 41, s. 30.]
(*c*) *Garland* v. *Mead*, 6 L. R. Q. B. 441.
(*d*) *Rivet's case*, Moore, 890.
(*e*) *White* v. *Hunt*, 6 L. R. Ex. 32.
[(*f*) *Re Fowler*, 16 Ch. D. 723.]

to keep leasehold property in repair so as to comply with the covenants of the lease (*a*).]

If trustee trade in that character, he is amenable to the bankrupt laws.

31. If a trustee carry on a *trade* in the due execution of his trust, he makes himself amenable to the operation of the bankrupt law in the same manner as if he had traded on his own account (*b*), and the debts contracted by him in such trade are not debts of the testator, but his own debts (*c*), and on his decease his lands, as those of a trader, were liable under Sir Samuel Romilly's Act (*d*) to the discharge of simple contract debts (*e*); and now, by 3 & 4 W. 4. c. 104, the lands of all persons, traders or otherwise, are liable to their simple contract debts; and by 32 & 33 Vict. c. 46, simple contract debts are payable *pari passu* with specialty debts. But an executor carrying on a business in pursuance of the directions of a will, is entitled to be indemnified out of the estate, as against the persons claiming under the will, though not as against creditors who claim paramount to the will (*f*).

Shares in companies.

32. If trustees be holders of shares in a company, their liabilities are the same as if they were the beneficial owners, though the fact of their trusteeship be noticed in the company's books (*g*); [and they cannot say that their liability is to be only a liability to the extent of the estate of their testator (*h*).]

Secondly. Of the legal estate in the trustee with reference to the construction of particular statutes.

How the legal estate is affected by the bankruptcy of the trustee.

[1. By the Bankruptcy Act, 1883 (*i*), it is enacted, that "all

[(*a*) *Re Courtier*, 34 Ch. D. 136.]

(*b*) *Wightman* v. *Townroe*, 1 M. & S. 412; *Ex parte Garland*, 10 Ves. 119, *per* Lord Eldon; *Hankey* v. *Hammond*, cited in marginal note to 1 Cooke's Bank. Law, 84, 3rd ed.; and see *Re Phœnix Life Insurance Company*, 2 J. & H. 229; *Lucas* v. *Williams*, No. 1, 4 De G. F. & J. 436; *Farhall* v. *Farhall*, 7 L. R. Ch. App. 123.

(*c*) *Farhall* v. *Farhall*, 7 L. R. Ch. App. 123; reversing *S. C.* 12 L. R. Eq. 98; *Owen* v. *Delamere*, 15 L. R. Eq. 134; [*Re Morgan*, 18 Ch. Div. 93;] see *Hall* v. *Fennell*, 9 Ir. R. Eq. 615.

(*d*) 47 G. 3. c. 74. Repealed and re-enacted by 11 G. 4. & 1 Will. 4. c. 47.

(*e*) *Longuet* v. *Hockley*, Feb. 16, 1836, Exch. MS. See a short statement of this case at p. 273, note (*b*) of 3rd edition; and see *Lucas* v. *Williams*, 3 Giff. 150.

(*f*) *Lucas* v. *Williams*, No. 2, 4 De G. F. & J. 439; [*Re Gorton*, 40 Ch. Div. 536; *S. C.* in D. P. *nom. Dowse* v. *Gorton*, and see *post*, Chap. xxiv. s. 2.]

(*g*) *Re Phœnix Life Assurance Company*, 2 J. & H. 229; *Re Leeds Banking Co., Fearnside's case, Dobson's case*, 12 Jur. N. S. 60; *Lumsden* v. *Buchanan*, 4 Macq. H. L. C. 950; *Imperial Mercantile Credit Association, Chapman and Barker's case*, 3 L. R. Eq. 361; [and see *Muir* v. *City of Glasgow Bank*, 4 App. Cas. 337; *Bell's case*, Ib. 547; *Alexander Mitchell's case*, Ib. 548; *Rutherford's case*, Ib. *Buchan's case*, Ib. 549; *Ker's case*, Ib.; *Cuninghame* v. *Glasgow Bank*, Ib. 607; *Gillespie* v. *Same*, Ib. 632.]

[(*h*) In *re Cheshire Banking Company*, 32 Ch. Div. 301, 309.]

[(*i*) 46 & 47 Vict. c. 52, ss. 44, 54;

such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge, shall, immediately on the debtor being adjudged bankrupt, vest in the trustee," and until a trustee is appointed, the official receiver is to be the trustee for the purposes of the Act.]

Assignees take differently from heirs and executors.

2. The operation of the Bankruptcy Acts was thus commented upon by Lord Chief Justice Willes: "The assignees under a commission of bankruptcy, are not to be considered as *general assignees* of all the real and personal estate of which the bankrupt was seised and possessed, as *heirs* and *executors* are of the estate of their ancestors and testators, for nothing vests in the assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts" (*a*).

The trust estate does not pass to the trustees in bankruptcy of the trustee.

3. It is clear, therefore, that in the case of a *bare trust*, the property, whether real (*b*) or personal (*c*), did not vest by the bankruptcy in the assignees, even *at law*. And the proposition applies not only to *express trustees*, but also to *trustees virtute officii*, as executors, administrators (*d*), factors (*e*), &c.; and by the recent Bankruptcy Acts (*f*) it is *expressly* enacted that the bankrupt's property shall not be taken to comprise property held by the bankrupt in trust for any other person.

Nor the property into which the trust estate has been converted.

4. Where the trust estate or fund has been converted into property of a different character, the new acquisition will equally be protected against the effects of the bankruptcy; for the product or substitute of the original thing must follow the nature of the thing from which it proceeded (*g*). Thus, if goods consigned to

and see the analogous sections 15 & 17 in the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71.]

(*a*) *Scott* v. *Surman*, Willes, 402.

(*b*) *Ex parte Gennys*, 1 Mont. & Mac. 258; *Houghton* v. *Kœnig*, 18 C. B. 235.

(*c*) See *Winch* v. *Keeley*, 1 T. R. 619; *Carpenter* v. *Marnell*, 3 B. & P. 40; *Gladstone* v. *Hadwen*, 1 M. & S. 517; *Boddington* v. *Castelli*, 1 Ell. & Bl. 879; *Westoby* v. *Day*, 2 Ell. & Bl. 605.

(*d*) *Howard* v. *Jemmett*, 3 Burr. 1369, *per* Lord Mansfield; *Ex parte Butler*, 1 Atk. 213, *per* Lord Hardwicke; *Viner* v. *Cadell*, 3 Esp. 88; *Farr* v. *Newman*, 4 T. R. 629, *per* Grose, J.; see *Ex parte Ellis*, 1 Atk. 101.

(*e*) *Godfrey* v. *Furzo*, 3 P. W. 186, *per* Lord King; *Tooke* v. *Hollingworth*, 5 T. R. 226, *per* Lord Kenyon; *L'Apostre* v. *Le Plaistrier*, cited *Copeman* v. *Gallant*, 1 P. W. 318; *Delauney* v. *Barker*, 2 Stark. 539; *Boddy* v. *Esdaile*, 1 Car. & P. 62; see *Ex parte Dumas*, 2 Ves. 582; *S. C.* 1 Atk. 232; *Paul* v. *Birch*, 2 Atk. 623; *Ryall* v. *Rolle*, 1 Atk. 172; *Ex parte Chion*, note (A) to *Godfrey* v. *Furzo*, 3 P. W. 187.

(*f*) 32 & 33 Vict. c. 71, s. 15; [46 & 47 Vict. c. 52, s. 44.]

(*g*) See *Taylor* v. *Plumer*, 3 M. & S. 575; *Scott* v. *Surman*, Willes, 404;

a factor be sold by him and reduced into money, so long as the money can be identified, as, where it has been kept in a bag, the employer, and not the creditors, will have the benefit of that specific sum (*a*). When money is said to have no *ear-mark*, the meaning is no more than this, that, being the currency of the country, it cannot be followed when once it has passed in circulation (*b*).

[Harris *v.* Truman.]

[5. So where money was paid into a bank by a firm of brewers, and an agent was allowed to draw upon the account in order to provide himself with funds for purchasing barley to be malted for the brewers, and the agent bought large quantities of barley, and also (although not authorized so to do) of malt, and drew largely upon the account, but in lieu of paying for the barley and malt, misappropriated the moneys which he received and subsequently became a bankrupt, it was held (1) that the moneys drawn out by the agent were impressed with a trust under which he was bound to appropriate them in the cash purchase of barley; (2) that even if the barley and malt which remained at the time of the bankruptcy in his possession were not bought in accordance with the authority given to him, and the legal property in them was not in the brewers but in the agent, he was a trustee of them for the brewers to the extent of the moneys advanced by the brewers, for they were the product of or substitute for the original trust property, and as such subject to the trust; and (3) that the bankrupt or his representative could not be allowed to set up the bankrupt's fraud and abuse of trust to defeat the title of his *cestui que trust* (*c*).]

Factor selling and taking notes.

6. So, if the factor sell the goods and take *notes* in payment, the value of the notes, notwithstanding the bankruptcy, may be recovered by action from the creditors' trustee (*d*); for, though negotiable securities are said, like money, to have no ear-mark, the expression does not intend that such securities in the hands of a bankrupt have run into the general mass of his property, and pass to his creditors, but only that negotiable securities, as a circulating medium in lieu of money, cannot be recovered from a person to whom they have been legally negotiated (*e*).

[*Ex parte Cooke*, 4 Ch. Div. 123; *Patten* v. *Bond*, 60 L. T. N.S. 583, 585; 37 W. R. 373.]

(*a*) *Tooke* v. *Hollingworth*, 5 T. R. 227, *per* Lord Kenyon; see *Taylor* v. *Plumer*, 3 M. & S. 571; [*Re Ulster Building Co.*, 25 L. R. Ir. 24, 29.]

(*b*) *Miller* v. *Race*, 1 Burr. 457, *per* Lord Mansfield.

[(*c*) *Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. Div. 264.]

(*d*) *Anon. case*, cited *Ex parte Dumas*, 2 Ves. 586.

(*e*) *Hartop* v. *Hoare*, 3 Atk. 50, *per* Lee, C.J.; *Miller* v. *Race*, 1 Burr. 457.

Factor selling for money payable at a future day.

7. So, if a factor sell the goods of his employer for money payable at a future day, and become bankrupt, and the creditors' trustee receives the money, he will be answerable for it to the merchant by whom the factor was employed (*a*).

Tortious conversion of the trust property.

8. In another case the conversion had been in *breach of the factor's duty* (*b*); and it was argued that, as the principal would not have been bound to accept the property which the agent had wrongfully purchased, the Court ought not to give a *lien* to the principal upon the tortious acquisition; but the Court said, it was impossible that an abuse of trust could confer any right on the person abusing it, or those claiming in privity with him (*c*).

Stockbroker selling.

[9. So, if a trustee employ a stockbroker to sell out consols and invest the proceeds on behalf of the trust estate, the money arising from the sale is trust money, and may be followed into the hands of the trustee in bankruptcy of the broker (*d*). And where money was borrowed for the purpose of purchasing a specific property which was to be mortgaged to secure the loan, and the borrower in lieu of applying the money for the specific purpose paid it into a bank and drew upon it, and subsequently became bankrupt, it was held that the lender could follow and claim so much of the money as remained in the bank unapplied (*e*).]

In whose name actions must be brought to recover the trust estate from the creditors' trustee.

10. Where the legal property does not pass, any action against the creditors' trustee must be brought by the bankrupt himself, for he is the person possessed of the legal right (*f*); but, in the case of a *factor*, an action may also be brought by the principal, for the absolute property remains with the employer, and a special property only vests in the agent (*g*). But, if *bills* be remitted to a factor, and made payable to him or his order, it has been doubted whether the property does not so vest in the factor, that no action of trover can be maintained by the principal (*h*).

Where the trust estate has become amalgamated with the trustee's other property, the *cestui que trust* must prove for the amount.

11. If the property possessed by the bankrupt in his character of trustee has become so amalgamated with his general property

(*a*) *Ryall* v. *Rolle*, 3 Atk. 172, *per* Burnet, J.; *Taylor* v. *Plumer*, 3 M. & S. 577; *Zinck* v. *Walker*, 2 W. Bl. 1154; *Garratt* v. *Cullum*, Bull. N. P. 42.

(*b*) *Taylor* v. *Plumer*, 5 M. & S. 562; see *Ryall* v. *Rolle*, 1 Atk. 172.

(*c*) *Taylor* v. *Plumer*, 3 M. & S. 574, *per* Lord Ellenborough; [*Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. Div. 264.]

[(*d*) *Ex parte Cooke*, 4 Ch. Div. 123.]

[(*e*) *Gibert* v. *Gonard*, 54 L. J. N.S. Ch. 439.]

(*f*) *Winch* v. *Keeley*, 1 T. R. 619; *Carpenter* v. *Marnell*, 3 B. & P. 40.

(*g*) *L'Apostre* v. *Le Plaistrier*, cited *Copeman* v. *Gallant*, 1 P. W. 318; *Delauney* v. *Barker*, 2 Stark. 539; *Boddy* v. *Esdaile*, 1 Car. 62.

(*h*) *Ex parte Dumas*, 2 Ves. 583.

that it can no longer be identified, the representative of the trust has then no other remedy but to come in as a general creditor and prove for the amount of the loss (*a*). But, in one case, though the trust money had *got into* the general fund, it was held, but under very particular circumstances, to have subsequently *got out again* (*b*).

Case of a bankrupt trustee having a beneficial interest.

12. As a general rule, where the bankrupt has a substantial beneficial interest, however small, in property legally vested in him, such property passes to the trustee, who takes as trustee for the creditors and other parties interested (*c*). It is conceived, however, that the rule would not apply to a case where a bankrupt is expressly a trustee, though he may himself have some partial beneficial interest, for his act ought not to work a prejudice to others, and as a conveyance by the bankrupt himself to a stranger would be a breach of trust, it can hardly be supposed that the Bankruptcy Act could be construed to have a similar tortious effect (*d*). Where the trust is constructive and the equity doubtful, the Court has sometimes directed the trustee to concur in conveying (*e*). And where the *legal* property passes, the *cestuis que trust* may have the same relief in equity against the creditors' trustee, as they would have been entitled to against the bankrupt himself (*f*).

Of trust chattels left in the possession of the bankrupt trustee.

[13. By the Bankruptcy Act, 1883, it is enacted that the property of the bankrupt divisible amongst his creditors shall comprise "all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt *in his trade or business*, by the consent and permission of the true

(*a*) *Ex parte Dumas*, 1 Atk. 234; *per* Lord Hardwicke, *Ryall* v. *Rolle*, 1 Atk. 172, *per* Burnet, J.; *Scott* v. *Surman*, Willes, 403, 404, *per* Willes, C. J.; [*Ex parte Dale and Co.* 11 Ch. D. 772; and see *Re Hallett's Estate*, 13 Ch. Div. 696.]

(*b*) *Ex parte Sayers*, 5 Ves. 169.

(*c*) *Carpenter* v. *Marnell*, 3 B. & P. 40; *Parnham* v. *Hurst*, 8 M. & W. 743; *Leslie* v. *Guthrie*, 1 Bing. N. C. 697; *D'Arnay* v. *Chesneau*, 13 M. & W. 809. See *Boddington* v. *Castelli*, 1 Ell. & Bl. 879.

(*d*) See *Fausset* v. *Carpenter*, cited *ante*, p. 238, as to the effect of a conveyance expressed in general words upon a trust estate.

(*e*) *Bennet* v. *Davis*, 2 P. W. 316; *Taylor* v. *Wheeler*, 2 Vern. 564; *Ex parte Gennys*, Mont. & Mac. 258.

(*f*) *Bennet* v. *Davis*, 2 P. W. 316; *Taylor* v. *Wheeler*, 2 Vern. 564; *Mitford* v. *Mitford*, 9 Ves. 100, *per* Sir W. Grant; *Ex parte Dumas*, 2 Ves. 585, *per* Lord Hardwicke; *Hinton* v. *Hinton*, 2 Ves. 633, *per eundem*; *Grant* v. *Mills*, 2 V. & B. 309, *per* Sir W. Grant; *Jones* v. *Mossop*, 3 Hare, 572, *per* Sir J. Wigram; *Tyrrell* v. *Hope*, 2 Atk. 558; *Bowles* v. *Rogers*, 6 Ves. 95, note (*a*); *Ex parte Hansom*, 12 Ves. 349, *per* Lord Eldon; *Ex parte Coysegame*, 1 Atk. 192; *Frith* v. *Cartland*, 2 H. & M. 417; *Fleeming* v. *Howden*, 1 L. R. H. L. Sc. 372: [*Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. Div. 264;] see *Mestaer* v. *Gillespie*, 11 Ves. 624; *Ex parte Herbert*, 13 Ves. 188; *Waring* v. *Coventry*, 2 M. & K. 406.

owner, under such circumstances that he is the reputed owner thereof." Thus, although all persons (traders or not) can now be made bankrupts, only those engaged in some trade or business come under the operation of the order and disposition clause; and, as it would seem, then only as to goods affected by such trade or business. The same section also provides that "*things in action* other than debts due or growing due to the bankrupt in the course of his *trade or business* shall *not* be deemed *goods* within the meaning of the section" (*a*).

It should be observed that this section differs from the corresponding section in the Bankruptcy Act, 1869 (*b*), which applied to the goods in the order and disposition of the bankrupt trader, whether in his trade or business or not (*c*). Under these sections it was at one time considered that shares in companies were not things in action within the Acts (*d*); but this view has been overruled in the House of Lords (*e*), and it has also been held that debentures of a company, by which they undertake to pay a sum of money and interest, and charge their undertaking and property with the payment thereof (*f*), and policies of life assurance (*g*), and equitable interests in shares which are registered in the names of other persons (*h*), are such things in action.]

No forfeiture where they are in his possession according to the title.

It has been decided under the corresponding clause in the previous Bankruptcy Acts, that the enactment does not apply where the possession of the goods by the bankrupt can be satisfactorily accounted for by the circumstances of the title, as, if a trustee be in possession of effects upon trust for payment of debts, and become bankrupt (*i*), or if goods be vested in A. upon trust to permit B. to have the enjoyment during his life, and B. becomes bankrupt while in possession under his equitable title (*j*); or if A. for valuable consideration assign his goods to a trustee for A.'s wife for her separate use, and the goods are in the house

[(*a*) 46 & 47 Vict. c. 52, s. 44.]

[(*b*) 32 & 33 Vict. c. 71, s. 15.]

[(*c*) *Re Jenkinson*, 15 Q. B. D. 441; *Colonial Bank* v. *Whinney*, 30 Ch. Div. 261.]

(*d*) *Union Bank of Manchester, Re Jackson*, 12 L. R. Eq. 354.

[(*e*) *Colonial Bank* v. *Whinney*, 11 App. Cas. 426, reversing *S. C.* 30 Ch. Div. 261.]

[(*f*) *Re Pryce*, 4 Ch. D. 685.]

[(*g*) *Ex parte Ibbetson*, 8 Ch. Div. 519.]

[(*h*) *Ex parte Barry*, 17 L. R. Eq. 113.]

(*i*) *Copeman* v. *Gallant*, 1 P. W. 314; and see under the Bankruptcy Act, 1869, *Ex parte Barry*, 17 L. R. Eq. 113.

(*j*) *Ex parte Martin*, 19 Ves. 491; *S. C.* 2 Rose, 331; see *Ex parte Horwood*, 1 Mont. & Mac. 169; Mont. 24; *Jarman* v. *Woolloton*, 3 T. R. 618; *Ex parte Massey*, 2 Mont. and Ayr. 173; *Ex parte Elliston*, 2 Mont. and Ayr. 365; *Ex parte Geaves*, 8 De G. M. & G. 291; 2 Jur. N.S. 651; *Re Bankhead's Trust*, 2 K. & J. 560.

occupied by A. and his wife at the date of his bankruptcy (*a*). [So property which belongs to a married woman for her separate use, but as to which the husband, by reason of there being no other trustee, is a trustee for the wife, does not pass to his trustee in bankruptcy (*b*); and farming stock of a testator left in the hands of the widow as tenant for life under the will was, under the circumstances of the case, held to be sufficiently ear-marked as trust property so that only the life-interest passed to the trustee in bankruptcy (*c*).] But if a residue be given to trustees upon trust to *sell* with all convenient speed, and to invest the proceds in the purchase of an annuity for the lives of A. (one of the trustees) and her children, the amount to be paid to A. for the benefit of the children, and if instead of selling the trustees permit A. to retain possession for a length of time, the goods are forfeited, such possession being contrary to the title (*d*).

Executors and administrators

14. The enactment does not extend to a lawful and necessary possession *en auter droit*, as that by executors and administrators (*e*); but there will be no exemption from the forfeiture if the executor can be proved to have dismissed the character of personal representative, and to have assumed that of absolute owner (*f*).

Factors.

15. So goods in the possession of *factors*, in the ordinary course of their trade, are not forfeitable under the clause (*g*).

Reversions.

16. The forfeiture clause affects interests in reversion as well as in possession (*h*), though such interests are contingent (*i*), and the circumstance that notice was given to the trustee, after the bankruptcy, but before the appointment of assignees in bankruptcy, has been held not to prevent the operation of the Act (*j*).

Deposits.

17. Under the old Bankruptcy Acts, no forfeiture was incurred where the security for a *chose en action*, as a policy, was deposited with a banker, not by way of equitable assignment so as to give the banker a right to receive the money, but by way of *lien*, so as to

(*a*) *Ex parte Cox*, 1 Ch. D. 302.

[(*b*) *Ex parte Sibeth*, 14 Q. B. Div. 417.]

[(*c*) *Ex parte Barber*, 28 W. R. 522.]

(*d*) *Ex parte Moore*, 2 Mont. D. and De G. 616; and see *Fox* v. *Fisher*, 3 B. & Ald. 135; *Ex parte Thomas*, 3 Mont. D. & De G. 40.

(*e*) *Ex parte Marsh*, 1 Atk. 158; *Joy* v. *Campbell*, 1 Sch. & Lef. 328.

(*f*) *Fox* v. *Fisher*, 3 B. & Ald. 135; *Ex parte Moore*, 2 Mont. D. & De G. 616; *Ex parte Thomas*, 3 Mont. D. & De G. 40; see *Quick* v. *Staines*, 1 B. & P. 293; *Whale* v. *Booth*, cited *Farr* v. *Newman*, 4 T. R. 625, note (*a*).

(*g*) *Mace* v. *Caddell*, Cowp. 232; *Ex parte Pease*, 19 Ves. 46, *per* Lord Eldon; *L'Apostre* v. *Le Plaistrier*, cited *Copeman* v. *Gallant*, 1 P. W. 318; *Whitfield* v. *Brand*, 16 M. & W. 282.

(*h*) *Bartlett* v. *Bartlett*, 1 De G. & J. 127; *Re Rawbone's Trust*, 3 K. & J. 300, 376; *Rickards* v. *Gledstanes*, 3 Giff. 298.

(*i*) *Hensley* v. *Wills*, 16 L. T. N.S. 582; *Davidson* v. *Chalmers*, 33 Beav. 653.

(*j*) *Re Tichener*, 35 Beav. 317.

disable the bankrupt from receiving the money (*a*). But the case was otherwise where the depositee had a right conferred upon him to receive the money, for then the *chose en action* was forfeited (*b*).

Ignorance.

18. The clause has been held not to apply where the true owner was ignorant of his being such, for if he did not know that he was the true owner, how could he have given any consent as such (*c*). And where the bankrupt held in trust for a corporation which had no power to possess such property, it was ruled that the corporation, being a mere abstraction of law, and incapable of action beyond the limits of its own legal powers, could not consent as *true* owner (*d*).

Whether bare trustee a "true owner."

19. Whether the permission of a *bare trustee* can be said to be that of the "*true owner*," to the prejudice of his innocent *cestuis que trust* is a question of some difficulty (*e*). It has been decided that a *cestui que trust* absolutely entitled is a *true owner* within the meaning of the Act (*f*). But here the trustee is a mere passive depositary, and can do *no* act without the direction of his *cestui que trust* (*g*); but the case is different, where, as in a marriage settlement, a fund is vested in trustees in trust for persons under disability or not in existence, and it is therefore intended that they should act on behalf of all parties as the absolute proprietors. It would seem that here the trustees are regarded as the true owners, and that if the funds are left by the trustees in the order and disposition of the bankrupt, they are so left with the consent of the true owners (*h*).

Of judgments against the trustee.

20. *Judgments*, at least so far as they affect *lands* (for execution against goods and chattels is by common law), derive their origin from certain statutory enactments (*i*).

Had trusts been established at the time when these statutes were passed, the construction would probably have been the same

(*a*) *Gibson* v. *Overbury*, 7 M. & W. 555.

(*b*) *Green* v. *Ingham*, 2 L. R. C. P. 525.

(*c*) *Re Rawbone's Trust*, 3 K. & J. 300, 476; and see *Ex parte Ford*, 1 Ch. Div. 521; *In re Hickey*, 10 Ir. Rep. Eq. 117.

(*d*) *Great Eastern Railway Company* v. *Turner*, 8 L. R. Ch. App. 149.

(*e*) See *Ex parte Richardson*, Buck, 480; *Ex parte Horwood*, 1 Mont. & Mac. 169, Mont. 24; *Viner* v. *Cadell*, 3 Esp. 88; *Ex parte Geaves*, 8 De G. M. and G. 291.

(*f*) *Ex parte Burbridge*, 1 Deac. 131; 4 Deac. & Ch. 87; and see *Day* v. *Day*, 1 De G. & J. 144.

[(*g*) See *Ex parte Culley*, 9 Ch. Div. 307; *Ex parte Dearle*, 14 Q. B. Div. 184, which show that a mere trustee of a debt for an absolute beneficial owner not under disability cannot alone sustain a petition for adjudication of bankruptcy against the debtor.]

(*h*) *Ex parte Caldwell*, 13 L. R. Eq. 188; *Darby* v. *Smith*, 8 T. R. 82; *Ex parte Dale*, Buck, 365; and see *Hensley* v. *Wills*, 16 L. T. N.S. 582.

(*i*) 11 E. 1; 13 E. 1, st. 1, c. 18; 13 E. 1, st. 3; 27 E. 3, st. 2, c. 9; see Co. Lit. 289, b.

as in the case of the Bankruptcy Acts, that is, judgments would have been held to bind those lands only of which the conusee was seised beneficially; but trusts at the period of which we are speaking had not made their appearance, and therefore judgments have been held to bind all lands of the conusee, whether vested in him beneficially, or in the character of trustee. But of course the *cestui que trust* will be protected from the legal process by application to a Court of equity (*a*).

[Garnishee order.]

[21. A garnishee order *nisi* to attach a debt due to a trustee will not be made absolute, if a *primâ facie* case be made out that the money sought to be attached is trust money, but the money will be ordered into Court to abide the event of an inquiry whether it be trust money or not (*b*).]

SECTION III.

WHAT PERSONS TAKING THE LEGAL ESTATE WILL BE BOUND BY THE TRUST.

General rule.

1. The universal rule, as trusts are now regulated, is, that all persons who take *through or under the trustee* (except purchasers for valuable consideration without notice), shall be liable to the trust.

Heir and executor bound by the trust.

2. On the death of the trustee, the *heir* (*c*), *executor*, or *administrator*, becomes the *legal* owner of the property; but as he merely represents the ancestor, testator, or intestate, he takes in the same character, and is therefore bound by the same equity.

So the devisee.

3. So, if a trustee devise the estate, the *devisee* takes the estate subject to the trust (*d*).

And assigns by act *inter vivos*.

4. So all *assigns* of the trust by acts *inter vivos* (except purchasers for valuable consideration without notice), will be bound by the trust (*e*).

So assigns in the *post*.

5. Assigns in the *post*, or by operation of law, are also invested with the character of trustees; as if a trustee marry, the wife is at *law* entitled to her dower, and if a female trustee marry, the husband is at *law* entitled to his curtesy, but in *equity* both the

(*a*) *Finch* v. *Earl of Winchelsea*, 1 P. W. 277; *Burgh* v. *Francis*, 1 Eq. Ca. Ab. 320; *Medley* v. *Martin*, Finch, 63; *Prior* v. *Penpraze*, 4 Price, 99; *Langton* v. *Horton*, 1 Hare, 560, *per* Sir J. Wigram. See *ante*, p. 236, as to chattels taken in execution.

[(*b*) *Roberts* v. *Death*, 8 Q. B. Div. 319.]

[(*c*) See now 44 & 45 Vict. c. 41, s. 30.]

(*d*) *Marlow* v. *Smith*, 2 P. W. 201, *per* Sir J. Jekyll; *Lord Grenville* v. *Blyth*, 16 Ves. 231, *per* Sir W. Grant.

(*e*) See *infra*.

dowress (*a*) and *tenant by the curtesy* (*b*) are compellable to recognise the right of the *cestui que trust*. So a *creditor* of the trustee extending the trust estate under an *elegit* (*c*), or taking a trust chattel by writ of execution (*d*), and by the same rule the creditors' trustee under a bankruptcy (*e*) are made subject to the equity.

6. And if the trustee commit a *forfeiture*, the lord, as he succeeds to the identical estate of the forfeitor, must take the property with all the engagements and incumbrances attached to it, and is therefore liable to the trust (*f*). In the case of a forfeiture to the Crown, it was formerly held that there was no equity against the Crown (*g*); but in modern times the equity was admitted, though the precise nature of the remedy was never distinctly ascertained (*h*). Forfeiture.

7. A lord taking by *escheat* stands on a somewhat different footing, for he does not take through or under the trustee at all; he is not an *assign* of the trustee either in the *per* or *post;* nor does he, as in forfeiture, succeed to the place of the trustee, but Escheat.

(*a*) *Pawlett* v. *Attorney-General*, Hard. 469, *per* Lord Hale; *Noel* v. *Jevon*, Freem. 43; *Hinton* v. *Hinton*, 2 Ves. 634, *per* Lord Hardwicke.

(*b*) *Bennet* v. *Davis*, 2 P. W. 319.

(*c*) *Kennedy* v. *Daly*, 1 Sch. & Lef. 373, *per* Lord Redesdale; *Finch* v. *Earl of Winchelsea*, 1 P. W. 277; *Burgh* v. *Burgh*, Rep. *t* Finch, 28. In the case of *Whitworth* v. *Gaugain*, 1 Cr. & Ph. 325, where a person made a deposit of title deeds, and then a judgment was entered up against him, Lord Cottenham expressed a doubt whether the judgment creditor, *if he had no notice*, would be bound by the prior equity. However, such a doctrine was not tenable, for a judgment creditor is *not a purchaser for valuable consideration*. *Brace* v. *Duchess of Marlborough*, 2 P. W. 491. He advances money, but not on the security of this estate. He may take the person of his debtor, or his goods and chattels, and if he is put in possession of the lands, it is not as purchaser of them, but by course of law. The cause was afterwards heard, and Lord Cottenham's doubts were displaced by a decision the other way, 3 Hare, 416; 1 Ph. 728. In *Watts* v. *Porter*, 3 Ell. & Bl. 743, three of the four judges, while approving of *Whitworth* v. *Gaugain*, refused to apply the principle of it to a case of stock. The remaining judge differed, and held that in personal, as in real estate, the specific incumbrancer, though he gives no notice to the trustee, prevails over the judgment creditor, though he has obtained a charging order. It is conceived that the single judge took the clearer view. Those who determined the other way, seem to have assumed that notice was necessary for the transfer of an equitable interest, which is not true as between assignor and assignee, but only as between two contending assignees. The case of *Watts* v. *Porter* has since been disapproved by the highest authorities, *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 507; *Kinderley* v. *Jervis*, 22 Beav. 34; *Scott* v. *Hastings*, 4 K. & J. 633. [And see *Ex parte Whitehouse*, 32 Ch. D. 512; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; 38 Ch. Div. 238; *Re Leavesley*, 39 W. R. 276 and *post*, Chap. xxvii. s. 7.]

(*d*) *Foley* v. *Burnell*, 1 B. C. C. 278, *per* Lord Thurlow.

(*e*) See *supra*, p. 256, note (*f*).

(*f*) *Burgess* v. *Wheate*, 1 Eden, 203, *per* Sir T. Clarke; Ib. 252, *per* Lord Henley.

(*g*) *Wike's case*, Lane, 54, agreed.

(*h*) *Burgess* v. *Wheate*, 1 Eden, 252;

claims by a title paramount of his own, by virtue of a condition originally annexed to the land, and wholly independent of the creation of the trust.

Burgess v. Wheate.

Lord Mansfield was of opinion, however, in *Burgess* v. *Wheate* (*a*), that a trust ought to be binding on the lord, and cited the opinions said to have been expressed by Lord Chief Justice Bridgman and Sir John Trevor (*b*); but as to the words attributed to the former, it appears from his own note-book, that they were never spoken (*c*); and the observation of Sir John Trevor was at the utmost a mere *obiter dictum*. Sir Thomas Clarke, on the other hand, who assisted Lord Mansfield in the case of *Burgess* v. *Wheate*, thought that *cestui qui trust* was no more relievable against the lord by escheat, than against a sale by the trustee to a purchaser without notice (*d*); and Lord Northington's inclination was apparently the same way, though, as the point was not necessarily involved in the question before him, he declined to conclude himself by any express and direct opinion (*e*). It is clear that the lord was not bound by a *use*. However, it must be admitted that in modern times the Courts have acted on more liberal principles; and it has been actually decided that where the fee out of which a mortgage term has been carved escheats to the lord, he may redeem (*f*), and if the lord may take a benefit through the tenant, it seems to follow that he must sustain an onus. Indeed, an opinion to that effect has been enunciated by Lord Justice James when Vice-Chancellor (*g*), and also by an equity court in Ireland (*h*). Now that the Acts, 13 & 14 Vict. c. 60, [and 44 & 45 Vict. c. 41,] (to be noticed presently), have been passed, it is unlikely that the point will ever call for a decision.

Copyholds.

8. In *copyholds* there is, properly speaking, no such thing as escheat. The freehold and inheritance are vested in the lord of the manor, and the tenant has no claim but according to the entry on the court roll. If the tenant be a trustee, and no trust appears on the roll, there can be no pretence for charging the

and see *Pawlett* v. *Attorney-General*, Hard. 467, which was a case of forfeiture, though treated by Lord Hale as a case of escheat. And see *supra*, p. 28.

(*a*) 1 Eden, 177, see p. 229; and see observations upon Lord Mansfield's argument in 3rd edit. p. 281.

(*b*) *Burgess* v. *Wheate*, 1 Eden, 230.

(*c*) See Ib. 230, note (*a*); and see Sir T. Clarke's observations, Ib. 202.

(*d*) Ib. 1 Eden, 203.

(*e*) Ib. 1 Eden, 246.

(*f*) *Viscount Downe* v. *Morris*, 3 Hare, 394.

(*g*) *Re Martinez' Trust*, 22 L. T. N.S. 403.

(*h*) *White* v. *Baylor*, 10 Ir. Eq. Rep. 54; and see *Evans* v. *Brown*, Beav. 116.

lord with an equity to which he never assented (*a*); but if a surrender be made upon a trust either *expressed* or *referred to* on the roll, the lord is stopped by this evidence of his will, and cannot afterwards claim in contradiction to his grant (*b*).

Customary freeholds.

9. *Customary freeholds* held not at the will of the lord, but according to the custom of the manor, stand on the same footing as copyholds in reference to escheat (*c*), for it is now established that customary freeholds are in fact copyholds, but of a privileged character (*d*).

Equity of redemption.

10. A distinction was taken by Lord Hale between a *trust* and an *equity of redemption*. "A trust," said his Lordship, "is created by the contract of the party, and he may direct it as he pleaseth, and he may provide for the execution of it, and therefore one that comes in in the *post* shall not be liable to it without express mention made by the party; and the rules for executing a trust have often varied, and therefore they only are bound by it who come in in privity of estate; but a power of redemption is an equitable right inherent in the land, and binds all persons in the *post* or otherwise (*e*), because it is an ancient right which the party is entitled to in equity" (*f*). But upon this distinction it must be observed, that even a trust will at the present day bind persons who take derivatively from the trustee, though in the *post*; and notwithstanding an equity of redemption amounts to what Lord Hale calls a *title* (*g*), there seems to be no reason why in the case of escheat the lord, who takes by title paramount, should be bound by an equity of redemption any more than by a simple trust (*h*). In a later case (*i*), however, the distinction between an equity of redemption and a trust was observed upon, and the Court expressed an opinion that a lord who was in by

Viscount Downe v. Morris.

(*a*) *Attorney-General* v. *Duke of Leeds*, 2 M. & K. 343; and see *Peachy* v. *Duke of Somerset*, 1 Str. 454; *Burgess* v. *Wheate*, 1 Eden, 231.

(*b*) *Burgess* v. *Wheate*, 1 Eden, 231, *per* Lord Mansfield; *Weaver* v. *Maule*, 2 R. & M. 97; and see *Everingham* v. *Ivatt*, 7 L. R. Q. B. 683; affirmed 8 L. R. Q. B. 388; [*Gallard* v. *Hawkins*, 27 Ch. D. 298.]

(*c*) *Weaver* v. *Maule*, 2 R. & M. 100, *per* Sir John Leach.

(*d*) *Duke of Portland* v. *Hill*, 12 Jur. N.S. 286.

(*e*) *Semble* not a purchaser without notice; see *Harding* v. *Hardrett*, Rep. *t.* Finch, 9; *Spurgeon* v. *Collier*, 1 Eden, 55.

(*f*) *Pawlett* v. *Attorney-General*, Hard. 469; and see *Bacon* v. *Bacon*, Tothill, 133; *Burgess* v. *Wheate*, 1 Eden, 206; *Tucker* v. *Thurstan*, 17 Ves. 133.

(*g*) See *Pawlett* v. *Attorney-General*, Hard. 467.

(*h*) See *Burgess* v. *Wheate*, 1 Eden, 255; *Attorney-General* v. *Duke of Leeds*, 2 M. & K. 344. *Pawlett* v. *Attorney-General*, Hard. 465, in which Lord Hale and Baron Atkins thought the king was bound by an equity of redemption, was not a case of *escheat*, as called by Lord Hale, but of *forfeiture*.

(*i*) *Viscount Downe* v. *Morris*, 3 Hare, 394.

escheat would be bound by an equity of redemption, if not by a trust (*a*).

Real estate assets in hands of assign or lord taking by escheat.

11. The 3 & 4 W. 4. c. 104 (which subjects a person's real estate to the payment of his simple contract debts), annexes the quality of assets to the estate itself (*b*), and subject to the right of alienation by the heir or devisee (*c*), creates a charge on the estate for the benefit of the creditors (*d*); and it has been held that a debtor's estate is assets, [in the hands of a voluntary assign of the heir or devisee (*e*), and] even in the hands of the lord taking by escheat (*f*).

13 & 14 Vict. c. 60.

12. The law relating to the forfeiture and escheat of trust estates, except so far as it illustrates general principles, has now, by the interference of the Legislature, become of little importance; for by 13 & 14 Vict. c. 60, it is enacted in effect, by sect. 15, that in case of *failure of heirs of a trustee*, the Court of Chancery shall have power, upon summary application, to transfer the legal estate (*g*); and by sect. 46, the trust property shall not escheat or be forfeited by reason of the *attainder* or *conviction for any offence of the trustee;* [and by 44 & 45 Vict. c. 41, s. 30, in the case of the death of a trustee after the 31st December, 1881, the legal estate in realty devolves upon the legal personal representative of the trustee (*h*), and may be disposed of and dealt with by him as if it were a chattel real.]

Outlawry of the trustee.

13. If a trustee be *outlawed* for *treason* or *felony*, the outlawry amounts to conviction (*i*), and the ordinary consequences of forfeiture or escheat (*j*) are averted by the above Act. But an outlawry on an indictment for a *misdemeanour* or in a *personal action* (*k*) is not equivalent to a conviction of the offence, but

(*a*) *Viscount Downe* v. *Morris*, 3 Hare, 394.

[(*b*) The real estate is made an asset from the time of the debtor's decease, not merely the corpus, but the fruit, and the rents and profits are necessarily included; *Re Hyatt*, 38 Ch. D. 609.]

(*c*) *Spackman* v. *Timbrell*, 8 Sim. 253; *Richardson* v. *Horton*, 7 Beav. 112; *Hynes* v. *Redington* 10 Ir. Ch. Rep. 194; *Pimm* v. *Insall*, 7 Hare, 193; 1 Mac. & G. 449; and see *Dilkes* v. *Broadmead*, 2 Giff. 113; [*Re Hedgely*, 34 Ch. D. 379, 384.]

(*d*) *Evans* v. *Brown*, 5 Beav. 116. (N.B. This case was appealed and compromised [and ultimately the real estate was sold to pay debts, see *Tyler* v. *Thomas*, 25 Beav. 47, referred to in *Re Hyatt*, 38 Ch. D. 609, at p. 620].) *Hamer's Devisees*, 2 De G. M. & G. 366; *Beale* v. *Symonds*, 16 Beav. 406; *Kinderley* v. *Jervis*, 22 Beav. 1.

[(*e*) *Re Hyatt*, 38 Ch. D. 609.]

(*f*) *Evans* v. *Brown*, 5 Beav. 116; and see *Viscount Downe* v. *Morris*, 3 Hare, 394.

(*g*) See *Re Martinez' Trust*, 22 L. T. N.S. 403; and *post*, Appendix, No. 2.

[(*h*) Other than a trustee of copyholds, who is tenant on the Court rolls; see 50 & 51 Vict. c. 73, s. 45.]

(*i*) Co. Lit. 390 b.; *Holloway's case*, 3 Mod. 42; *Rex* v. *Ayloff*, Ib. 72.

(*j*) See pp. 25, 26, *suprà*.

[(*k*) Outlawry in civil actions is now abolished. See 42 & 43 Vict. c. 59.]

merely of a contempt of Court (*a*), punishable with forfeiture of the life rent of the outlaw's lands, and of his chattels, real and personal, absolutely, and in this case, therefore, the statute does not apply.

A disseisor not bound by the trust.

14. A *disseisor* is not an assign of the trustee either in the *per* or *post*, for he does not claim through or under the trustee, but holds by a wrongful title of his own, and adversely to the trust. The first resolution in *Sir Moyle Finch's case* was, that "a disseisor was subject to no trust, nor any *subpœna* was maintainable against him, not only because he was not in the *post*, but because the right of inheritance or freehold was determinable at the common law, and not in Chancery, neither had the *cestui que trust* (while he had his being) any remedy in that case" (*b*). And we may add the authority of Lord St. Leonards, who, in his edition of Gilbert on Uses, observes, "At this day every one is bound by a trust who obtains the estate without a valuable consideration, or even for a valuable consideration if with notice, unless perhaps the lord by escheat. But persons claiming the legal estate by an actual disseisin, without collusion with the trustee, will not be bound by the trust. Therefore, if I oust A., who is a trustee for B., and a claim is not made in due time, A. will be barred, and his *cestui que trust* with him, although I had notice of the trust" (*c*) (1). And the same thing may be inferred from the terms of the section of the Statute of Limitations relating to express trusts (*d*).

(*a*) *Rex* v. *Tippin*, Salk. 494.
(*b*) *Sir Moyle Finch's case*, 4 Inst. 85.
(*c*) Gilbert on Uses, Sugd. ed. 249.
(*d*) 3 & 4 W. 4. c. 27, s. 25.

(1) And an outstanding term in a trustee would have attended the inheritance gained by the disseisin. *Reynolds* v. *Jones*, 2 Sim. & St. 206; and see *Turner* v. *Buck*, 22 Vin. Ab. 21; *Doe* v. *Price*, 16 M. & W. 603.

CHAPTER XIII.

GENERAL PROPERTIES OF THE OFFICE OF TRUSTEE.

From the *estate* of the trustee we pass on to the consideration of his *office*, and upon this subject we shall, in the first place, investigate the *general* properties of the office, as, *First*. A trustee having once accepted the trust cannot afterwards renounce it. *Secondly*. He cannot delegate it. *Thirdly*. In the case of co-trustees the office must be exercised by all the trustees jointly. *Fourthly*. On the death of one trustee there is survivorship, that is, the trust will pass to the survivors or survivor. *Fifthly*. One trustee shall not be liable for the acts of his co-trustee. *Sixthly*. A trustee shall derive no personal benefit from the trusteeship.

First. A trustee who has accepted the trust cannot afterwards *renounce*.

Trustee cannot renounce after acceptance.

1. It is a rule, without any exception, that a person who has once undertaken the office, either by actual or constructive acceptance, cannot discharge himself from liability by a subsequent *renunciation*. The only mode by which he can obtain a release is either under the sanction of a Court of Equity, *or* by virtue of a special power in the instrument creating the trust, [*or* of a statutory power (*a*)], *or* with the consent of all the parties interested in the estate and being *sui juris* (*b*).

Executor cannot renounce after he has acted.

Thus, where A. was named executor, and acted in behalf of some particular legatees, but disclaimed the intention of interfering generally, and then renounced, and B. obtained letters of administration *cum testamento annexo*, and possessed himself of assets, and died insolvent, it was held that A., having acted, could not afterwards discharge himself, and was responsible for the *devastavit* committed by B. (*c*).

[(*a*) See 44 & 45 Vict. c. 51, ss. 31, 32.]

(*b*) See *Doyle* v. *Blake*, 2 Sch. & Lef. 245; *Chalmer* v. *Bradley*, 1 J. & W. 68; *Read* v. *Truelove*, Amb. 417; *Manson* v. *Baillie*, 2 Macq. H. L. Cas. 80. As to the discharge of the trustee, see Ch. xxv. *infra*.

(*c*) *Doyle* v. *Blake*, 2 Sch. & Lef. 231; see *Lowry* v. *Fulton*, 9 Sim. 123.

2. Though a trustee may have given a bond for the due execution of the trust, and the *cestui que trust* may have recovered upon the bond, and been paid the money, yet, if the *cestui que trust* afterwards take proceedings to compel a conveyance of the trust estate, the trustee cannot divest himself of his fiduciary character by pleading that the penalty of the bond was a stated damage for the breach of trust, and that on payment of the penalty the trustee should be released. A conveyance, however, will not be decreed without an allowance to the trustee of the penalty recovered upon the bond, with the interest at the usual rate (*a*). Moorecroft *v.* Dowding.

Secondly. The office of trustee, being one of personal confidence, cannot be *delegated.*

1. "Trustees," said Lord Langdale, "who take on themselves the management of property for the benefit of others, have no right to shift their duty on other persons; and if they do so they remain subject to responsibility towards their *cestuis que trust* for whom they have undertaken the duty" (*b*). If a trustee, therefore, confide the application of the trust fund to the care of another, whether a stranger (*c*), or his own attorney or solicitor (*d*), or even co-trustee or co-executor (*e*), he will be personally responsible for any loss that may result (*f*). But trustees were held not Trustee cannot delegate the office.

(*a*) *Moorecroft* v. *Dowding*, 2 P. W. 314.

(*b*) *Turner* v. *Corney*, 5 Beav. 517.

(*c*) *Adams* v. *Clifton*, 1 Russ. 297; *Hardwick* v. *Mynd*, 1 Anst. 109; *Venables* v. *Foyle*, 1 Ch. Ca. 2; case cited by Sir J. Jekyll, *Walker* v. *Symonds*, 3 Sw. 79, note (*a*); *Char. Corp* v. *Sutton*, 2 Atk. 405; *Kilbee* v. *Sneyd*, 2 Moll. 199, *per* Sir A. Hart; *Douglas* v. *Browne*, Mont. 93; *Ex parte Booth*, Id. 248; *Turner* v. *Corney*, 5 Beav. 515.

(*d*) *Chambers* v. *Minchin*, 7 Ves. 196, *per* Lord Eldon; *Ex parte Townsend*, 1 Moll. 139; *Griffiths* v. *Porter*, 25 Beav. 236; *Ghost* v. *Waller*, 9 Beav. 497; *Bostock* v. *Floyer*, 1 L. R. Eq. 26; *S. C.* 35 Beav. 603; *Wood* v. *Weightman*, 13 L. R. Eq. 434; *Ingle* v. *Partridge*, 32 Beav. 661, 34 Beav. 411; [*Dewar* v. *Brooke*, 54 L. J. N.S. Ch. 830; 52 L. T. N.S. 489; 33 W. R. 497; *Baylis* v. *Dick*, W. N. 1878, p. 81;] but see *In re Bird*, 16 L. R. Eq. 203.

(*e*) *Langford* v. *Gascoyne*, 11 Ves. 333; *Harrison* v. *Graham*, 3 Hill's MSS. 239, cited 1 P. W. 241 note (*y*), 6th ed.; *Davis* v. *Spurling*, 1 R. & M. 66, *per* Sir J. Leach; *Kilbee* v. *Sneyd*, 2 Moll. 200, 212, *per* Sir A. Hart; *Lane* v. *Wroth*, and *Stanley* v. *Darington*, cited in *Anonymous case*, Mos. 36; *Marriott* v. *Kinnersley*, Taml. 470; *Ex parte Winnall*, 3 D. & Ch. 22; *Anon.* Mos. 35; *Clough* v. *Bond*, 3 M. & Cr. 497, *per* Lord Cottenham; *Dines* v. *Scott*, T. & R. 861, *per* Lord Eldon; *Trutch* v. *Lamprell*, 20 Beav. 116; *Thompson* v. *Finch*, 22 Beav. 316; 6 De G. M. & G. 560; *Cowel* v. *Gatcombe*, 27 Beav. 568; *Eaves* v. *Hickson*, 30 Beav. 136; [*Rodbard* v. *Cooke*, 25 W. R. 555.]

[(*f*) But in the ordinary course of business trustees may employ brokers and solicitors as their agents without being liable for their acts. "A trustee," said L. J. Lindley, "has no business to cast upon brokers, or solicitors, or anybody else, the duty of performing

to be responsible where they drew a cheque and delivered it to a co-trustee, but crossed with the names of bankers to whom the money was meant to be paid, and to whom it was payable in the due execution of the trust, and the co-trustee (as the Court assumed) erased the crossing and received the money himself; for such a receipt was a fraud on the trustees, and not the result of any act of theirs (*a*). [But where it was the duty of executors to purchase stock, and in lieu thereof a cheque was drawn in favour of the legatee, and the money was lost by the fraud of one executor, his co-executor was held liable (*b*).]

Balchen *v.* Scott.

2. The case of *Balchen* v. *Scott* (*c*), is no exception to the general rule; for there an executor had received a bill of exchange by the post from a debtor to the estate, and transmitted it to his co-executor, and it was held, that by this proceeding the executor had *not acted* in the trust (*d*), and therefore was no more answerable for the application of the money by the co-executor, than any stranger would have been under similar circumstances.

Churchill *v.* Hobson.

3. In *Churchill* v. *Hobson* (*e*), an executor had paid 500*l.* into the hands of his co-executor, who misapplied it, and it was ruled by the Court that he was not bound to make it good; but the decision is universally considered as having turned upon the circumstance that the co-executor was a *banker*, and had been trusted by the testator in his lifetime, besides being made his executor at his death (*f*). Lord Harcourt, in his judgment, observed, "The co-executor having been the cashier with whom the testator in his lifetime chose to intrust his money, the

those trusts and exercising that judgment and discretion which he is bound to perform and exercise himself. On the other hand a trustee is not bound to do everything himself. A trustee is entitled to employ brokers and solicitors to do that which in the ordinary course of business other people would employ brokers and solicitors to do;" and in the same case, L. J. Bowen said, "The proposition as to trustees and agents that they cannot delegate means this simply —that a man employed to do a thing himself has not the right to get somebody else to do it, but when he is employed to get it done through others he may do so." *Re Speight*, 22 Ch. Div. 727, 756, 763; 9 App. Cas. 1. [As to the powers conferred on trustees by the Trustee Act, 1888, s. 2, to receive money through the agency of a solicitor, or policy monies through the agency of a banker or solicitor, see *post*, Chap. xviii.]

(*a*) *Barnard* v. *Bagshaw*, 3 De G. J. & S., 355.

[(*b*) *Re Bennison*, 60 L. T. N.S. 859.]

(*c*) 2 Ves. jun. 678.

(*d*) As the executor had proved the will he would be deemed at the present day to have accepted the trust. See *ante*, p. 211.

(*e*) 1 P. W. 241.

(*f*) See *Harrison* v. *Graham*, 3 Hill's MSS., cited 1 P. W. 241, note (*y*), 6th ed.; *Chambers* v. *Minchin*, 7 Ves. 198.

executor ought not to suffer for having trusted him whom the testator himself in his life trusted."

Trustee may delegate by testator's direction.

4. But trustees cannot be answerable, if they merely follow the testator's directions. Thus a testator by his will recommended his executors to employ A. (who had been in the testator's own employment) as their clerk or agent. The executors gave A. a power of attorney to receive debts, and A. subsequently became insolvent. It was contended that the executors were answerable for the default of A., but Sir A. Hart said that if a testator pointed out an agent to be employed by the executor, and such employee received a sum of money, and immediately made default, the executor would clear himself by showing that the testator designated the person, and that he could not by the exercise of reasonable diligence recover the money (*a*).

Trustee acting as agent.

5. And an executor cannot be answerable for having handed over money which he had no legal right to retain. Thus, a testator appointed A., B, and C. his executors, and empowered one of them, A., to sell certain freehold premises, and directed the proceeds of the sale to be applied and disposed of in the same manner as his personal estate. A. employed B., as his agent, to make the sale, who, having disposed of the property, paid the proceeds to A., by whom the money was misapplied. It was held that B. was not answerable for this, the money having come to his hands, not in the character of executor, but of agent (*b*).

Delegation permitted where there is a moral necessity for it.

6. And trustees and executors may justify their administration of the trust fund by the instrumentality of others, where there exists a moral necessity for it. "There are," said Lord Hardwicke, "two sorts of necessity: first *legal* necessity; and secondly: *moral* necessity. As to the *first* a distinction prevails. Where two *executors* join in giving a discharge for money, and one of them only receives it, they are both answerable for it; because there is no necessity for both to join in the discharge, the receipt of either being sufficient: but if *trustees* join in giving a discharge, and only one receives, the other is not answerable, because his joining in the discharge was necessary. *Moral* necessity is from the usage of mankind, if the trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business; as if a trustee appoint rents to be paid to

(*a*) *Kilbee* v. *Sneyd*, 2 Moll. 199, 200; and see *Doyle* v. *Blake*, 2 Sch. & Lef. 239, 245.

(*b*) *Davis* v. *Spurling*, 1 R. & M. 64; *S. C.* Taml. 199; and see *Crisp* v. *Spranger*, Nels. 109; *Keane* v. *Robarts*, 4 Mad. 332, see 356, 359; *Re Fryer*, 3 K. & J. 317; *Home* v. *Pringle*, 8 Cl. & F. 264.

a banker at that time in credit, but who afterwards breaks, the trustee is not answerable; so in the employment of stewards and agents: for none of these cases are on account of necessity, but because the persons acted in the usual method of business" (*a*). And Lord Loughborough in very similar terms observed, "If the business was transacted in the *ordinary* manner, unless there were some circumstances to create suspicion, surely the allowance is fair" (*b*). "Necessity," said Lord Cottenham, "which includes the *regular course of business*, will exonerate" (*c*). And Lord Redesdale, in the same spirit observed, "An executor living in London is to pay debts in Suffolk, and remits money to his co-executor to pay those debts: he is considered to do this of *necessity*: he could not transact business without trusting some person, and it would be impossible for him to discharge his duty, if he is made responsible where he remitted money to a person to whom he would himself have given credit, and would in his own business have remitted money in the same way" (*d*). [And Lord Watson in a recent case in the House of Lords (*e*) observed, "Whilst trustees cannot delegate the execution of the trust, they may, as was held by this House in *Speight* v. *Gaunt* (*f*), avail themselves of the services of others wherever such employment is according to the usual course of business."]

Ex parte Griffin.

In conformity with these principles, where A. and B. were assignees of a bankrupt, and A. signed the dividend cheques upon the bankers in favour of the creditors, and delivered them to B.,

(*a*) *Ex parte Belchier*, Amb. 219; [*Re Speight*, 22 Ch. Div. 727; 9 App. Cas. 1; and see *Re Weall*, 42 Ch. D. 674.]

(*b*) *Bacon* v. *Bacon*, 5 Ves. 335.

(*c*) *Clough* v. *Bond*, 3 M. & Cr. 497.

(*d*) *Joy* v. *Campbell*, 1 Sch. & Lef. 341; and see [*Re Speight*, 22 Ch. Div. 727; 9 App. Cas. 1;] *Bacon* v. *Bacon*, 5 Ves. 331, and compare *Chambers* v. *Minchin*, 7 Ves. 193, and *Langford* v. *Gascoyne*, 11 Ves. 335; and see *Davis* v. *Spurling*, 1 R. & M. 66; *Munch* v. *Cockerell*, 5 M. & Cr. 214; *Re Bird*, 16 L. R. Eq. 203.

[(*e*) *Learoyd* v. *Whiteley*, 12 App. Cas. at p. 734; see *Blyth* v. *Fladgate*, (1891), 1 Ch. 337, 360. "A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance of their duties. It does not, however, follow that he can intrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself, and the Court would be disposed to support any conclusion at which he arrives, however erroneous, provided it is his conclusion—that is, the outcome of such consideration as might reasonably be expected to be given to a like matter by a man of ordinary prudence, guided by such rules and arguments as generally guide such a man in his own affairs," *per* Kekewich, J., *Re Weall*, 42 Ch. D. at p. 678, citing *Speight* v. *Gaunt*, 9 App. Cas. 1.]

[(*f*) 9 App. Cas. 1.]

who undertook to affix his signature, and deliver them to the creditors, and B. accordingly signed the cheques, and placed them in his desk, whence they were stolen, and presented at the bank, and paid; on an application to the Court to make A. answerable, Sir J. Leach was of opinion that the delivery of the cheques by A. to B. as his co-assignee, was an act done of necessity in the course of business, and that he was not responsible for the subsequent loss of the cheques (*a*).

[So where a trustee desiring to invest trust funds employed a broker in the ordinary course of business, to purchase securities authorized by the trust, and on the receipt of the bought note handed over a cheque for the purchase-money to the broker, who misappropriated it, the trustee was not liable to make good the loss (*b*). But a trustee negotiating with a municipal corporation through a broker, for a *direct loan* to them, would not be justified in handing over the money to the broker for payment to the corporation, for "there would be no moral necessity or sufficient practical reason from the usage of mankind or otherwise," to justify such a course (*c*).] [Re Speight.]

7. But where the assignees of a bankrupt employed an *attorney* to recover debts due to the estate, and the attorney brought actions and received the money and absconded, Sir A. Hart held them accountable on the ground that there was *no necessity* for permitting the attorney to receive one shilling of the money recovered further than his costs, and laid it down, that if the attorney received the money one day and became insolvent the next, the assignee would be liable. And his Lordship said the same point had been decided in an unreported case before Lord Eldon (*d*). Trustees undoubtedly must not let the money *lie* in the hands of the attorney, but that they must not suffer it to pass through his hands in the ordinary course of business, in the recovery of a debt by *action*, was beyond any previous decision; unless, as suggested, it had been so ruled by Lord Eldon. However, we have here the authority of Sir A. Hart, that the plaintiffs' attorney in an action cannot *virtute officii* sign a discharge, and that if the plaintiffs empower him to receive the amount recovered, they are answerable for his receipts as for the act of an agent improperly appointed to sign such receipt. Ex parte Townsend.

(*a*) *Ex parte Griffin*, 2 Gl. & J. 114; and see *Wackerbath* v. *Powell*, Buck, 495; *S. C.* 2 Gl. & J. 151; *Kilbee* v. *Sneyd*, 2 Moll. 186.

[(*b*) *Re Speight*, 22 Ch. Div. 727; 9 App. Cas. 1.]

[(*c*) *Re Speight*, *ubi sup.*]

(*d*) *Ex parte Townsend*, 1 Moll. 139; see *Anon. case*, 12 Mod. 560; *Re Fryer*, 3 K. & J. 317.

Trustee not to require security from his agent.

8. A trustee or executor is not called upon to take any *security* from the agent; for to do that upon every occasion would tend greatly to the hindrance of business (*a*).

[If a trustee employs an agent under circumstances which justify the employment, and a loss arises from the insolvency of the agent, the *onus* is on the persons seeking to make the trustee liable for the loss, to show that it was attributable to the default of the trustee (*b*).]

How trust money to be transmitted.

9. Where trust money is to be transmitted to a distance, the trustee may do it most conveniently and securely through the medium of a responsible bank, or he may take bills drawn by a person of undoubted credit, and payable at the place whither the money is to be sent (*c*).

Payments into bank must be to the account of the trust.

10. But the money must be paid in to the account of the *trust estate*, and the bills must be taken in favour of the trustee *in that character*, and if he neglect these precautions, then, if the bank break, or the bills be dishonoured, the trustee will be liable for the loss to *the cestuis qui trust* (*d*).

Rule at law as to liability of executors.

11. The rule formerly applied to *executors* in a Court of law seems to have been somewhat different from that established in Courts of Equity. An executor once become responsible by actual receipt of any part of the assets could not at law have founded his discharge in respect thereof as against a creditor, either by a plea of reasonable confidence disappointed, or a loss not occasioned by any negligence or default; as if an executor transmitted a sum to his co-executor under circumstances that in equity would have justified the confidence, a Court of law would still have held him responsible for any misapplication by the co-executor, and could not allow him to plead *plene administravit* (*e*). But now that [the rules of equity prevail over the rules of the common law where they conflict, the distinction has disappeared (*f*).]

Delegation of a discretionary trust.

12. If the trust be of a *discretionary* character, not only is the trustee answerable for all the mischievous consequences of

(*a*) *Ex parte Belchier*, Amb. 220, *per* Lord Hardwicke.

[(*b*) *Re Brier*, 26 Ch. Div. 238.]

(*c*) *Knight* v. *E. of Plymouth*, 1 Dick. 120; *S. C.* 3. Atk. 480; recognised *Ex parte Belchier*, Amb. 219, and *Routh* v. *Howell*, 3 Ves. 566; *Joy* v. *Campbell*, 1 Sch. & Lef. 341; and see *Wren* v. *Kirton*, 11 Ves. 380, 385.

(*d*) See *Wren* v. *Kirton*, 11 Ves. 380, 381; *Massey* v. *Banner*, 1 J. & W. 247.

(*e*) *Cross* v. *Smith*, 7 East, 246; and see *Jones* v. *Lewis*, 2 Ves. 241.

[(*f*) 36 & 37 Vict. c. 66, s. 25, subs. 11; *Job* v. *Job*, 6 Ch. D. 562; and see *Re Radcliffe*, 7 Ch. D. 733; *Vibart* v. *Coles*, 24 Q. B. Div. 364.]

the delegation, but the exercise of the discretion by the substitute will be actually void (*a*).

Thus an advowson was vested in twenty-five of the principal inhabitants of a parish upon trust to elect and present a proper preacher, and some of the trustees having deputed *proxies* to vote at the election, Lord Hardwicke held that, as the election had been conducted in this manner, it could not be supported (*b*).

[Trustees may however enquire what are the wishes and opinions of others, especially of those who are interested, before finally determining what in the exercise of their own discretion they think expedient, and will not be held to act against their own judgment, if they should in the end disregard objections to which they had previously given weight (*c*).]

Not permitted, though to a co-trustee.

13. And a *discretionary* trust can no more be delegated to a *co-executor* or *co-trustee* than to a stranger (*d*). Thus, where a sum of money was given to three executors upon trust to distribute in charity at their own discretion, and the executors assumed each the independent control of one-third, Lord Hardwicke said, "I am of opinion the executors could not divide the charity into three parts, and each executor nominate a third absolutely, because the determination of the property of *every* object was left by the testator to the direction of *all* the executors" (*e*).

Transfer of the trust estate does not transfer the power.

14. Of course if a trustee convey the estate, the mere transfer of the estate will not have the effect of carrying with it the trust or power to the grantee (*f*). And so if a trustee devise the estate, the devisee cannot administer a discretionary trust unless the original settlement contemplated such an event, and by vesting the powers in the trustee and his assigns annexed the powers to the estate in the hands of the devisee (*g*).

Delegation distinguished from appointment of a proxy.

15. It must be noticed that the appointment of an *attorney* or *proxy* is not in all cases a *delegation* of the *trust*. When the trustee has resolved in his own mind in what manner to exercise his discretion, he cannot be said to delegate any part of the confidence if he merely execute the deed by attorney, or signify his

(*a*) See *Alexander* v. *Alexander*, 2 Ves. 643; *Bradford* v. *Belfield*, 2 Sim. 264; *Hitch* v. *Leworthy*, 2 Hare, 200.

(*b*) *Attorney-General* v. *Scott*, 1 Ves. 413, see 417; *Wilson* v. *Dennison*, Amb. 82; *S. C.* 7 B. P. C. 296.

[(*c*) *Fraser* v. *Murdoch*, 6 App. Cas. 855.]

(*d*) *Crewe* v. *Dicken*, 4 Ves. 97.

(*e*) *Attorney-General* v. *Gleg*, 1 Atk. 356.

(*f*) *Crewe* v. *Dicken*, 4 Ves. 97, see 100; *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 194; *Bradford* v. *Belfield*, 2 Sim. 264; *Cole* v. *Wade*, 16 Ves. 47, *per* Sir W. Grant; *Kingham* v. *Lee*, 15 Sim. 400, *per* Sir L. Shadwell.

(*g*) *Re Burtt's Estate*, 1 Drew. 319;

will by proxy. Thus, in the case before cited (*a*) where the trust was to elect and present a proper clerk to a benefice, Lord Hardwicke had no doubt that so far as related to the mere act of presentation, the trustees, having themselves fixed upon the object, might have signed the presentation by proxy; "a trustee who had a legal estate might make an attorney to do legal acts."

[Appointment of surveyor.]

[16. Trustees who are exercising the statutory power of sale conferred by the Lands Clauses Consolidation Act, 1845, cannot appoint one of themselves to be the surveyor to value the land under the 9th section of the Act, for the appointment of a surveyor under that section is intended as a check on the action of the trustees (*b*).]

Thirdly. In the case of co-trustees the office is a *joint* one.

Trust a joint office.

1. Where the administration of the trust is vested in *co-trustees*, they all form as it were but one collective trustee, and therefore must execute the duties of the office in their *joint* capacity (*c*). It is not uncommon to hear one of several trustees spoken of as the *acting* trustee, but the Court knows no such distinction; all who accept the office are in the eyes of the law acting trustees. If any one refuse or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court (*d*). However, the act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both (*e*). But such sanction or approval must be strictly proved (*f*).

[Notice of renewal.]

[2. Notice of an intention to exercise a right of renewal of a lease of property vested in several trustees is good if served upon one only of the trustees (*g*).]

Receipts.

3. A receipt for money must, in the absence of a receipt clause specially worded, receive the joint authentication of the whole body of trustees, and not of the majority merely, or it will not

and see *ante*, pp. 242, 243; [but see *Osborne to Rowlett*, 13 Ch. D. 774.]

(*a*) *Attorney-General* v. *Scott*, 1 Ves. 413; and see *Ex parte Rigby*, 19 Ves. 463.

[(*b*) *Peters* v. *Lewes and East Grinstead Railway Company*, 16 Ch. D. 703; 18 Ch. Div. 429.]

(*c*) See *Ex parte Griffin*, 2 Gl. & J. 116.

(*d*) *Doily* v. *Sherrartt*, 2 Eq. Ca. Ab. 742, marginal note to (D). *Re Congregational Church, Smethwick*, W. N. 1866, p. 196; [*Luke* v. *South Kensington Hotel Company*, 7 Ch. D. 789; 11 Ch. Div. 121.]

(*e*) *Messeena* v. *Carr*, 9 L. R. Eq. 260.

(*f*) See *Lee* v. *Sankey*, 15 L. R. Eq. 204.

[(*g*) *Nicholson* v. *Smith*, 22 Ch. D. 640.]

be valid (*a*). And therefore where the trustees are numerous, it is common in orders of the Court to insert a special direction that the moneys *may* be paid to any two or more of them (*b*).

All the trustees must prove.

4. Again, if a debtor to the trust become bankrupt, *all* the trustees should join in the proof (*c*), but under particular circumstances the Court will make an order for *some* of the trustees to prove, but even then the Court has occasionally inserted a direction that the dividends shall be *payable* to *all* the trustees (*d*).

Acknowledgment of debt by one trustee.

5. If a mortgage be made to two trustees so described and the statutory period elapse, an interim acknowledgment by *one* of the trustees will not prevent the operation of the Statute of Limitations in bar of redemption (*e*).

In public trusts the majority of the trustees may bind the rest.

6. Where there are several trustees, and the trust is of a *public* character, the act of the *majority* is held to be the act of the whole number (*f*); as where there were seven trustees and they met for the purpose of electing a schoolmaster, and at the meeting five of the trustees concurred in the appointment, but two dissented, the act of the majority was considered to bind the minority (*g*). But of course the act of the majority does not bind the minority, so far as the act is beyond the proper sphere of the duty of the trustees (*h*). [Nor can a majority, in the absence of express statutory authority, pass the legal estate which is vested in all (*i*).] And when a *special* power is given to trustees, it cannot be exercised by the majority only, but *all* must join (*j*). Now, by 32 & 33 Vict. c. 110, s. 12, it is enacted that a *majority* of *charity* trustees present at a meeting duly constituted, and voting, shall have and be deemed to have always had the same power of disposition over the charity property, as if it were the act of the whole body; and by the 13th section the majority of the charity trustees may, with the sanction of the charity commissioners, *sue* as if they were the sole trustees.

Trustees of charities. Quorum.

7. Where a numerous body are appointed trustees by the Court,

(*a*) *Walker* v. *Symonds*, 3 Sw. 63; *Hall* v. *Franck*, 11 Beav. 519; *Lee* v. *Sankey*, 15 L. R. Eq. 204.

(*b*) See *Attorney-General* v. *Brickdale*, 8 Beav. 223.

(*c*) *Ex parte Smith*, 1 Deac. 391, *per* Sir T. Erskine.

(*d*) *Ex parte Smith*, 1 Deac. 385.

(*e*) *Richardson* v. *Younge*, 6 L. R. Ch. App. 478.

(*f*) *Wilkinson* v. *Malin*, 2 Tyr. 544; *Perry* v. *Shipway*, 1 Giff. 1; and see *Attorney-General* v. *Shearman*, 2 Beav. 104; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 139; *Younger* v. *Welham*, 3 Sw. 180.

(*g*) *Wilkinson* v. *Malin*, 2 Tyr. 572.

(*h*) *Ward* v. *Hipwell*, 3 Giff. 547.

[(*i*) *Re Ebsworth and Tidy's Contract*, 42 Ch. Div. 23.]

(*j*) See *Re Congregational Church, Smethwick*, W. N. 1866, p. 196.

as in cases of charity, the Court sometimes, for greater convenience, annexes to the order a direction that part of them shall form a *quorum*.

[Enfranchisement of copyholds.]

[By the Copyhold Act, 1887 (*a*), sec. 40, where either the lords or tenants of copyholds are trustees, and one or more of such trustees shall be abroad, or incapable, or refuse to act, any proceedings necessary to be done by such trustees for effecting any enfranchisement under the Copyhold Acts may be done by the other trustee or trustees, as the case may be.]

Dividends and rents.

8. If *stock* be standing in the names of several co-trustees, then, as they are joint tenants, and the Bank does not recognise the trust, any *one* of them may receive the *dividends*, though all must join in the sale of the *corpus;* and the Court itself has occasionally directed the dividends of stock, standing under its control, to be paid to one of several trustees (*b*). And in the case of Bank annuities standing to the credit of trustees of a charity, the Court to prevent the necessity of recurring applications on changes of trustees, made an order for payment of the dividends "to the trustees or any two of them, or to other the trustees for the time being or any two of them" (*c*), and in another case for payment to the "trustees for the time being or one of them" (*d*). Where there are co-trustees of *lands*, any one of them may receive the rents, though all must concur in a conveyance (*e*). But if there be two trustees, and one of them receives the rents and misapplies them, and the other trustee has notice of this, it is the duty of such other trustee to serve a notice on the tenants not to pay their rents to the defaulting trustee alone, and if he omit to do this or to take the necessary steps for insuring the safety of the rents, as against the defaulting trustee, he will himself become liable (*f*).

Co-trustees should not sever in legal proceedings.

9. As co-trustees are a joint body, the Court requires them,

[(*a*) 50 & 51 Vict. c. 73.]

(*b*) *Re Coulson's Settlement*, 17 L. T. N.S. 27.

(*c*) *Milne* v. *Gilbart*, W. N. 1875, p. 128.

(*d*) *In re Foy's Trusts*, 33 L. T. N.S. 161; 23 W. R. 744. [The National Debt Act, 1889 (52 Vict. c. 6, s. 4), provides that where two or more persons are registered as joint holders of stock (by which is meant all stock of any company or corporation, funds or annuities, transferable in the books of the Bank of England or of Ireland) any one of those persons may give an effectual receipt for any dividend on the stock unless notice to the contrary has been given to the bank by any other of the holders.]

(*e*) See *Townley* v. *Sherborne*, Bridg. 35; *Williams* v. *Nixon*, 2 Beav. 472; *Gouldsworth* v. *Knight*, 11 M. & W. 337 [and see *Re Ebsworth & Tidy*, 42 Ch. Div. 23.]

(*f*) *Gough* v. *Smith*, W. N. 1872, p. 18; reversed under a different state of circumstances, W. N. 1872, p. 66.

unless under special circumstances, to defend a suit jointly, and if they sever, the extra costs thereby occasioned must be borne by the defaulting party (*a*). It is conceived that this rule, so strictly observed in Court, must not be lost sight of in transactions out of Court, and that co-trustees are bound, unless they can show good reason to the contrary, to act by the same *solicitor* and the same *counsel*. It would be a strange anomaly if four trustees were allowed only one solicitor and one counsel in Court, and four separate solicitors and four separate counsel out of Court. Every trustee should be prepared to act in harmony with his co-trustees, or he should not accept the office. It may be said that as each trustee is responsible for the due administration of the trust, he ought to be at liberty to employ a professional adviser of his own choosing, but this argument would *a fortiori* apply to so important a matter as the defence of a suit, and yet there the Court pays no attention to it.

Survivorship of the trust.

Fourthly. On the death of one trustee the joint office *survives*.

1. It is a well-known maxim that a *bare authority* committed to several persons is determined by the death of any one; but, if coupled with an *interest*, it passes to the survivors (*b*). Thus, the committees of a lunatic's estate are regarded in the light of mere bailiffs without a spark of interest, and if one of them die, the office is immediately extinguished (*c*). [And where under an order for maintenance two trustees were directed to pay the income of a trust fund to the mother of an infant for the maintenance of the infant during her minority, and one of the trustees died and the survivor continued the payments, it was held by the late M. R. that the trust for maintenance arose only under the order and did not survive (*d*). But this view was not acquiesced in by

[(*a*) If one of the trustees be a defaulter or indebted to the trust estate, the other trustees will be justified in severing from him, *Smith* v. *Dale*, 18 Ch. D. 516, 518; and see *Williams* v. *Wight*, W. N. 1890, p. 50, where the executors of one trustee and the administrator of the other were, under the circumstances, held entitled to appear by separate solicitors.]

(*b*) Co. Lit. 113 a, 181 b; *Butler* v. *Bray*, Dyer, 189 b; *Attorney-General* v. *Gleg*, 1 Atk. 356; *S. C.* Amb. 584; Goulds. 2, pl. 4; *Peyton* v. *Bury*, 2 P. W. 628; *Mansell* v. *Vaughan*, Wilm. 49; *Eyre* v. *Countess of Shaftesbury*, 2 P. W. 108, 121, 124. [In the case of executorships and trusts constituted after or created by instruments coming into operation after the 31st Dec. 1881, 44 and 45 Vict. c. 41, s. 38, provides that a power or trust given to two or more executors or trustees jointly, may, subject to any direction to the contrary, be exercised or performed by the survivor or survivors for the time being.]

(*c*) *Ex parte Lyne*, Case *t.* Talbot, 143.

[(*d*) *Brown* v. *Smith*, 10 Ch. Div. 377; 46 L. J. N.S. Ch. 866.]

the Court of Appeal, where a distinction was drawn between a power and a positive direction involving no discretion (*a*).] But an executorship or administratorship survives (*b*); for "if," says Lord Talbot, "a joint estate at law will survive, why shall not a joint administration, when they both have a joint estate in it? (*c*). So a *testamentary* guardianship vests in the survivors (*d*), for, as guardians may bring actions and avow in their own names, may grant leases during the minority of the ward, and demise copyholds even in reversion as lords *pro tempore*, it is evident they have an interest (*e*). It follows that as co-trustees have an authority coupled with an estate or interest, their office also must be impressed with the quality of survivorship (*f*): as if land be vested in two trustees upon trust to sell and one of them dies, the other may sell (*g*); and if an adowson be conveyed to trustees upon trust to present a proper clerk, the survivors or survivor may present (*h*). Otherwise, indeed, the more precaution a person took by increasing the number of the trustees, the greater would be the chance of the abrupt determination of the trust by the death of any one. Even where the trust was to raise the sum of 2000*l.* out of the testator's estate "by sale or otherwise, at the discretion of his *trustees*, who should invest the same in the names of the said trustees upon trust," &c., and one of the two trustees died, and the survivor sold; Vice-Chancellor Wood decided that the survivor could make a good title. "I find," he said, "a clear estate in the vendor, and a clear duty to perform. Is it to be said that the sale is a breach of trust because the co-trustee is dead? If I were to lay down such a rule, it would come to this, that wherever an estate was vested in two or more trustees to raise a sum by sale or mortgage, you must come to the Court on the death of one of the trustees" (*i*).

[(*a*) *Brown* v. *Smith*, 10 Ch. Div. 377, 382.]

(*b*) *Adams* v. *Buckland*, 2 Vern. 514; *Hudson* v. *Hudson*, Cas. *t.* Talb. 127.

(*c*) *Hudson* v. *Hudson*, Cas. *t.* Talb. 129.

[(*d*) See 49 & 50 Vict. c. 27, s. 4, as to guardians under that Act.]

(*e*) *Eyre* v. *Countess of Shaftesbury*, 2 P. W. 102. But if joint guardians be appointed by the Court, the office, on the death of one, is at an end; *Bradshaw* v. *Bradshaw*, 1 Russ. 528; *Hall* v. *Jones*, 2 Sim. 41; [Simpson on Infants, 2nd ed. p. 248.]

(*f*) *Hudson* v. *Hudson*, Cas. *t.* Talb. 129, *per* Lord Talbot; Co. Lit. 113 a; *Attorney-General* v. *Glegg*, Amb. 585, *per* Lord Hardwicke; *Gwilliams* v. *Rowel*, Hard. 204; *Billingsley* v. *Mathew*, Toth. 168.

(*g*) See Co. Lit. 113 a; *Warburton* v. *Sandys*, 14 Sim. 622; *Watson* v. *Pearson*, 2 Exch. 594.

(*h*) See *Attorney-General* v. *Bishop of Litchfield*, 5 Ves. 825; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 139. If two trustees employ a solicitor, the surviving trustee may obtain a decree for an account against the solicitor without making the representative of the deceased trustee a party; *Slater* v. *Wheeler*, 9 Sim. 156.

(*i*) *Lane* v. *Debenham*, 11 Hare, 188;

Trust survives, though there be a power of appointment of new trustees.

2. The survivorship of the trust will not be defeated because the settlement contains a power for restoring the original number of trustees by new appointments (*a*): unless there be something in the instrument that specially manifests such an intention (*b*). Even in an Act of Parliament, which declared in very strong terms that the survivors *should* (*c*), *and they were thereby required* to appoint new trustees, the Court said the proviso was analogous to the common one in settlements, and expressed an opinion (for the decision was upon another point), that the clause was not imperative, but merely of a directory character (*d*).

Trustee not liable for his co-trustee.

Fifthly. One trustee shall not be *liable* for the acts or defaults of his *co-trustee.*

Townley *v.* Sherborne.

1. This canon appears to have been first established by the case of *Townley* v. *Sherborne* (*f*) in the reign of Charles the First.

A., B., C. and D. were trustees of some leasehold premises. A. and B. collected the rents during the first year and a half, and *signed acquittances;* but from that period the rents were uniformly received by an assign of C. The liability of A. and B. during the first year and a half was undisputed, but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, but had never come to their hands. "The *Lord Keeper Coventry*" (says the reporter) "considered the case to be of great consequence, and thought not to determine the same suddenly, but to advise thereof, and desired *the Lords the Judges Assistant* to take the same into their serious consideration, whereby some course might be settled that parties trustees might not be too much punished, lest it should dishearten men to take any trust which would be inconvenient on the one side, nor that too much liberty should be given to parties trustees, lest they should be emboldened to break the trust imposed on them, and so be as much prejudicial on the other side. And the *Lord Keeper and the Lords the Judges Assistant* afterwards conferring together, and

and see *Hind* v. *Poole*, 1 K. & J. 383.

(*a*) See *Doe* v. *Godwin*, 1 D. & R. 259; *Warburton* v. *Sandys*, 14 Sim. 622; compare *Townsend* v. *Wilson*, 1 B. & Ald. 608, with *Hall* v. *Dewes*, Jac. 193; and see *Attorney-General* v. *Floyer*, 2 Vern. 748; *Jacob* v. *Lucas*, 1 Beav. 436; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 139.

(*b*) *Foley* v. *Wontner*, 2 J. & W. 245; and see *Jacob* v. *Lucas*, 1 Beav. 436.

(*c*) As to the force of the words "shall and may" in an Act of Parliament, see *Attorney-General* v. *Lock*, 3 Atk. 166; *Stamper* v. *Millar*, Id. 212; *Rex* v. *Flockwood*, 2 Chit. Rep. 252.

(*d*) *Doe* v. *Godwin*, 1 D. & R. 259.

(*e*) Bridg. 35; and see *Leigh* v. *Barry*, 3 Atk. 584; *Anon. case*, 12 Mod. 560.

upon mature deliberation conceiving the case to be of great importance, his Lordship was pleased to call unto him also *Mr. Justice Crook, Mr. Justice Barcley, and Mr. Justice Crawley,* for their assistance also in the same, and *appointed precedents to be looked over* as well in the Court of Chancery as in other courts, if any could be found touching the point in question; whereupon several precedents were produced before them, some in the Court of Chancery and some in the Court of Wards, where parties trustees were chargeable only according to their several and respective receipts, and not one to answer for the other, but no precedent to the contrary was produced to them. Whereupon his Lordship, after *long and mature deliberation on the case, and serious advice with all the said Judges,* did this day in open Court declare the resolution of his Lordship and the said Judges—That where lands or leases were conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dyeth or decayed in his estate, his co-trustee shall not be charged or be compelled in the Court of Chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil dealing appear to have been in them to prejudice the trust; *for they being by law joint tenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by.* It is no breach of trust to permit one of the trustees to *receive* all or the most part of the profits, it falling out many times that some of the trustees live far from the lands and are put in trust out of other respects than to be troubled with the receipt of the profits. But his Lordship and the said Judges did resolve, that if upon the proofs or circumstances the Court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing."

Trustee not liable for joining *pro formâ* in receipts.

2. Co-trustees (*a*), (as was determined in *Townley* v. *Sherborne,*) were *formerly* considered responsible for money if they joined in *signing the receipt* for it; but in later times the rule has been established, that a trustee who joins in a receipt for conformity, but without receiving, shall not be answerable for a misapplication by the trustee who receives (*b*). Where the administration of the

(*a*) *Townley* v. *Sherborne,* Bridg. 35; *Spalding* v. *Shalmer,* 1 Vern. 303; *Sadler* v. *Hobbs,* 2 B. C. C. 114; and see *Bradwell* v. *Catchpole,* cited *Walker* v. *Symonds,* 3 Sw. 78, note (*a*); but said by Lord Cowper, *Fellows* v. *Mitchell,* 2 Vern. 516, to be contrary to natural justice.

(*b*) *In re Fryer,* 3 K. & J. 317; *Brice* v. *Stokes,* 11 Ves. 324, *per* Lord Eldon; *Harden* v. *Parsons,* 1 Eden, 147, *per* Lord Northington; *Westley* v.

trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in their joint capacity, and it would be tyranny to punish a trustee for an act which the very nature of his office will not permit him to decline.

But he must prove that he did not actually receive.

3. But it lies upon a trustee who joins in a receipt to show that the money acknowledged to have been received by all was in fact received by the other or others, and that he himself joined only for conformity (*a*). In the absence of all evidence, the effect of a joint receipt is to charge each of the trustees *in solido;* as if a mortgage be devised to three trustees, and the mortgagor with his witness meets them to pay it off, and the money is laid on the table, and the mortgagor having obtained a reconveyance and receipt for his money, withdraws, each of the trustees in this case will be answerable for the whole (*b*). A joint receipt at law is conclusive evidence that the money came to the hands of both, but a Court of equity, which rejects estoppels and pursues truth, will decree according to the justice and verity of the fact (*c*). "Where," said Lord Cowper, "it cannot be distinguished how much was received by one trustee and how much by the other, it is like throwing corn or money into another man's heap, where there is no reason that he who made this difficulty should have the whole; on the contrary, because it cannot be distinguished he shall have no part" (*d*).

Trustee joining in a receipt must not permit the money to *lie* in the hands of the co-trustee.

4. And though a trustee joining in a receipt may be safe in *merely permitting* his co-trustee to *receive* in the first instance, yet he will not be justified in allowing the money to *remain* in

Clarke, 1 Eden, 359, *per eundem; Heaton* v. *Marriot*, cited *Aplyn* v. *Brewer*, Pr. Ch. 173; *Ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Leigh* v. *Barry*, 3 Atk. 584, *per eundem; Fellows* v. *Mitchell* 1 P. W. 81; *Gregory* v. *Gregory*, 2 Y. & C. 316, *per* Baron Alderson; *Sadler* v. *Hobbs*, 2 B. C. C. 117, *per* Lord Thurlow; *Chambers* v. *Minchin*, 7 Ves. 198, *per* Lord Eldon; *Lord Shipbrook* v. *Lord Hinchinbrook*, 16 Ves. 479, *per eundem; Harrison* v. *Graham*, 3 Hill's MSS. 239, *per* Lord Hardwicke, cited 1 P. W. 241, 6th ed. note (*y*); *Carsey* v. *Barsham*, cited *Joy* v. *Campbell*, 1 Sch. & Lef. 344, *per eundem; Anon. case*, Mosely, 35; *Ex parte Wackerbath*, 2 Gl. & J. 151. [But the rule, it is conceived, is inapplicable where from the nature of the transaction or the character of the trust, the omission to receive the money is in itself a breach of duty; see the observations of Kay, J., in *Re Flower and the Metropolitan Board of Works*, 27 Ch. D. 592, 596, and see *post*, p. 311.]

(*a*) *Brice* v. *Stokes*, 11 Ves. 234, *per* Lord Eldon; and see *Scurfield* v. *Howes*, 3 B. C. C. 95, Belt's Edition, note (8).

(*b*) *Westley* v. *Clarke*, 1 Eden, 359, *per* Lord Henley.

(*c*) *Harden* v. *Parsons*, 1 Eden, 147, *per eundem; Wilson* v. *Keating*, 4 De G. & J. 593, *per Cur.*

(*d*) *Fellows* v. *Mitchell*, 1 P. W. 83. For the ordinary and more natural application of this illustration, see *infra*, Ch. xxx. s. 2.

his hands for a longer period than the circumstances of the case reasonably require (*a*). And it is the duty of a trustee not to rely on a mere statement by his co-trustee, that the money has been duly invested, but to ascertain that such is the fact (*b*). Two trustees authorised a co-trustee to remove from their bankers a box containing *active* Spanish stock, for the purpose of converting it into *deferred* Spanish stock, and the co-trustee after the conversion returned the box with only a part of the converted stock in it, and the trustees, who relied on the assurance of the co-trustee to their solicitor that all was right, and did not ascertain the fact, were held liable for the deferred stock which had been misappropriated (*c*).

Walker *v.* Symonds.

5. *Walker* v. *Symonds* (*d*) involved an unusual particularity of circumstances; but as Lord Eldon described it as a case of great importance to trustees in general (*e*), it may be useful to present a summary of it so far as it bears upon the present subject.

A sum of money secured by mortgage had been assigned to Donnithorne, Griffith, and Symonds, upon certain trusts. On 12th January, 1791, the mortgage was paid off and the estate re-conveyed, and a joint receipt signed, and the money, with the approbation of the co-trustees, was put into the hands of Donnithorne. The money was shortly afterwards invested by Donnithorne, with the sanction of his co-trustees, in bills or notes of the East India Company payable at the end of two years. In 1793 the bills were paid off by the Company, and the money received by Donnithorne. Intelligence to that effect having been transmitted to the co-trustees, Symonds the same year wrote to Donnithorne requesting him to invest it in the public funds in the joint names of the trustees. Donnithorne begged that the money might remain in his hands, and proposed to secure the repayment of it by a mortgage from himself and his son of their settled estates in Cornwall, and, until the mortgage could be prepared, to secure it by their joint bond. The co-trustees, conceiving the security to be ample, expressed their

(*a*) *Brice* v. *Stokes*, 11 Ves. 319; *Bone* v. *Cook*, M'Clel. 168; *Gregory v. Gregory*, 2 Y. & C. 313; *Thompson* v. *Finch*, 22 Beav. 316; *Lincoln* v, *Wright*, 4 Beav. 427; and see *Re Fryer*. 3 K. & J. 317. This doctrine appears to have been very little regarded in the time of Lord Talbot. See *Attorney-General* v. *Randall*, 21 Vin. Ab. 534.

(*b*) *Thompson* v. *Finch*, 22 Beav. 316; 8 De G. M. & G. 560; and see *Hanbury* v. *Kirkland*, 3 Sim. 265.

(*c*) *Mendes* v. *Guedella*, 2 J. & H. 259.

(*d*) 3 Sw. 1.

(*e*) 3 Sw. 74

consent, and the joint bond was accordingly executed. Donnithorne not having sent the mortgage as he promised, Symonds made several applications to him upon the subject, earnestly desiring him either to invest the money in the funds, or to give them landed security. In September, 1796, Donnithorne died insolvent, and without having executed the mortgage. Sir W. Grant observed, "The money in 1791 was paid in without any act of the trustees: they were obliged to receive it: so far they were blameless. It came to Donnithorne's hands, and *the trustees were not to blame in letting it come to his hands;* but they might have afterwards made themselves responsible by merely not doing what was incumbent on them; by permitting the money to *remain* a considerable time in the hands of their co-trustee they might, without any positive act on their part, have made themselves liable. That will depend on the degree and extent of their *laches* in suffering the money to remain in the hands of Donnithorne. The trustees being authorised to put the money out on mortgage, it would be rather hard to say that they were guilty of *laches* by giving Donnithorne a little time to find a mortgage, taking his bond in the meantime. What passed in the interval between to the death of Donnithorne does not appear. If it were necessary to decide the point, an inquiry before the Master must be directed" (*a*). Sir W. Grant dismissed the bill, which was to set aside (as having been fraudulently obtained) a compromise of the alleged breach of trust, but did so on grounds foreign to the subject under discussion; Lord Eldon, however, before whom the case was brought upon appeal, reversed Sir W. Grant's decree, and directed an inquiry by the Master as to the conduct of the trustees from January, 1791, when the mortgage was paid off, to 1796, the time of Donnithorne's death. It then appeared by the Master's report, made in pursuance of the order, that the money had been invested by Donnithorne, soon after he had received it, in East India bills *payable to himself;* that the money due on the bills had been discharged in 1793, and the money paid to Donnithorne; that the co-trustees had made no inquiry about the trust fund from January, 1791, till May, 1795, which was the time when Symonds wrote the letter and made the applications already stated. On the hearing of the cause upon further directions, Lord Eldon said, "The cause comes back with a report stating a clear breach of trust in leaving the trust-fund in the situation represented

Walker *v.* Symonds.

(*a*) 3 Sw. 41.

Walker *v.* Symonds.

from 1791 to 1793, and from 1793 to 1795. The money was laid out in 1791, with the consent of the trustees, on India bills *payable to Donnithorne*, a palpable breach of trust by placing the fund under his control, secured by little more than a promissory note payable to himself. It was probable that in 1793 Donnithorne would be paid the money due on the bills, and it would be lodged in his hands; and although the Court will proceed as favourably as it can to trustees who have laid out the money on a security from which they cannot with activity recover it, yet no Judge can say they are not guilty of a breach of trust, if they suffer it to lie out on such a security during so long a time (*a*). The trustees were guilty of a breach of trust, in permitting the money to remain on bills *payable to Donnithorne alone*, and in leaving the state of the funds unascertained for five years (*b*). I agree with the Master of the Rolls that inquiry *might*, on the principles of this Court, have discharged the trustees in given circumstances from a breach of trust. If, without previous participation, they in June, 1795, had found that, *being themselves implicated in no breach of trust, they had a co-trustee who had been guilty of a shameful violation of his duty, and immediately exerted themselves to obtain from him a mortgage, which was their object at that time, and used their utmost efforts instead of filing a bill in this Court which perhaps might have destroyed his means of giving security, I should have hesitated long before I charged them*, if inquiry had satisfied me that for a simple contract debt due to them they had taken a bond and a mortgage instead of instituting a suit, with the rational hope that by means of the bond and the mortgage they should obtain payment from their co-trustee" (*c*). The result of his Lordship's judgment was, that under the circumstances disclosed by the Master's report, the trustees were to be held responsible for the loss of the money.

Executor answerable for joining in receipts *pro formâ*.

6. *Co-executors* also, like co-trustees, are generally answerable each for his own acts only, and not for the acts of any co-executor (*d*). But in respect of receipts, the case of *co-executors* is materially different from that of co-trustees. An executor has, independently of his co-executor, a full and absolute control over the personal assets of the testator (*e*). If an executor join

(*a*) 3 Sw. 65.
(*b*) 3 Sw. 67.
(*c*) 3 Sw. 71; see *Thompson* v. *Finch*, 22 Beav. 326.
(*d*) *Hargthorpe* v. *Milforth*, Cro. Eliz. 318; *Anon.* Dyer, 210 a; Wentw. Off. Ex. 306, 14 edit.; *Williams* v. *Nixon*, 2 Beav. 472.
[(*e*) But one co-executor cannot make a valid transfer of railway

with a co-executor in a receipt, he does a wanton and unnecessary act; he interferes when the nature of the office lays upon him no such obligation, and therefore it was a rule very early established, that if executors joined in receipts, they should be answerable, each *in solido*, for the amount of the money received (*a*).

Westley *v.* Clarke.

7. In *Westley* v. *Clarke* (*b*), Lord Northington expressed an opinion that aimed at breaking down the rule; and by his decision of that case he succeeded in establishing a qualification of it.

Thompson, one of three co-executors, had called in a sum of money secured by a mortgage for a term of years, and received the amount, and *afterwards*, but the same day, sent round his clerk to his co-executors with a particular request that they would execute the assignment and sign the receipt, which they accordingly did. Thompson afterwards became bankrupt, and the money was lost, and thereupon a bill was filed to charge the co-executors. Lord Northington said, "The rule that executors joining in a receipt are all liable amounts to no more than this, that a joint receipt given by executors is a *stronger* proof that they *actually* joined in a receipt, because generally they have no occasion to join for conformity. But, if it appears plainly that one executor only received, and discharged the estate indebted, and assigned the security, and the others joined afterwards without any reason, and without being in a capacity to control the act of their co-executor either before or after the act was done, what grounds has any Court in conscience to charge him? The only act that affected the assets was the first that discharged the debt, and, according to the sense of the Bar, transferred the legal estate of the lands. Then *that* the co-executors are not to to answer for, and the second is nugatory." His Lordship was therefore of opinion that the co-executors were not liable for the misapplication by the co-executor.

shares standing in their joint names, and subject to the Companies Clauses Act, 1845; *Barton* v. *North Staffordshire Railway Co.*, 38 Ch. D. 458.]

(*a*) *Aplyn* v. *Brewer*, Pr. Ch. 173; *Murrell* v. *Cox*, 2 Vern. 560; *Ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Leigh* v. *Barry*, 3 Atk. 584, *per eundem*; *Harrison* v. *Graham*, 3 Hill's MSS. 239, *per eundem*; cited 1 P. W. 241, 6th ed. note (*y*); *Darwell* v. *Darwell*, 2 Eq. Ca. Ab. 456; *Gregory* v. *Gregory*, 2 Y. & C. 316, *per* Baron Alderson.

(*b*) 1 Eden, 357; *S. C.* 1 Dick. 329; and see *Candler* v. *Tillett*, 22 Beav. 257; *Harden* v. *Parsons*, 1 Eden, 147, 148. Yet in *Churchill* v. *Hobson*, 1 P. W. 241, note (1) by Mr. Cox, his Lordship is reported to have said, according to a note of the case by Sir L. Kenyon, that in *Westley* v. *Clarke* he should have thought the co-executors liable if they had been present at the time the money was paid; and Lord Redesdale, in *Doyle* v. *Blake*, 2 Sch. & Lef. 242, 243, seemed to think that Lord Northington had no intention of *breaking down*, but only of *qualifying* the rule.

Executors joining *pro formâ* not answerable where the joining was a nugatory act.

The doctrine propounded in this case, that the joint receipt of co-executors is merely a stronger proof of the actual receipt than in the instance of co-trustees, and that an executor as well as a trustee may rebut the presumption by positive evidence, has since been repeatedly controverted (*a*). The simple point determined, viz. that an executor who signs shall not be answerable when the act of signature is nugatory, may be considered as now settled. Lord Thurlow, indeed, is reported to have questioned the decision in *Westley* v. *Clarke* (*b*): but Lord Alvanley said, "he must enter his dissent against the rule, that executors joining in a receipt were both liable, for he did not hold that an executor could not *in any case* be discharged from a receipt given for conformity: he did not find fault, for instance, with the case of *Westley* v. *Clarke*" (*c*). And, again, he said, "he perfectly concurred in the decision of that case; and the joining in a receipt, though not perhaps absolutely necessary, he would not consider *conclusive*" (*d*). Lord Eldon, in evident allusion to the case of *Westley* v. *Clarke*, admitted that the old rule had been *pared down*, at the same time expressing his opinion that the notion upon which the later cases had proceeded, viz. that the old rule had a tendency to discourage executors from acting, was very ill founded. A plain general rule, he thought, which once laid down was easily understood and might be generally known, was much more inviting to executors than a rule referring everything to the particular circumstances (*e*).

Present doctrine on the subject.

The later doctrine of the Court was thus enunciated by Lord Eldon:—"Though one executor has joined in a receipt, yet whether he is liable shall depend on his *acting*. The former was a simple rule that *joining* should be considered as *acting*, but now *joining alone* does not impose responsibility" (*f*); and in another case he observed that the old rule had been "broken down, leaving every case to be determined by its own circumstances" (*g*). Lord Redesdale laid down the rule thus: "the distinction with respect to mere signing appears to be this; that if a receipt be

(*a*) *Sadler* v. *Hobbs*, 2 B. C. C. 114; *Scurfield* v. *Howes*, 3 B. C. C. 90; *Langford* v. *Gascoyne*, 11 Ves. 333; and see *Doyle* v. *Blake*, 2 Sch. & Lef. 243; *Joy* v. *Campbell*, 1 Sch. & Lef. 341; *Chambers* v. *Minchin*, 7 Ves. 198; *Brice* v. *Stokes*, 11 Ves. 325; *Shipbrook* v. *Hinchinbrook*, 16 Ves. 479; *Walker* v. *Symonds*, 3 Sw. 64; *Re Fryer*, 3 Jur. N. S. 485.

(*b*) *Sadler* v. *Hobbs*, 2 B. C. C. 117.

(*c*) *Scurfield* v. *Howes*, 3 B. C. C. 94.

(*d*) *Hovey* v. *Blakeman*, 4 Ves. 608.

(*e*) See *Chambers* v. *Minchin*, 7 Ves. 198; *Brice* v. *Stokes*, 11 Ves. 325; *Walker* v. *Symonds*, 3 Sw. 64.

(*f*) *Walker* v. *Symonds*, 3 Sw. 64.

(*g*) *Shipbrook* v. *Hinchinbrook*, 16 Ves. 479.

given for the purpose of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such receipt shall charge; and the true question in all these cases seems to have been, whether the money was under the control of both executors: if it was so considered by the person paying the money, then the joining in the receipt by the person who did not actually receive amounted to a direction to pay to his co-executor (for it could have no other meaning), and he became responsible for the money, just as if he had actually received it" (*a*). And in another case he said, "where two executors join in a receipt to a debtor, though the receipt of one would have been a discharge to the debtor, yet, they joining in the discharge, the debtor is taken to have paid to them both. His requiring the discharge of the executor who has not received the money amounts to saying, 'I make this payment to you both, and not to him only who actually receives the money'" (*b*).

Churchill *v.* Hobson.

8. In *Churchill* v. *Hobson* (*c*), Lord Harcourt took a distinction between creditors and legatees (*d*); that in the case of creditors who were entitled to the utmost benefit of the law, the joining of the executors in the receipt might make each liable for the whole; but when the legatees were concerned, who had no remedy for their demand except in equity, it was altogether inequitable that one executor should answer for the receipt of the other. This doctrine was thus commented upon by Lord Northington. "At law," he said, "a joint receipt is conclusive evidence that the money came to them both, and is not to be contradicted; but a Court of equity, which rejects estoppels and pursues truth, will decree according to the justice and verity of the fact (*e*); and what is said by Lord Harcourt as to the distinction between a receipt of this kind as to a legatee and a creditor seems to have this meaning—that a *creditor* may at *law* charge both executors on a joint receipt, but that in a Court of *equity*, where alone *legacies* are received, such receipt shall not be conclusive, but the Court will see who actually received, and charge that person accordingly" (*f*). The distinction taken by

(*a*) *Joy* v. *Campbell*, 1 Sch. & Lef. 341.
(*b*) *Doyle* v. *Blake*, 2 Sch. & Lef. 242.
(*c*) 1 P. W. 241.
(*d*) See *Gibbs* v. *Herring*, Pr. Ch. 49.
(*e*) See *ante*, p. 211.
(*f*) *Harden* v. *Parsons*, 1 Eden, 147.

Lord Harcourt has by subsequent authorities been clearly overruled (*a*).

Executor may be answerable to creditors when not to legatees.

Lord Redesdale, however, has rightly observed, that "there *may* be a case, where executors would be charged as against creditors, though not as against legatees; for legatees are bound by the terms of the will, creditors are not, and therefore, if the testator direct the executors to collect the assets, and pay the proceeds into the hands of A., which is done accordingly, and A. fails, if a creditor remain unpaid, he may charge the executors; but, as regards a legatee, the executors may justify themselves by the directions of the will" (*b*).

Executor responsible for any act which puts assets into the hands of a co-executor.

9. On the same principle that an executor is liable for joining in a receipt, he is responsible for any act by which he reduces any part of the testator's property into the sole possession of his co-executor (*c*), as if an executor join in drawing (*d*), or indorsing (*e*), a bill, or be otherwise instrumental in giving to his co-executor possession of any part of the property (*f*). So it is laid down in an old case, that "if by agreement between the executors one be to receive and intermeddle with such a part of the estate, and the other with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made betwixt both" (*g*). So an executor is answerable, if he give a power of attorney, or other authority, to his co-executor to collect the assets (*h*), or deliver to him securities for money which enable him to receive the amount due (*i*).

Executor not answerable for joining where the act is necessary.

10. But under particular circumstances the joining of an executor is as absolutely necessary as the joining of a trustee, and of course in such cases executors and trustees are put upon the same footing in respect of liability.

As in bills of exchange held jointly.

Thus, if a bill of exchange be remitted to two agents payable to them personally, who on the death of their principal are made his executors, the mere indorsement of one, after they are

(*a*) See *Sadler* v. *Hobbs*, 2 B. C. C. 117; and see *Doyle* v. *Blake*, 2 Sch. & Lef. 239.

(*b*) *Doyle* v. *Blake*, 2 Sch. & Lef. 239, 245.

(*c*) *Townsend* v. *Barber*, 1 Dick. 356; *Moses* v. *Levi*, 3 Y. & C. 359; *Candler* v. *Tillett*, 22 Beav. 263, *per* M. R.

(*d*) *Sadler* v. *Hobbs*, 2 B. C. C. 114.

(*e*) *Hovey* v. *Blakeman*, 4 Ves. 608, *per* Lord Alvanley.

(*f*) *Clough* v. *Dixon*, 3 M. & Cr. 497, *per* Lord Cottenham; and see *Dines* v. *Scott*, T. & R. 361.

(*g*) *Gill* v. *Attorney-General*, Hard. 314; [*Lewis* v. *Nobbs*, 8 Ch. D. 591;] see *Moses* v. *Levi*, 3 Y. & C. 359.

(*h*) *Doyle* v. *Blake*, 2 Sch. & Lef. 231; *Lees* v. *Sanderson*, 4 Sim. 28; *Kilbee* v. *Sneyd*, 2 Moll. 200, *per* Sir A. Hart.

(*i*) *Candler* v. *Tillett*, 22 Beav. 236, *per* M. R.

executors, in order to enable the other to receive the money, will not operate to charge him who does not actually receive (*a*).

And in transfer of stock.

And so where the joining of both executors is necessary to the transfer of stock (*b*).

Unless the act be with improper view.

11. But where the joining of an executor is absolutely indispensable, it is still incumbent on the executor to see that the act in which he joins is perfectly consistent with the due execution of the trust (*c*).

Executor must not depend on mere representation of his co-executor.

12. And the executor will not be excused if he rely on the mere representation of his co-executor as to the necessity or propriety of the act, for the executor has imposed upon him at least ordinary and reasonable diligence to inquire whether the representation is true (*d*).

Greater caution required where the testator has been long dead.

13. And if, *at a period when in the ordinary course of administration the debts should long since have been discharged,* an executor is applied to by his co-executor to join in a transfer of stock for the purpose of payment of debts, and the executor does inquire, and ascertains there are such debts, but afterwards it turns out that the co-executor had in his hands a fund sufficient for the payment of the debts, in such a case the executor who joins in the receipt is liable to the imputation of negligence for not having acquainted himself how the co-executor had dealt with the assets during the preceding period, and is liable for the application of the money he enables the co-executor to receive (*e*).

Executor must not leave the money in the hands of the co-executor.

14. And the executor will be answerable if he *leave* the money, as for two years, in the hands of the co-executor, when by the terms of the trust it ought to have been invested on proper securities (*f*). But an executor will not be called upon to replace so much of the fund as it can be proved the co-executor *bonâ fide* expended towards the purposes of the trust (*g*).

(*a*) *Hovey* v. *Blakeman*, 4 Ves. 608, *per* Lord Alvanley.

(*b*) *Chambers* v. *Minchin*, 7 Ves. 197, *per* Lord Eldon; *Shipbrook* v. *Hinchinbrook*, 11 Ves. 254; *S. C.* 16 Ves. 479, *per eundem*; *Terrell* v. *Matthews*, 1 Mac. & G. 434, note; see *Murrell* v. *Cox*, 2 Vern. 570, and compare *Scurfield* v. *Howes*, 3 B. C. C. 94; (Note, the doctrine at the period of the last case had not been settled); and see *Moses* v. *Levi*, 3 Y. & C. 359.

(*c*) *Chambers* v. *Minchin*, 7 Ves. 186; *Shipbrook* v. *Hinchinbrook*, 11 Ves. 252; *Underwood* v. *Stevens*, 1 Mer. 712; *Bick* v. *Motley*, 2 M. & K. 312; *Williams* v. *Nixon*, 2 Beav. 472; *Hewett* v. *Foster*, 6 Beav. 259.

(*d*) *Shipbrook* v. *Hinchinbrook*, 11 Ves. 252, see 254; *Underwood* v. *Stevens*, 1 Mer. 712; *Hewett* v. *Foster*, 6 Beav. 259.

(*e*) *Shipbrook* v. *Hinchinbrook*, 11 Ves. 254, *per* Lord Eldon; *Bick* v. *Motley*, 2 M. & K. 312.

(*f*) *Scurfield* v. *Howes*, 3 B. C. C. 91; *Styles* v. *Guy*, 1 Mac. & G. 422; 1 Hall & Tw. 523; *Egbert* v. *Butter*, 21 Beav. 560; *Williams* v. *Higgins*, W. N. 1868, p. 49; and see *Lincoln* v. *Wright*, 4 Beav. 427.

(*g*) *Shipbrook* v. *Hinchinbrook*, 11

Liability of executor for not getting in money owing from a co-executor.

15. And the executor will be equally answerable, whether the money left in the hands of the defaulting co-executor consists of a debt due from him to the testator, or of property received by him after the testator's death. Thus, in *Styles* v. *Guy* (*a*), a testator appointed three executors, all of whom proved the will; but one of them, viz., Guy, was the acting executor. Guy, at the death of the testator, had large assets in his hands, with which he eventually absconded. The two co-executors were held responsible for the loss; and though free from blame morally, had to pay upwards of 20,000*l.* out of their own pockets. They knew, or ought to have known, that Guy was a debtor to the estate; and having by probate accepted the executorship, it was their duty to have recovered the debt from Guy as from any other debtor to the estate, and this they neglected to do for a period of six years.

Co-administrators on same footing as co-executors.

16. The rules respecting co-executors are equally applicable to co-administrators. Lord Hardwicke once expressed an opinion that joint administrators resembled rather co-trustees, and that any one of them could not exercise the office without the concurrence of the rest (*b*); but it was afterwards determined in the Court of King's Bench, that joint administrators and co-executors stood in this respect precisely on the same footing (*c*).

How trustee ought to act where a breach of trust is committed by a co-trustee.

17. To return to the liabilities of co-trustees: if one trustee be cognizant of a breach of trust committed by another, and either industriously conceal it (*d*), or do not take active measures for the protection of the *cestui que trust's* interest (*e*), he will himself become responsible for the mischievous consequences of the act. A trustee is called upon, if a breach of trust be *threatened*, to prevent it by obtaining an injunction (*f*), and, if a breach of trust has been *already committed*, to bring an action for the restoration of the trust fund to its proper condition (*g*), or, at least, to take

Ves. 252; *S. C.* 16 Ves. 477; *Williams* v. *Nixon*, 2 Beav. 472; *Kilbee* v. *Sneyd*, 2 Moll. 213, *per* Sir A. Hart; *Underwood* v. *Stevens*, 1 Mer. 712; and see *Brice* v. *Stokes*, 11 Ves. 328; *Hewett* v. *Foster*, 6 Beav. 259.

(*a*) 1 Mac. & G. 422; 1 Hall. & Tw. 523; *Egbert* v. *Butter*, 21 Beav. 560; and see *Scully* v. *Delany*, 2 Ir. Eq. Rep. 165; *Candler* v. *Tillett*, 22 Beav. 257.

(*b*) *Hudson* v. *Hudson*, 1 Atk. 460.

(*c*) *Willand* v. *Fenn*, cited *Jacomb* v. *Harwood*, 2 Ves. 267.

(*d*) *Boardman* v. *Mosman*, 1 B. C. C. 68.

(*e*) *Brice* v. *Stokes*, 11 Ves. 319; and see *Walker* v. *Symonds*, 3 Sw. 41; *Oliver* v. *Court*, 8 Price, 166; *In re Chertsey Market*, 6 Price, 279; *Attorney-General* v. *Holland*, 2 Y. & C. 699; *Booth* v. *Booth*, 1 Beav. 125; *Williams* v. *Nixon*, 2 Beav. 472; *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 477; *Gough* v. *Smith*, W. N. 1872, p. 18; [*Jackson* v. *Munster Bank*, 15 L. R. Ir. 356.]

(*f*) *In re Chertsey Market*, 6 Price, 279.

(*g*) *Franco* v. *Franco*, 3 Ves. 75;

such other active measures as, with a due regard to all the circumstances of the case may be considered the most prudential (*a*).

Effect of the indemnity clauses.

18. [Formerly an express clause was] inserted in trust-deeds, that one trustee should not be answerable for the receipts, acts, or defaults of his co-trustee. But the proviso, while it informed the trustee of the general doctrine of the Court, added nothing to his security against the liabilities of the office. In *Westley* v. *Clarke* (*b*) Lord Northington was inclined to attach some importance to the clause. But equity infuses such a proviso into every trust-deed (*c*), and a person can have no better right from the expression of that which, if not expressed, had been virtually implied (*d*). It is clear that, in later cases, the Court has considered it an immaterial circumstance whether the instrument creating the trust contained such a proviso or not (*e*). And now, by Lord St. Leonards' Act, every instrument creating a trust shall be deemed to contain the usual indemnity and re-imbursement clauses, and therefore in future the express introduction of them in deeds and wills may be safely dispensed with (*f*).

Special indemnity clause.

19. A settlor, however, has full power to abridge the ordinary duties of trustees, and a *special* indemnity clause may be so worded as to exempt trustees from responsibility in respect of acts, which would otherwise be breaches of trust. Thus, if a testator declare "that any trustee who shall pay over to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive any moneys, shall not be obliged to see to the application thereof; nor shall such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same moneys," here the testator has not only appointed joint trustees, but has also authorized each of them to delegate his duties to a co-trustee; and therefore where two trustees, under such a power, enabled a third to receive moneys, who misapplied them, and the fraud was concealed for two years, the two were held not to be responsible, though but for the special power they would have been declared liable on the

Earl Powlet v. *Herbert*, 1 Ves. jun. 297.

(*a*) See *Walker* v. *Symonds*, 3 Sw. 71.

(*b*) 1 Eden, 360.

(*c*) See *Dawson* v. *Clarke*, 18 Ves. 254.

(*d*) *Worrall* v. *Harford*, 8 Ves. 8.

(*e*) *Brice* v. *Stokes*, 11 Ves. 319; *Bone* v. *Cook*, M'Clel. 168; *S. C.* 13 Price, 332; *Hanbury* v. *Kirkland*, 3 Sim. 265; *Moyle* v. *Moyle*, 2 R. & M. 710; *Sadler* v. *Hobbs*, 2 B. C. C. 114; *Mucklow* v. *Fuller*, Jac. 198; *Pride* v. *Fooks*, 2 Beav. 430; *Williams* v. *Nixon*, 2 Beav. 472; *Fenwick* v. *Greenwell*, 10 Beav. 418; *Drosier* v. *Brereton*, 15 Beav. 221; *Dix* v. *Burford*, 19 Beav. 409; *Brumridge* v. *Brumridge*, 27 Beav. 5; *Rehden* v. *Wesley*, 29 Beav. 213.

(*f*) 22 & 23 Vict. c. 35, s. 31.

ground of *crassa negligentia* (*a*); [and this case has since been followed (*b*).]

Trustee shall derive no advantage from the trust.

Sixthly. A Trustee shall not make a *profit* of his office.

1. It is a general rule established to keep trustees in the straight line of their duty, that they shall not derive any personal advantage from the administration of the trust property (*c*). It was upon this principle that Lord Eldon once directed an inquiry, whether the liberty of *sporting* over the trust estate could be let for the benefit of the *cestuis que trust*, and, if not, he thought the game should belong to the heir; the trustee might appoint a gamekeeper, if necessary, for the preservation of the game, but not to keep up a mere establishment of pleasure (*d*).

Not entitled to the game on the trust estate where it can be let.

Nor to a right of presentation.

2. So, if an *advowson* be devised to trustees, and the next presentation cannot be made productive to the trust estate, the right of presentation does not belong to the trustee, but must be exercised by him for the benefit of the heir-at-law, or of the *cestuis que trust*, according to circumstances. Thus, where an advowson was devised to trustees upon trust during the life of A., to apply the rents and profits in the purchase of an estate to be settled to certain uses upon the death of A., it was decided that the right of presentation (should any vacancy occur) during A.'s life, would, as undisposed of, belong to the heir-at-law (*e*); and, in a later case, where there was a devise to trustees during the life of A. to apply the rents and profits in *payment of debts*, it was held that the right of next presentation during the life of A. was a profit, which ought to be sold for the benefit of the creditors (*f*). If a testator devise an advowson to trustees for *sale*, the proceeds to be divided amongst certain persons, and a presentation falls,

(*a*) *Wilkins* v. *Hogg*, 3 Giff. 116; 10 W. R. 47.

[(*b*) *Pass* v. *Dundas*, 43 L. T. N.S. 665; 29 W. R. 332.]

(*c*) *Burgess* v. *Wheate*, 1 Eden, 226, *per* Lord Mansfield; 1b. 251, *per* Lord Henley; *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 126, *per* Lord Redesdale; *Ex parte Andrews*, 2 Rose, 412, *per* Sir T. Plumer; *Middleton* v. *Spicer*, 1 B. C. C. 205, *per* Lord Thurlow; *Docker* v. *Somes*, 2 M. & K. 664, *per* Lord Brougham; *Gubbins* v. *Creed*, 2 Sch. & Lef. 218, *per* Lord Redesdale; and see *Hamilton* v. *Wright*, 9 Cl. & Fin. 111; *Bentley* v. *Craven*, 18 Beav. 75; [*Bennett* v. *Gaslight and Coke Company*, 52 L. J. N.S. Ch. 98; 48 L. T. N.S. 156.] A legacy therefore to a person as a mere trustee for others, is not invalidated by the fact of such trustee or his wife being an attesting witness to the will. *Cresswell* v. *Cresswell*, 6 L. R. Eq. 69.

(*d*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480, see 488; and see *Hutchinson* v. *Morritt*, 3 Y. & C. 547.

(*e*) *Sherrard* v. *Harborough*, Amb. 165; and see *Martin* v. *Martin*, 12 Sim. 579; *Gubbins* v. *Creed*, 2 Sch. & Lef. 218; *Re Shrewsbury School*, 1 M. & Cr. 647.

(*f*) *Cooke* v. *Cholmondeley*, 3 Drew. 1.

though the heir is absolutely disinherited, the trustees have not the nomination, but it belongs to the *cestuis que trust* (*a*), and where the *cestuis que trust* are tenants in common, they must cast lots for the presentation (*b*).

Trustee may not buy up debts for himself.

3. If trustees or executors buy up any debt or incumbrance to which the trust estate is liable for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves, but the creditors or legatees, or other *cestuis que trust*, shall have the advantage of it (*c*). [And if a trustee takes advantage of his position to buy up fixtures on the trust property, which he afterwards sells at a profit, he cannot personally retain the benefit so acquired (*d*); and the same principle applies to all persons in a fiduciary position, as in the case of a solicitor buying up incumbrances created by his client, for the purpose of relieving the client from embarrassment (*e*).] But if a trustee buy up a debt intending it for *cestuis que trust*, and they refuse to take it or pay the purchase-money, they cannot, after lying by for a length of time, step forward when the speculation turns out profitably and claim the debt for themselves (*f*).

Trustee trading with the trust estate must account for the profits.

4. Again, if a trustee or executor use the fund committed to his care in buying and selling land, or in stock speculations, or lay out the trust money in a commercial adventure, as in fitting out a vessel for a voyage; or put it into the trade of another person from which he is to derive certain stipulated gains (*g*), or employ it himself for the purposes of his own business or trade (*h*), in all these cases, while the executor or trustee is liable

(*a*) *Hawkins* v. *Chappel*, 1 Atk. 621; *Johnstone* v. *Baber*, 22 Beav. 562; *Briggs* v. *Sharp*, 20 L. R. Eq. 317; [*Welch* v. *Bishop of Peterborough*, 15 Q. B. D. 432.]

(*b*) *Johnstone* v. *Baber*, 6 De G. M. & G. 439; reversing *S. C.* 22 Beav. 562.

(*c*) *Robinson* v. *Pett*, 3 P. W. 251, note (A); *Darcy* v. *Hall*, 1 Vern. 49; *Ex parte Lacey*, 6 Ves. 628, *per* Lord Eldon; *Morret* v. *Paske*, 2 Atk. 54, *per* Lord Hardwicke; *Anon.* 1 Salk. 155; *Carter* v. *Horne*, 1 Eq. Ca. Ab. 7; *Dunch* v. *Kent*, 1 Vern. 260; *Fosbrooke* v. *Balguy*, 1 M. & K. 226; *Pooley* v. *Quilter*, 4 Drew. 184; 2 De G. & J. 327.

[(*d*) *Armstrong* v. *Armstrong*, 7 L. R. Ir. 207.]

[(*e*) *Macleod* v. *Jones*, 24 Ch. Div. 289, where the solicitor was allowed interest at the rate of 5*l.* per cent on the money employed by him in buying up the incumbrances. *S. C.* 50 L. T. N.S. 358; 32 W. R. 660.]

(*f*) *Barwell* v. *Barwell*, 34 Beav. 371.

(*g*) *Docker* v. *Somes*, 2 M. & K. 664, *per* Lord Brougham.

(*h*) *Docker* v. *Somes*, 2 M. & K. 655; *Willett* v. *Blanford*, 1 Hare, 253; *Cummins* v. *Cummins*, 8 Ir. Eq. Rep. 723; *Parker* v. *Bloxam*, 20 Beav. 295; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41; 22 Beav. 84; *Townend* v. *Townend*, 1 Giff. 201; [*Flockton* v. *Bunning*, 8 L. R. Ch. App. 323, n.] If the trustee or executor be one only of a firm, he must account for his share of the profits. *Vyse* v. *Foster*, 8 L. R. Ch. App. 309; affirmed 7 L. R. H. L. 318; *Jones* v. *Foxall*, 15 Beav. 388.

for all losses, he must account to the *cestui que trust* for all clear profits. And where a trustee retired from his trust in consideration of his successor paying him a sum of money, it was held that the money so paid must be treated as forming part of the trust estate, and be accounted for by the retiring trustee (*a*).

Giving to a trustee.

5. Neither can a trustee bargain with his *cestui que trust* for a benefit, and it is even said that a *cestui que trust* cannot *give* a benefit to his trustee (*b*).

Mortgagee regarded as a trustee to some intents.

6. *Mortgagees* are to some, though not to all, intents and purposes trustees, and in one case (the authority of which, however, has been doubted), where a mortgagor in fee died, and the mortgagee bought in the mortgagor's wife's right of dower, it was decreed that the heir of the mortgagor, on bringing his bill to redeem, might take the purchase at the price paid (*c*).

Partners.

7. *Partners* also stand in a fiduciary relation to each other (*d*), and if on the termination of the partnership by effluxion of time (*e*), or bankruptcy (*f*), or death (*g*), a partner instead of winding up the partnership affairs, retains the whole assets in the trade, so that in effect the partnership continues, he must account for a share of the profits (*h*). But as profits arise not only from *capital*, but also from the application of skill and industry, and other ingredients (*i*), while in former times the Court, from the difficulty of taking the account, often gave interest only (*j*); yet, at the

(*a*) *Sugden* v. *Crossland*, 3 Sm. & G. 192.

(*b*) *Vaughton* v. *Noble*, 30 Beav. 34; see 39.

(*c*) *Baldwin* v. *Banister*, cited *Robinson* v. *Pett*, 3 P. W. 251, note (A); and see comments thereon, *Dobson* v. *Land*, 8 Hare, 220; and compare *Arnold* v. *Garner*, 2 Ph. 231; *Matthison* v. *Clarke*, 3 Drew. 3.

(*d*) *Bentley* v. *Craven*, 18 Beav. 75; *Parsons* v. *Hayward*, 31 Beav. 199. [Partnership Act, 1890 (52 & 53 Vict. c. 39) s. 29; Lindley on the Act, p. 74.]

(*e*) See Lord Eldon's observations, *Crawshay* v. *Collins*, 15 Ves. 226.

(*f*) *Crawshay* v. *Collins*, 15 Ves. 218.

(*g*) *Brown* v. *De Tastet*, Jac. 284; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41; 22 Beav. 84; [*The Lord Provost, &c., of Edinburgh* v. *The Lord Advocate*, 4 App. Cas. 823]; and see *Flockton* v. *Bunning*, 8 L. R. Ch. App. 323, n.

(*h*) [And see Partnerships Act, 1890, s. 42, and Lindley on the Act, p. 108.] In *Knox* v. *Gye*, 5 L. R. H. L. 656, Lord Westbury denied that any fiduciary relation existed between the surviving partner, and the representative of the deceased partner, but Lord Hatherley was clearly of opinion to the contrary. See the arguments of these judges *pro* and *con* in the report. The surviving partner has, no doubt, larger powers than an ordinary trustee, for as between him and third persons he can sign a valid receipt for an outstanding asset, and being personally liable for the debts, he may be able to give a good title on sale of the partnership property, the presumption being that such realization is wanted for payment of debts; but it seems a strong measure to lay down, that the surviving partner is not to account for what he receives after the expiration of six years from the death of his co-partner.

(*i*) See *Vyse* v. *Foster*, 8 L. R. Ch. App. 331; affirmed, 7 L. R. H. L. 318.

(*j*) See the observations in *Docker* v. *Somes*, 2 M. & K. 662.

present day, the Court will direct an account of profits, *having regard* to the various ingredients of capital, skill, industry, &c., or will comprise them under the head of "*just allowances*" (*a*).

Traders not partners.

8. Where the trader stands in no fiduciary situation, as where he is neither trustee nor executor, nor was the partner of the testator, but trust monies come to his hands *bonâ fide*, though with a knowledge of the trust, that is, of the breach of trust (as where a trustee or executor lends money without authority to a trader), here the trader, though answerable for principal and interest, is not made to account for the extra profits (*b*). And if a person was in fact a partner with the testator but without knowing it (*c*), or has *bonâ fide* settled the partnership accounts (*d*), he will be equally protected as if he had not been such partner. And if the terms of the partnership be that on the death of any partner his share shall be taken by the survivor, at the value estimated at the last stock-taking, and a partner dies having appointed three executors, one of whom is a co-partner, and another afterwards becomes a co-partner, and the testator's share is left in the business and traded with, the two executors who are in the firm are not answerable for profits, but only for the capital of the testator's share with interest. The surviving partners are in this case regarded as purchasers of the share of the deceased, at the price expressed by the articles, and the two executors are answerable on the footing only of having left outstanding a debt, which they ought in a reasonable time to have got in (*e*).

Agents, &c.

9. The foregoing principle that trustees are not to profit by the

(*a*) *Brown* v. *De Tastet*, Jac. 284; *Willett* v. *Blandford*, 1 Hare, 253.

(*b*) *Stroud* v. *Gwyer*, 28 Beav. 130; *Townend* v. *Townend*, 1 Giff. 210; *Simpson* v. *Chapman*, 4 De G. M. & G. 154; *Macdonald* v. *Richardson*, 1 Giff. 81. See *Flockton* v. *Bunning*, 8 L. R. Ch. App. 323, note (6).

(*c*) *Brown* v. *De Tastet*, Jac. 284.

(*d*) *Chambers* v. *Howell*, 11 Beav. 6. And in *Ex parte Watson*, 2 Ves. & B. 414, Lord Eldon seems to speak of *partners* taking with notice, as *debtors* for the money, as if it had been placed with them by way of direct loan.

(*e*) *Vyse* v. *Foster*, 8 L. R. Ch. App. 309; affirmed, 7 L. R. H. L. 318. The judgment of L. J. James should be read, to see the principles upon which the Court now acts. The Court in this case viewed the claim against the surviving partners, though one of them was also executor, as a debt only, and, as such, not giving a right to an account of profits, and the Court observed that, although there had been hundreds, probably thousands, of cases in which traders had been executors, and in which, on taking the accounts, balances, and large balances, had been found due from them, yet where there had been *no active breach of trust*, in the getting in or selling out trust assets, but there had been a mere balance on the account of receipts and payments, the omission to invest the balance had never made the executor liable to account for the profits of his own trade. Ib. p. 335. [And see now the Partnership Act, 1890, ss. 42 (2), 43, which is in accordance with the previous law, Lindley on the Act, p. 111.]

trust applies to *agents* (*a*), *guardians* (*b*), (who are trustees to the extent of the property come to their hands (*c*), *directors* of a company (*d*), secretary of a company (*e*), [promoters of a company (*f*),] *inspectors* under creditor deeds (*g*), the *mayor* of a corporation (*h*), and generally to all persons clothed with a fiduciary character (*i*).

Heir or devisee purchasing incumbrance.

10. Even an *heir* has been so far regarded as a trustee for *creditors of the ancestor*, that he cannot hold an incumbrance as against them for more than he gave for it (*j*), and it is presumed, though there is no decision upon it, that the rule applies equally to a devisee as between him and the creditors of the testator (*k*).

But either an heir or a devisee who was himself an incumbrancer at the death of the ancestor or testator, may buy up a prior (but not a subsequent) incumbrance, and hold it for the whole amount due; for his own incumbrance is by title paramount and not affected by any trust for creditors, and the Court considers him to that extent as a stranger, and allows him to buy up the prior incumbrance not as heir or devisee, but for the protection of his own incumbrance (*l*). And if the heir or devisee acquire the prior incumbrance *not by his own act or procurement* but by the *bounty of another*, as either by gift *inter vivos*, or by will, there seems no reason on principle why the heir or devisee should not hold the prior incumbrance for the whole amount due; and *semble* it can make no difference whether the donor was the prior incumbrancer himself, or was a stranger who had purchased from the incumbrancer at an under-value (*m*).

(*a*) *Morret* v. *Paske*, 2 Atk. 54, *per* Lord Hardwicke.

(*b*) *Powell* v. *Glover*, 3 P. W. 251, note.

(*c*) *Sleeman* v. *Wilson*, 13 L. R. Eq. 41 *per Cur.*

(*d*) *Great Luxembourg Railway Company* v. *Magnay*, 25 Beav. 586; *Imperial Mercantile Credit Association* v. *Coleman*, 6 L. R. Ch. App. 558; 6 L. R. H. L. 189; *Parker* v. *McKenna*, 10 L. R. Ch. App. 96; *In re Imperial Land Company of Marseilles Ex parte Larking*, 4 Ch. Div. 566; [*Nant-y-glo and Blaina Ironworks Company* v. *Grave*, 12 Ch. D. 738; *Eden* v. *Redsdales Railway Lighting Co.*, 23 Q. B. Div. 368; but directors are not to be regarded as trustees for the creditors of the company; *Re Woods Ships Woodite Co.*, 62 L. T. N.S. 760; nor is a liquidator strictly speaking a trustee either for creditors or contributories; *Knowles* v. *Scott*, (1891) 1 Ch. 717.]

(*e*) *In re McKay's case*, 2 Ch. D. 1.

[(*f*) *New Sombrero Phosphate Company* v. *Erlanger*, 5 Ch. Div. 73; *Bagnall* v. *Carlton*, 6 Ch. Div. 371; *Emma Silver Mining Company* v. *Grant*, 11 Ch. Div. 918; *Emma Silver Mining Company* v. *Lewis*, 4 C. P. D. 396; and see *Ladywell Mining Company* v. *Brookes*, 34 Ch. D. 398; 35 Ch. Div. 400.]

(*g*) *Chaplin* v. *Young* (No. 2), 33 Beav. 414.

(*h*) *Bowes* v. *City of Toronto*, 11 Moore, P. C. C. 463.

(*i*) *Docker* v. *Somes*, 2 M. & K. 665.

(*j*) *Lancaster* v. *Evors*, 10 Beav. 154; and see 1 Ph. 354; *Brathwaite* v. *Brathwaite*, 1 Vern. 334; *Long* v. *Clopton*, 1 Vern. 464; *Darcy* v. *Hall*, 1 Vern. 49; *Morret* v. *Paske*, 2 Atk. 54.

(*k*) See *Long* v. *Clopton*, 1 Vern. 464; *Davis* v. *Barrett*, 14 Beav. 542.

(*l*) *Davis* v. *Barrett*, 14 Beav. 542; *Darcy* v. *Hall*, 1 Vern. 49.

(*m*) See *Anon.* 1 Salk. 155.

And an heir or devisee may, it seems, hold an incumbrance which he has bought up himself at an under-value for the whole amount as against a subsequent incumbrancer, though not as against the general creditors of the ancestor or testator; as if A. be the first incumbrancer, B. the second, and C. the heir or devisee, and C. buys up A.'s incumbrance, here if B. have a charge merely and is not a creditor, or his debt is barred by the statute, there is no thread of trust or confidence running between B. and C., and therefore C. is regarded as a stranger (*a*).

Joint purchasers.

11. One of two *joint purchasers* of an estate has been declared a trustee for the other of a proportionate part of the benefit derived by the former from an incumbrance bought up by him at a less value (*b*).

Tenant for life.

12. An opinion has also been expressed by a high authority, that even a *tenant for life* stands in such a confidential relation towards the remainderman that he cannot as against him hold an incumbrance which he has bought up for more than he gave for it (*c*).

Trustee may not charge for services.

13. As regards trustees, in the strict sense of the word, the general rule deprives them of any right to receive remuneration for their personal labour and services.

Trustee may not be receiver of the trust estate at a salary.

14. Thus, the trustee of an estate cannot be appointed *receiver* of it at a salary (*d*); and even should he offer his services gratuitously, he would not be appointed except under particular circumstances, for it is the duty of the trustee to superintend the receiver and check the accounts with an adverse eye (*e*); but if a person be merely a trustee to preserve contingent remainders, the reasons for excluding him are held not to be applicable (*f*).

Factors, &c.

15. In the absence of any special authority contained in the instrument of trust (*g*), a *trustee* or *executor* who happens to be a factor (*h*), broker (*i*), commission agent (*j*), or auctioneer (*k*), can make no profit in the way of his business from the estate committed to his charge. So trustees who are *bankers* cannot in their character of trustees borrow money of themselves, as bankers, at

(*a*) *Davis* v. *Barrett*, 14 Beav. 542. The observations of M. R. are general, but he probably meant no more than this.

(*b*) *Carter* v. *Horne*, 1 Eq. Ca. Ab. 7.

(*c*) *Hill* v. *Browne*, Drur. 433.

(*d*) *Sutton* v. *Jones*, 15 Ves. 584; *Sykes* v. *Hastings*, 11 Ves. 363; —— v. *Jolland*, 8 Ves. 72; *Anon.* 3 Ves. 515; and see *Morison* v. *Morison*, 4 M. & Cr. 215.

(*e*) *Sykes* v. *Hastings*, 11 Ves. 364, *per* Lord Eldon; [and see *Re Lloyd*, 12 Ch. Div. 447].

(*f*) *Sutton* v. *Jones*, 15 Ves. 587, *per* Lord Eldon.

(*g*) *Douglas* v. *Archbutt*, 2 De G. & J. 148; *Re Sherwood*, 3 Beav. 338.

(*h*) *Scattergood* v. *Harrison*, Mos. 128.

(*i*) *Arnold* v. *Garner*, 2 Ph. 231.

(*j*) *Sheriff* v. *Axe*, 4 Russ. 33.

(*k*) *Matthison* v. *Clarke*, 3 Drew. 3; *Kirkman* v. *Booth*, 11 Beav. 273.

compound interest, though it be the usage of the bank with ordinary customers (*a*).

Solicitor.

16. A trustee, whether expressly or constructively such (*b*), who is a *solicitor*, cannot charge for his professional labours, but will be allowed merely his costs out of pocket (*c*), unless there be a special contract or direction to that effect (*d*); and even then he cannot charge for matters not strictly belonging to the professional character, such as attendances for paying premiums on policies, for transfers of stock, attendances on proctors or auctioneers, or attendances on paying legacies or debts (*e*), [unless such non-professional charges are expressly authorized. Where the will authorized a solicitor-trustee to make the usual professional or *other proper and reasonable* charges for all business done and time expended in relation to the trusts of the will, whether such business was usually within the business of a solicitor or not, charges for business not strictly of a professional character were allowed (*f*). But where the solicitor trustee was authorized to make the usual professional charges, and was to be entitled "to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time and trouble given and bestowed by him, in or about the execution of the trusts and powers of the will, or the management and administration of the trust estate, as if he, not being himself a trustee or executor, were employed by the trustee or executor," non-professional charges were disallowed (*g*).] A trustee who in that character invests the trust fund upon mortgage, and acts also for the mortgagor, is not accountable to the trust for the professional profits made by the mortgage and which are paid by the mortgagor (*h*). [But a solicitor who is also executor cannot, by postponing probate, entitle himself in the mean time to charge for professional work done for his co-executor in relation to his testator's estate (*i*).

(*a*) *Crosskill* v. *Bower*, 32 Beav. 86.

(*b*) *Pollard* v. *Doyle*, 1 Dr. & Sm. 319.

(*c*) *New* v. *Jones*, Exch. Aug. 9, 1833. 9 Byth. by Jarm. 338; *Moore* v. *Frowd*, 3 M. & Cr. 46; *Fraser* v. *Palmer*, 4 Y. & C. 515; *York* v. *Brown*, 1 Col. 260; *Broughton* v. *Broughton*, 5 De G. M. & G. 160; [but a solicitor who is both trustee and mortgagee is not thereby disentitled to charge profit costs against the mortgagor; *Re Donaldson*, 27 Ch. D. 544.]

(*d*) *In re Sherwood*, 3 Beav. 338; and see *Douglas* v. *Archbutt*, 2 De G. & J. 148.

(*e*) *Harbin* v. *Darby*, 28 Beav. 325.

[(*f*) *Re Ames*, 25 Ch. D. 72.]

[(*g*) *Re Chapple*, 27 Ch. D. 584; see the observations of Kay, J. in this case as to inserting a power authorizing non-professional charges.]

(*h*) *Whitney* v. *Smith*, 4 L. R. Ch. App. 513.

[(*i*) *Re Barber*, 34 Ch. D. 77; *Robinson* v. *Pett*, 3 P. W. 249.]

A solicitor trustee who prepares leases of portions of the trust estate, the costs being paid by the lessees, is accountable, as the work is done on behalf of the trust estate. And where a solicitor-trustee was made defendant to an administration action in which a receiver was appointed, and his firm through their London agents acted for the receiver and made profit costs, it was held that they could not be retained, as a trustee must not place himself in a position in which his interest conflicts with his duty (*a*).

But where trustees appoint the partner of one of them, who is a solicitor, steward of a manor which forms part of the trust estate, such partner is not accountable in respect of fees for manorial business received by him in his capacity of steward (*b*).

A declaration in a will that a solicitor-trustee may charge profit costs is a gift to him of a beneficial interest within section 15 of the Wills Act, and is therefore void if he is one of the attesting witnesses (*c*).] As the solicitor-trustee himself cannot charge, so neither can the charge be made by a *firm* of which he is a partner (*d*), even though the business be done by one of the partners who is not a trustee (*e*); but a country solicitor defending a suit in Chancery as executor, through a *town agent*, will be allowed such proportion of the agent's bill in respect of the defence, as such agent is entitled to receive (*f*); and a trustee may employ his partner as the solicitor to the trust, and pay the usual professional charges, if by the articles of partnership the trustee is not to participate in the profits or have any benefit from such charges (*g*). Partners.

17. In *Cradock* v. *Piper* (*h*), the principle of the rule was held not to apply where several *co-trustees* were made defendants to a suit, this being a matter thrust upon them and beyond their own control, so that one of the trustees, who was a solicitor, was allowed to act for himself and the others, and to receive the full costs, it not appearing that they had been increased through his conduct. But this decision is open to comment. If the distinc- Cradock *v.* Piper.

[(*a*) *Re Corsellis*, 34 Ch. Div. 675.]

[(*b*) *Re Corsellis*, 34 Ch. Div. 675.]

[(*c*) *Re Barber*, 31 Ch. D. 665; *Re Pooley* (C. A.), 40 Ch. Div. 1, where the question was raised whether a trustee taking the benefit of such a clause might not be liable to pay legacy duty.]

(*d*) *Collins* v. *Carey*, 2 Beav. 128; *Lincoln* v. *Windsor*, 9 Hare, 158; [*Re Corsellis*, 34 Ch. Div. 675].

(*e*) *Christophers* v. *White*, 10 Beav. 523; [*Re Corsellis*, 34 Ch. Div. 675.]

(*f*) *Burge* v. *Burton*, 2 Hare, 373.

(*g*) *Clack* v. *Carlon*, 7 Jur. N. S. 441.

(*h*) 1 Mac. & G. 664; *S. C.* 1 Hall & Tw. 617; overruling *Bainbrigge* v. *Blair*, 8 Beav. 588.

tion be made between costs out of court and costs in court, because as regards the latter, the conduct of the trustee is under the cognizance of the Court, and the costs are to be taxed, the rule would equally apply to the case of a single trustee defending himself (*a*). The exception, [though well established (*b*),] appears to be anomalous, and is not likely to be extended. [It applies not only to proceedings in a hostile action, but to friendly proceedings in chambers, *e.g.*, an application for maintenance of an infant (*c*).] Where a single trustee defended himself by his partner, the professional profits were disallowed (*d*).

Trustee might accidentally be advantaged, as by failure of heirs of the *cestui que trust*.

18. [Prior to the Intestates Estates Act, 1884, a trustee might by *possibility* have derived] a benefit from the trust estate, not from any positive right in himself, but from the want of right in any other; as if lands were vested in A. and his heirs upon trust for B. and his heirs, and B. died without an heir, the equitable interest in this case could neither escheat to the lord (*e*); nor, if the trust were created by conveyance from B., whose *seisin* or *title* was *ex parte paternâ*, could the lands, upon failure of heirs in that line, descend to the heir of B. *ex parte maternâ* (*f*): but the trustee, no person remaining to sue a *subpœna*, retained, as the legal proprietor, the beneficial enjoyment (*g*). [But now where the death occurs since the 14th August, 1884, the law of escheat applies in the same manner as if the interest had been a legal estate in corporeal hereditaments (*h*).]

Onslow *v.* Wallis.

19. If an estate be held by A. upon trust for B., and B. dies without leaving an heir, but having devised the estate to C. and D. upon trusts which fail or do not exhaust the beneficial interests, A. cannot insist on retaining the estate upon offering to satisfy the charges, if any, but will be bound to convey the estate to C. and D. as the nominees in the will and so entitled as against A., the bare trustee, and the Court as between those parties will not inquire into the nature of the trust or how far it can be executed (*i*). [But it will be otherwise if C. and D.

(*a*) See *Broughton* v. *Broughton*, 2 Sm. & G. 422; 5 De G. M. & G. 160.

[(*b*) *Re Corsellis*, 34 Ch. Div. 675; *Re Barber*, 34 Ch. D. 77.]

[(*c*) *Re Corsellis*, *ubi sup.*]

(*d*) *Lyon* v. *Baker*, 3 De G. & Sm. 622. And see *Manson* v. *Baillie*, 2 Macq. H. L. Ca. 80.

(*e*) *Burgess* v. *Wheate*, 1 Eden, 177. But as to a surplus dividend in the hands of trustees for creditors, see *Wild* v. *Banning*, 12 Jur. N. S. 464.

(*f*) See 1 Eden, 186, 216, 256.

(*g*) *Taylor* v. *Haygarth*, 14 Sim. 8; *Davall* v. *New River Company*, 3 De G. & Sm. 394; *Cox* v. *Parker*, 22 Beav. 168; *Barrow* v. *Wadkin*, 24 Beav. 9; and see *Attorney-General* v. *Sands*, Hard. 496; Cary, 14; *Burgess* v. *Wheate*, 1 Eden, 212, 213, 253.

[(*h*) 47 & 48 Vict. c. 71, s. 4.]

(*i*) *Onslow* v. *Wallis*, 1 Mac. & G. 506; and see *Jones* v. *Goodchild*, 3 P. W. 33.

are themselves mere bare trustees to whom, if the legal estate had been in their testator, it would not have passed by his will (*a*).]

Purchaser dying without heir after payment of purchase-money, and before conveyance.

20. In *Burgess* v. *Wheate*, Sir Thomas Clarke, M. R., put the case of a purchaser paying the consideration money, and then dying without an heir before the execution of the conveyance, Whether under such circumstances the vendor should keep both the estate and the money? The M. R. thought that the vendor would keep the estate, but that the purchaser's personal representative would have a lien upon it for the purchase money (*b*).

Mortgagor dying without an heir.

In the same case the questions were asked, whether in the event of a mortgagor in fee dying intestate as to real estate and leaving no heir, the mortgagee should hold the estate absolutely? and whether, if the mortgagee demanded his debt of the personal representative, he should take to himself both the land and the debt? Sir Thomas Clarke thought that the mortgagee might hold the estate absolutely; but that if the mortgagee took his remedy against the personal representative, the Court would compel him to re-convey, not to the lord by escheat, but to the personal representative, and would consider the estate reconveyed as coming in lieu of the personalty, and as assets to answer even simple contract creditors (*c*). Lord Mansfield said, "He could not state on any ground established what would be the determination in that case" (*d*). Lord Henley observed, "The lord has his tenant and services in the mortgagee, and he has no right for anything more. Perhaps it would not be difficult to answer what would be the justice of the case, but it is not to the business in hand" (*e*). In the opinion of Sir John Romilly, M. R., the mortgagee held absolutely, subject to the payment of the mortgagor's debts out of the equity of redemption (*f*). [But since the late Act (*g*) the interest of the mortgagor will escheat to the lord.]

Cestui que trust attainted for felony.

21. But a failure of inheritable blood might before 4th July, 1870, have happened (*h*), not only for want of an heir (as in the case of an illegitimate person dying without issue), but through the corruption of blood caused by attainder, for *petit treason* or *murder;* and in the case of such attainder, the question arose

[(*a*) *Re Lashmar*, (1891) 1 Ch. 258.]
(*b*) 1 Eden, 211, *per* Sir T. Clarke.
(*c*) Id. 210.
(*d*) 1 Eden, 236.
(*e*) Id. 256; and see *Viscount Downe* v. *Morris*, 3 Hare, 394.
(*f*) *Beale* v. *Symonds*, 16 Beav. 406.
[(*g*) 47 & 48 Vict. c. 71, s. 4.]
(*h*) See 33 & 34 Vict. c. 23.

whether the trustee should hold against the heir of the person attainted. Under the system of *uses* the *heir* could not sue his *subpœna* by reason of the corruption of blood (*a*); but trusts have since been administered on more liberal principles than uses formerly were. In reference to this point, and also to the question, whether the trustees could hold against the person attainted himself if subsequently pardoned, Sir Thomas Clarke said, "The detaining the estate against the Crown where the *cestui que trust* dies without leaving a relation was different from detaining it against the *cestui que trust* himself. The Court would go as far as it could, and he thought the trustee would be estopped from setting up such a claim" (*b*). Lord Mansfield said, "He could not resolve the case upon principle, for he could find no clear and certain rule to go by" (*c*). But Lord Henley agreed with Sir Thomas Clarke, and asked, "If the King thinks proper to pardon the felon, what hinders him from suing his trustee?—what hinders him from instantly assigning his trust for the benefit of his family" (*d*).

Whether the author of the trust can assert a claim.

22. A question was put by Lord Mansfield in *Burgess* v. *Wheate*, but was neither answered at the time, nor received any notice from the bench afterwards, viz. whether the right to the estate might not, in particular cases, result to the *author* of the trust (*e*). As, if A. infeoffed B. and his heirs, in trust for C. and his heirs, and C. [before the 14th August, 1884 died] without heirs, could the equitable interest result in favour of A.? Such a case has never occurred, and there is no authority upon the subject; but it seems anomalous that a trust can under any circumstances result when the whole beneficial interest has been once parted with.

Trustee cannot come into a court of equity for his own benefit.

23. As the trustee when he can claim in these cases advances not a positive, but merely a negative right, he has no ground for coming into a court of equity for the establishment of his right (*f*). Thus, where A. devised a copyhold estate to B. and his heirs in trust for C. and his heirs, and C. died without heirs, and then B. died, having entered upon the lands, and having applied the rents to the trust, but never having been admitted, and the heir of B. filed a bill against the lord for compelling him to grant him admission, Lord Loughborough said, "If a man has

(*a*) Br. Feff. al. Us. 34; Cary, 14.
(*b*) 1 Eden, 210.
(*c*) Id. 236; and see Id. 184.
(*d*) Id. 255.
(*e*) Id. 185. As in a gift of land in fee to a corporation, and the corporation is dissolved or ceases, Co. Lit. 13 b.
(*f*) See Id. 212; and see *Onslow* v. *Wallis*, 1 Mac. & G. 506.

got the legal estate, the Court will not take it from him, except for some person who has a claim; but does it follow that the Court will *give* him the legal estate?" (*a*) [But a Court of law will grant a *mandamus* to the lord to admit the heir of the trustee (*b*), and prior to the late Act the heir when admitted was entitled to hold the lands for his own benefit (*c*).]

If *cestui que trust* die without next of kin, the trust chattel goes to the Crown.

24. If a *cestui que trust* of *chattels*, whether *real or personal*, die intestate, without leaving any *next of kin*, the beneficial interest will not, in this case, remain with the trustee, but like all other *bona vacantia* will vest in the Crown by the prerogative (*d*). And the result will be the same where the *cestui que trust*, though not dying absolutely *intestate*, has appointed an *executor*, who by the language of the will itself is excluded from any beneficial interest (*e*). But an executor not expressly made a trustee by the will, was, before the Act of William IV. (*f*), entitled *primâ facie* to the surplus for his own benefit, and that statute, it is conceived, has converted him into a trustee for the *next of kin* only, and has not altered the old law, as between him and the *Crown*, in case there be no next of kin (*g*).

Trustee cannot set up title adverse to *cestui que trust*.

25. A trustee is, under no circumstances, allowed to set up a title *adverse* to his *cestui que trust* (*h*). But though he may not claim against his own *cestui que trust*, yet he is not bound to deliver over the property to his *cestui que trust* if he cannot safely do so by reason of notice of title in another which is paramount to the trust (*i*).

(*a*) *Williams* v. *Lord Lonsdale*, 3 Ves. 752, see 756, 757.

[(*b*) *Rex* v. *Coggan*, 6 East, 431.]

[(*c*) *Gallard* v. *Hawkins*, 27 Ch. D. 298. See now 47 & 48 Vict. c. 71, s. 4.]

(*d*) If the intestate leave a widow and no next of kin the Crown takes a moiety of the personal estate; *Cave* v. *Roberts*, 8 Sim. 214. [By the Intestates' Estate Act, 1890 (53 & 54 Vict. c. 29), if the net value of the real and personal estates of every man who dies intestate after September 1st, 1890, leaving a widow, but no issue, do not exceed 500*l.*, they belong to his widow absolutely.]

(*e*) *Middleton* v. *Spicer*, 1 B. C. C. 201; *Taylor* v. *Haygarth*, 14 Sim. 8; *Russell* v. *Clowes*, 2 Coll. 648; *Powell* v. *Merrett*, 1 Sm. & G. 381; *Cradock* v. *Owen*, 2 Sm. & G. 241; *Read* v. *Stedman*, 26 Beav. 495; [*Dillon* v. *Reilly*, 9 L. R. Ir. 57; *Re Mary Hudson's Trusts*, 52 L. J. N.S. Ch. 789; and see *Re Gosman*, 15 Ch. D. 67.] The foregoing were all cases of failure of next of kin of the author of the trust, but the principle of the decisions applies equally.

(*f*) 11 G. 4. & 1 W. 4. c. 40.

(*g*) See *ante*, p. 60. [So now decided *Re Knowles*, 49 L. J. N.S. Ch. 625; *Re Bacon's Will*, 31 Ch. D. 46.]

(*h*) See *Attorney-General* v. *Munro*, 2 De G. & Sm. 163; *Stone* v. *Godfrey*, 5 De G. M. & G. 76; *Ex parte Andrews*, 2 Rose, 412; *Kennedy* v. *Daly*, 1 Sch. & Lef. 381; *Shields* v. *Atkins*, 3 Atk. 560; *Pomfret* v. *Windsor*, 2 Ves. 476; *Conry* v. *Caulfield*, 2 B. & B. 272; *Langley* v. *Fisher*, 9 Beav. 90; *Reece* v. *Trye*, 1 De G. & Sm. 279; *Newsome* v. *Flowers*, 30 Beav. 461; *Frith* v. *Cartland*, 2 H. & M. 417; *Tennant* v. *Trenchard*, 4 L. R. Ch. App. 537; *Neligan* v. *Roche*, 7 Ir. R. Eq. 332.

(*i*) *Neale* v. *Davies*, 5 De G. M. & G. 258.

Moral rights.

26. Trustees would not be justified in doing any act at variance with their trust. If, for instance, they honestly believed that property accepted by them in trust for one belonged of right to another, they would not be justified in communicating to such other that he could successfully claim the estate. Trustees have the custody of the property, but do not keep the conscience of their *cestui que trust*.

Impeachable settlements.

27. It sometimes happens that circumstances raise a *suspicion* but without any *constat*, that the trust deed is impeachable, as if the trust be created by a father tenant for life and a son claiming in remainder under an appointment in exercise of a special power and there are grounds for surmising that the appointment was collusive, but the trustee must assume the validity of the trust until it is actually impeached (*a*).

(*a*) *Beddoes* v. *Pugh*, 26 Beav. 407.

CHAPTER XIV.

THE DUTIES OF TRUSTEES OF CHATTELS PERSONAL.

We next advance to the *duties* of trustees, and as trusts of chattels personal are of the most frequent occurrence, we shall first advert to trustees of property of this description. We may consider this branch of our subject under six heads:—1. The reduction of the chattel into the possession of the trustee. 2. The safe custody of it. 3. The rules of the Court as to conversion. 4. The proper investment of the trust fund. 5. The liability of trustees to payment of interest in cases of improper detainer; and, 6. The distribution of the trust fund.

SECTION I.

OF REDUCTION INTO POSSESSION.

Of reduction into possession.

1. The first duty of trustees is to place the trust property in a state of security. Thus if the trust fund be an equitable interest of which the legal estate cannot at present be transferred to them, it is their duty to lose no time in giving notice of their own interest to the persons in whom the legal estate is vested; for otherwise he who created the trust might incumber the interest he has settled in favour of a purchaser without notice, who by first giving notice to the legal holder might gain a priority (*a*).

Chose en action.

2. If the trust fund be a *chose en action*, as a *debt*, which may be reduced into possession, it is the trustee's duty to be active in getting it in; and any unnecessary delay in this respect will be at his own personal risk (*b*). A marriage settlement often contains a covenant by one of the parties for payment of a certain

(*a*) See *Jacob* v. *Lucas*, 1 Beav. 436.

(*b*) *Caffrey* v. *Darby*, 6 Ves. 488; *Platel* v. *Craddock*, C. P. Cooper's Cases, 1837–8, 481; *Jones* v. *Higgins*, 2 L. R. Eq. 538; *Ex parte Ogle*, 8 L. R. Ch. App. 711; *McGachen* v. *Dew*,

sum to the trustees within a limited period, and if the Statute of Limitations be allowed to run so that the claim is barred, the trustees are answerable (*a*); and *à fortiori* the trustees will be responsible if they execute the settlement and sign a receipt for the money but do not actually receive it (*b*).

Prepayment.

Though trustees may be answerable for delaying *after* the proper time to get in a *chose en action*, there can be no objection to their receiving it *before* the time, if the person liable be willing to pay it (*c*). [And trustees of a reversionary *chose en action* may concur with the person entitled to the prior interest in calling for an immediate transfer to themselves of the *chose en action* (*d*).]

Executors.

3. There is no inflexible rule as to the time within which *executors* are bound to get in the assets (*e*); but in every case the particular circumstances must govern, and the Court allows the executors a large discretion (*f*). Thus if a testator die possessed of live stock which cannot be kept but at a great expense, the executors ought to sell forthwith (*g*). So executors would not be justified in continuing the testator's housekeeping expenses for an unreasonable time, but when they have acquainted themselves with the facts, should discharge the servants and break up the establishment; and an interval of two months was in one case, but under rather special circumstances, held to be justifiable (*h*). A testator died possessed of Crystal Palace shares, and it was contended that the executors were to be responsible for the value at the end of two months, but the Court held that they had a discretion whether to sell or not until the end of twelve months (*i*).

Buxton *v.* Buxton.

Where a great part of the assets was outstanding on *Mexican bonds*, and the executors sold in the course of the *second year* from the testator's decease, Lord Cottenham held that, if the executors were bound *at once* to convert the assets without con-

15 Beav. 84; *Wiles* v. *Gresham*, 2 Drew. 258; *Waring* v. *Waring*, 3 Ir. Ch. Rep. 335; *Tebbs* v. *Carpenter*, 1 Mad. 298; *Grove* v. *Price*, 26 Beav. 103; [*Re Brogden*, 38 Ch. D. 546;] and see *Rowley* v. *Adams*, 2 H. L. Cas. 725; *Macken* v. *Hogan*, 14 Ir. Ch. R. 220.

(*a*) *Stone* v. *Stone*, 5 L. R. Ch. App. 74.

(*b*) *Westmoreland* v. *Holland*, 23 L. T. N.S. 797; 19 W. R. 302; affirmed W. N. 1871, p. 124.

(*c*) *Mills* v. *Osborne*, 7 Sim. 30; *Maskelyne* v. *Russell*, W. N. 1869, p. 184.

[(*d*) *Anson* v. *Potter*, 13 Ch. D. 141.]

[(*e*) See *Hiddingh* v. *Denyssen*, 12 App. Cas. 624.]

(*f*) *Hughes* v. *Empson*, 22 Beav. 183, *per* M. R.

(*g*) Ib.

(*h*) *Field* v. *Peckett* (No. 2), 29 Beav. 576.

(*i*) *Hughes* v. *Empson*, 22 Beav. 181.

sidering how far it was for the interest of the persons beneficially entitled, there would of necessity be always an immediate sale, and often at a great sacrifice of property; that executors were entitled to exercise a *reasonable discretion* according to the circumstances of the particular case. The will had directed the trustees to convert "with all convenient speed," but this, observed his Lordship, was the ordinary duty implied in the office of every executor (*a*). [So where a testator bequeathed his personal estate to his executors upon trust to divide the same equally among four persons, all of whom were of age, and the estate comprised foreign railway bonds which the executors retained beyond the end of the first year from the testator's death, it was held by the Court of Appeal affirming the decision of V. C. Hall, that as the executors acted with a view to what they thought beneficial to everybody interested, and in the exercise of their discretion thought it more prudent to wait, they ought not to suffer because they had committed an error of judgment, and L. J. James observed, "It would be very hard upon executors who have been saddled with property of this speculative kind, and have endeavoured to do their duty honestly, if they were to be fixed with a loss arising from their not having taken what, as it was proved by the result, would have been the best course" (*b*).] But in *Grayburn* v. *Clarkson*, where the testator died possessed of shares in the Leeds Banking Company which involved a liability without limit, and the shares remained unsold for many years, L. J. Wood said that there was no fixed rule that conversion *must* take place by the end of one year, but that such was the *primâ facie* rule, and that executors who did not convert by that time, must show some reason why they did not (*c*); and the Court directed an inquiry whether any loss had accrued by the neglect to sell by the end of one year from the death of the testator, and declared the executor responsible for any such loss (*d*). And again in *Sculthorpe* v. *Tipper* (*e*), where a testator died possessed of shares in an unlimited Banking Company, and directed his executors to realize his personal estate "immediately after his decease, or *so soon thereafter as his trustees might see fit so to do*," the trustees acting, as they believed, for the best

(*a*) *Buxton* v. *Buxton*, 1 M. & Cr. 80.

[(*b*) *Marsden* v. *Kent*, 5 Ch. Div. 598.]

(*c*) *Grayburn* v. *Clarkson*, 3 L. R. Ch. App. 606.

(*d*) *Grayburn* v. *Clarkson*, 3 L. R. Ch. App. 605; [*Dunning* v. *Earl of Gainsborough*, 54 L. J. N.S. Ch. 991;] and see *Sculthorpe* v. *Tipper*, 13 L. R. Eq. 232.

(*e*) 13 L. R. Eq. 232.

interests of the parties, neglected for *two years and a quarter* to sell the shares, and they were made liable for the consequences, the Vice-Chancellor observing that although a discretion was vested in the trustees, they were bound to exercise it within a reasonable time, that is within a year. This has been considered a somewhat harsh decision. Had the testator simply directed the executors to realize immediately after his decease, they would still have had the year, and the Vice-Chancellor therefore gave no effect to the words of the power, "or so soon thereafter as they might see fit." The question should rather have been, Was the discretion vested in them *bonâ fide* exercised? In another case where the trustees had an absolute discretion to sell and convert the testator's shares in a banking company, "*at such time or times as they might think proper*," they were held not to be liable for retaining the testator's shares beyond a year from his decease, but were made liable for other new shares in the bank which they had purchased themselves (*a*).

[Absolute discretion.]

[And where an absolute discretion is given to the trustees to postpone the sale and conversion of the estate, they are not bound by the ordinary rule to convert the property within a year, even although it consists of shares in companies with unlimited liability, and in the absence of *mala fides* they will not be responsible for losses arising to the estate from the non-conversion (*b*); nor will the Court interfere with the exercise of the discretion if the trustees are acting *bonâ fide* (*c*).

[Investment becoming unauthorized after testator's decease.]

Where shares belonging to a testator are altered in amount after his death and become liable to calls, so as no longer to be an authorized investment according to the terms of the will, the trustees should convert them with reasonable speed (*d*).

[Retaining investments for infants *in specie*.]

4. Where it is for the benefit of infants to retain investments which are not authorized by the terms of the trust, the Court has a discretion to allow such retainer. The Court, however, will not exercise this discretion unless special circumstances are shown to exist, and the mere fact that the unauthorized securities are such as are authorized by sect. 21 of the Settled Land Act, 1882, and that a loss of income would be caused by a conversion, will not induce the Court to allow the securities to be retained (*e*).]

Personal security.

5. An executor is not to allow the assets of the testator to

(*a*) *Edwards* v. *Edmunds*, 34 L. T. N.S. 522; [*Re Johnson*, W. N. 1886, p. 72.]

[(*b*) *Re Norrington*, 13 Ch. Div. 654.]

[(*c*) *Re Blake*, 29 Ch. Div. 913.]

[(*d*) *Re Morris*, 54 L. J. Ch. 388.]

[(*e*) *Fox* v. *Dolby*, W. N. 1883, p. 29.]

remain outstanding upon *personal* security (*a*), though the debt was a loan by the testator himself on what he considered an eligible investment (*b*). And it will not justify the executor, if he merely apply for payment through his attorney, but do not follow it up by instituting legal proceedings (*c*). Personal security changes from day to day, by reason of the personal responsibility of the debtor giving the security; and, as a testator's means of judging of the value of that responsibility are put an end to by his death, the executor who omits to get in the money within a reasonable time becomes himself the security (*d*). An executor will be equally liable if he knows that a *co-executor* is a debtor to the testator's estate, and does not take the same active steps for recovery of the amount from the co-executor, as it would have been his duty to take against a stranger. And it does not vary the case that the testator himself was in the habit of leaving money in the hands of that co-executor, and treating him as a private banker (*e*). Nor will an executor be excused for not calling in money on personal security by a clause in the will, that the executors are to call in "*securities not approved by them;*" for such a direction is construed as referable to securities upon which a testator's property may allowably be invested, and not as authorizing an investment which the Court will not sanction (*f*). If a settlement contain a clause that the trustees are to get in the money "whenever they shall think fit and expedient so to do," they will be liable, if they refrain from enforcing payment out of tenderness to the tenant for life without a due regard to the interests of *all* the *cestuis que trust* (*g*). [And, generally, it is the duty of trustees to press for payment of the trust funds to them, and if they are not paid within a reasonable time, to enforce payment by legal proceedings, and they are especially bound to act promptly where

(*a*) *Lowson* v. *Copeland*, 2 B. C. C. 156; *Caney* v. *Bond*, 6 Beav. 486; *Bailey* v. *Gould*, 4 Y. & C. 221; and see *Attorney-General* v. *Higham*, 2 Y. & C. C. C. 634; where the *chose en action* is recoverable only in equity, a *cestui que trust* may take active steps for getting it in, and as to the effect of *cestui que trust*'s laches in this respect see *Paddon* v. *Richardson*, 7 De G. M. & G. 563; *Horton* v. *Brocklehurst* (No. 2), 29 Beav. 511.

(*b*) *Powell* v. *Evans*, 5 Ves. 839; *Bullock* v. *Wheatley*, 1 Coll. 130; and see *Tebbs* v. *Carpenter*, 1 Mad. 298; *Clough* v. *Bond*, 3 M. & Cr. 496.

(*c*) *Lowson* v. *Copeland*, 2 B. C. C. 156.

(*d*) *Bailey* v. *Gould*, 4 Y. & C. 226, *per* Baron Alderson.

(*e*) *Styles* v. *Guy*, 1 Mac. & G. 422; 1 Hall & Tw. 523; *Egbert* v. *Butter*, 21 Beav. 560; *Candler* v. *Tillett*, 22 Beav. 257.

(*f*) *Styles* v. *Guy*, 1 Mac. & G. 428; and see *Scully* v. *Delany*, 2 Ir. Eq. Rep. 165.

(*g*) *Luther* v. *Bianconi*, 10 Ir. Ch. Rep. 194.

payment is deferred by the terms of the trust to a specified time (*a*), but where there are no funds available trustees are not bound to institute proceedings at their own expense (*b*)]. If it appears, or there is reasonable ground for believing, that had legal steps been taken they would have produced no useful result, the executor or trustee is not liable (*c*); [but where a trustee seeks to excuse himself on this ground, the burden of showing that if he had taken proceedings no good would have resulted from them lies upon him (*d*).]

Case of trust fund outstanding on mortgage.

6. Money outstanding upon good *mortgage* security an executor is not called upon to realize, until it is wanted in the course of administration (*e*). "For what," said Lord Thurlow, "is the executor to do? Must the money lie dead in his hands, or must he put it out on fresh securities? On the original securities he had the testator's confidence for his sanction, but on any new securities it will be at his own peril" (*f*). But the trustee should ascertain that there is no reason to suspect the goodness of the security (*g*); and if it be not adequate, it is the duty of the trustee to insist on its being paid, though by the terms of the settlement every investment or change of investment is to be with the *consent* of the tenant for life who refuses, for nothing will justify conduct that puts the trust fund in danger (*h*).

How money to be received by trustees.

7. When the property is reduced into possession by actual payment, [and the circumstances of the case are such as render it impracticable or highly inconvenient for both trustees to be present at the payment of the money (*i*), while both must join in signing the receipt, it is conceived that the money may be *paid* for the time to one without responsibility on the part of the other. In a recent case, however, (*j*) where the question was as

[(*a*) *Re Brogden*, 38 Ch. Div. 546, 568; *Re Hurst*, 63 L. T. N.S. 665; and as to the effect of sec. 37 of the Conveyancing Act, 1881, see *Re Owens*, 47 L. T. N.S. 61, 64.]

[(*b*) *Tudball* v. *Medlicott*, 59 L. T. N.S. 370; 36 W. R. 886.]

(*c*) *Clack* v. *Holland*, 19 Beav. 262; *Hobday* v. *Peters* (No. 3), 28 Beav. 603; *Alexander* v. *Alexander*, 12 Ir. Ch. Rep. 1; *Maitland* v. *Bateman*, 16 Sim. 233, note; *Walker* v. *Symonds*, 3 Sw. 71.

[(*d*) *Re Brogden*, 38 Ch. Div. 546, 568; *Re Hurst*, 63 L. T. N.S. 665.]

(*e*) *Orr* v. *Newton*, 2 Cox, 274; and see *Howe* v. *Earl of Dartmouth*, 7 Ves. 150.

(*f*) *Orr* v. *Newton*, 2 Cox, 276.

(*g*) See *Ames* v. *Parkinson*, 7 Beav. 384.

(*h*) *Harrison* v. *Thexton*, 4 Jur. N.S. 550.

[(*i*) If money be laid down on a table in the presence of all the trustees, that is a payment to all of them, and if one of them be commissioned by the others to take it to the bank, that is an act subsequent to the receipt of the money with which the person paying the money is not concerned; per Kay, J., *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592, 599.]

[(*j*) *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592.]

to the payment of purchase-money to trustees who were selling under a power of sale, Kay, J., expressed the opinion that it would be a breach of trust on the part of one trustee to allow his co-trustee to *receive* the trust money. But the early authorities on the general point were not specially considered, and it is conceived that the rule which was previously established (*a*), that a trustee joining in a receipt merely for the sake of conformity is not responsible for money not actually received by him still remains in force.] But a trustee will not be justified in allowing the co-trustee to *retain* the money in his hands for a longer period than the particular circumstances of the case may *necessarily* require. And, indeed, the safer course, where practicable, is, that the money should not be handed to either of the trustees personally, but should, in the first instance, be paid into some bank of credit to their joint account (*b*).

Receipts of trustees.

8. If money be payable to A., who is simply a trustee for B., it would clearly be a breach of trust to pay it to the trustee against the wishes of the *cestui que trust* (*c*); and, on the other hand, if the nature of the trust be such that the person who has the money ready in his hands could not reasonably be expected to see to the application, he may pay safely to the trustee (*d*). Some recent cases in Ireland have gone further, and taken a distinction between monies which are *pure personalty* and monies payable on *sales* or *mortgages*. Thus, where the owner of a policy assigned it to a trustee for a minor without a power of signing receipts, the Master of the Rolls in Ireland expressed an opinion (for a decision was not then called for), that if the Insurance Company were released from the debt by the person to whom they were liable at law, and whom the owner of the policy had constituted the trustee of it, they would not be

[(*a*) See *ante*, p. 281; and the cases there cited note (*b*). It must however be borne in mind that the rule allowing a trustee to sign a receipt for the sake of conformity without actually receiving the trust-money was founded on *necessity*, and that as at the present day, through increased means of communication and locomotion and the facilities of passing money through banks, trustees can in most cases at very slight expense avoid the risk of putting the trust-money, even for a moment, in the power of ONE of themselves, the cases in which they can escape liability on the plea of having signed merely for the sake of conformity are more restricted than formerly, and the plea is one which can only be relied upon under exceptional circumstances.]

[(*b*) See *ante*, p. 281. As to the provisions of the Conveyancing Act, 1881, and the Trustee Act, 1888, authorising the receipt of money by the solicitor of the trustees as their agent, *vide post*, Chap. xviii. sec. ii.]

(*c*) *Pritchard* v. *Langher*, 2 Vern. 197.

(*d*) *Glynn* v. *Locke*, 3 Dru. & War. 11.

answerable in equity for the execution of the trusts, and he did not understand how the rules applicable to purchasers of *real property* could be extended to debtors so as to implicate them in trusts created by their creditors (*a*). And in another case (*b*), where the insurer effected a policy for 700*l.*, and then assigned it to a trustee to pay 400*l.* to one, and 300*l.* to another, without an express power of signing receipts, and a *bonus* of 33*l.* was added to the policy, and the insurer being dead without a personal representative, and one of the *cestuis que trust* being also dead without a sufficient personal representative, and the other *cestui que trust* being in America, the company instituted an interpleader suit,—the Lord Chancellor of Ireland laid down the same distinction as the Master of the Rolls between a *personal debt* and money arising out of *real estate*, and held that the trustee could sign a discharge, and that the interpleader suit could not be sustained. The decision of the Lord Chancellor may have been correct, for the circumstance of one *cestui que trust* being abroad, and the other dead without a personal representative, as was also the insurer himself, may have justified the company in paying to the trustee; but the suggested distinction between pure personalty and money raised out of realty, until adopted by the English Courts, cannot be relied upon.

22 & 23 Vict. c. 35.

9. By a late Act it is declared that where "*purchase* or *mortgage* money *shall be* payable to a person upon any express or implied trust," and the payment is made *bonâ fide*, the receipt of the trustee "*shall* effectually discharge the person paying the same, unless the contrary *shall be* expressly declared by the instrument creating the trust" (*c*). It seems the better opinion that the clause applies only to trusts created since the Act, viz. 13*th August*, 1859, for how can a person expressly declare that an Act shall not apply when the Act itself does not exist?

23 & 24 Vict. c. 145.

10. By a more recent Act (*d*), the receipts of trustees for any money generally payable to them under any trust or power created by a deed, will or other instrument executed after 28*th August*, 1860, were made sufficient discharges (*e*).

[11. By a still more recent Act, which has repealed the last

(*a*) *Fernie* v. *Maguire*, 6 Ir. Eq. Rep. 137.

(*b*) *Ford* v. *Ryan*, 4 Ir. Ch. Rep. 342.

(*c*) 22 & 23 Vict. c. 35, s. 23.

(*d*) 23 & 24 Vict. c. 145, ss. 29, 34; and see s. 12.

(*e*) As to the doctrine of receipts generally, see *post*, Chap. xviii. s. ii.

enactment (*a*), the receipts of trustees for any money securities or other personal property or effects payable, transferable or deliverable to them under any trust or power, and whether the trust be created before or after the commencement of the Act, are made sufficient discharges (*b*).] [44 & 45 Vict. c. 41.]

12. Where the holder of the money knows that the trustee intends to commit a breach of trust, it would not be safe to pay to the trustee, whether he has by these Acts or otherwise a power of signing receipts or not. But the fact of such a knowledge must be brought home to the person paying, so as to make him *particeps criminis*, a privy to the fraud (*c*). Receipt of a trustee who is known to intend a breach of trust.

SECTION II.

OF THE SAFE CUSTODY OF TRUST PROPERTY.

1. Lord Northington once observed, "No man can require or with reason expect that a trustee should manage another's property with the same care and discretion that he would his own" (*d*); but the maxim has never failed, as often as mentioned, to elicit strong marks of disapprobation, [and it is now established on the highest authority that the law requires of a trustee the same degree of diligence and care in the execution of his office that a man of ordinary prudence would exercise in the management of his own affairs, but that as a general rule no higher degree of diligence will be required of him (*e*).] Trustee must take same care of the trust property as of his own.

2. A trustee in an old case, had kept in his house 40*l.* of trust money, and 200*l.* belonging to himself, and was robbed of both by his servant, and was held not to be responsible (*f*). An administratrix had left goods with her solicitor to be delivered to the party entitled. The articles were stolen; and the Court said it Robbery of the trust property.

[(*a*) 44 & 45 Vict. c. 41, s. 71.]

[(*b*) 44 & 45 Vict. c. 41, s. 36.]

(*c*) See *Fernie* v. *Maguire*, 6 Ir. Eq. Rep. 137; [*Hone* v. *Abercrombie*, 46 J. P. 487.]

(*d*) *Harden* v. *Parsons*, 1 Eden, 148.

[(*e*) *Learoyd* v. *Whiteley*, 12 App. Cas. 727, 733; and see *Knox* v. *Mackinnon*, 13 App. Cas. 753; *Rae* v. *Meek*, 14 App. Cas. 558, 569;] *Morley* v. *Morley*, 2 Ch. Cas. 2, *per* Lord Nottingham; *Budge* v. *Gummow*, 7 L. R. Ch. App. 720, *per* V. C. Bacon; *Jones* v. *Lewis*, 2 Ves. 241, *per* Lord Hardwicke; *Massey* v. *Banner*, 1 J. & W. 247, *per* Lord Eldon; *Attorney-General* v. *Dixie*, 13 Ves. 534, *per eundem*; [*Re Speight*, 22 Ch. Div. 739, *per* Jessel, M.R.; *S. C.* in D. P. 9 App. Cas. 19, *per* Lord Blackburn; and as to the application of the principle to cases of investment, *vide post*, sec. iv.]

(*f*) *Morley* v. *Morley*, *ubi supra*; and see *Jones* v. *Lewis*, 2 Ves. 241; *Ex parte Belchier*, Amb. 220; *Ex parte Griffin*, 2 Gl. & J. 114. But see *Sutton* v. *Wilders*, 12 L. R. Eq. 377.

was the same as if they had been in the custody of the administratrix, and it was too hard to charge her with the loss (*a*). Lord Romilly, however, in a recent case, made a distinction between a loss arising from a *criminal act* done by a *stranger*, and a *criminal act* done by an *agent* appointed by the trustee himself, and held that in the latter case, but aggravated by circumstances of carelessness, and where both parties were innocent, the trustee was liable (*b*).

Chattels passing by delivery.

3. Where there are several trustees, as they cannot all have the custody of the property, if the subject of the trust be articles which pass by delivery, as plate, they should be deposited with the bankers of the trustees (*c*). As to stocks transferred by delivery and payable to bearer, as Spanish bonds, Vice-Chancellor Wood observed, that "no doubt the bonds might be kept at the bankers' in a box with *three locks*, opened by *three different keys*, one to be kept by each of the three trustees; but as the interest was payable upon *coupons* twice a year, so that the box must be opened as often for that purpose, he thought that ordinary prudence did not require such a course to be adopted, more particularly as it would be the bankers' duty to see that the *coupons* only were taken out of the box, and that neither the box nor the securities were removed;" and so it was decided (*d*).

[Where Russian Railway bonds which passed by delivery were purchased by two trustees, and each of the trustees took possession of a moiety of the bonds, but one of the trustees disposed of the moiety held by him and applied the proceeds for his own purposes, it was held that the other trustee was liable for the misapplication, as it was the duty of the trustees where the bonds were transferable by delivery to take care that no improper disposition could be made of them (*e*).]

Insurance.

4. An executor has been held *not* to be answerable for having omitted to secure the safety of *leasehold* premises by *insuring* them against fire (*f*).

[By the Trustee Act, 1888 (*g*) it is now provided that "it shall be lawful for, but not obligatory upon, a trustee (*h*) to insure

(*a*) *Jones* v. *Lewis*, 2 Ves. 240.

(*b*) *Bostock* v. *Floyer*, 1 L. R. Eq. 28; 35 Beav. 603; [and see *Re Brier*, 26 Ch. Div. 238.]

(*c*) *Mendes* v. *Guedalla*, 2 J. & H. 259.

(*d*) *Mendes* v. *Guedalla*, 2 J. & H. 259; *Consterdine* v. *Consterdine*, 31 Beav. 331; and see *Matthews* v. *Brise*, 6 Beav. 239.

[(*e*) *Lewis* v. *Nobbs*, 8 Ch. D. 591.]

(*f*) *Bailey* v. *Gould*, 4 Y. & C. 221; and see *Ex parte Andrews*, 2 Rose, 410; *Dobson* v. *Land*, 8 Hare, 216; *Fry* v. *Fry*, 27 Beav. 146.

(*g*) 51 & 52 Vict. c. 59.

[(*h*) Which expression (by s. 1) includes an executor or administrator,

against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to pay the premiums for such insurance out of the income thereof, or out of the income of any other property, subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income;" but this provision does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any *cestui que trust* upon being requested so to do. The Act (*a*) applies as well to trusts created by instruments executed before as to trusts created after its passing, but nothing therein contained is to authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do by the instrument or instruments creating the trust."]

Trustee should place trust money in a responsible bank, but not to his own credit.

5. If the subject of the trust be *money*, it may be deposited for *temporary* purposes in some responsible banking-house (*b*), but in such a manner that the *cestuis que trust* may follow the fund into the hands of the bankers (*c*), and it is no objection that the bank allows interest on the deposits (*d*). [But the trustees must not allow the money to remain on deposit longer than the circumstances of the trust require, and where a mortgage was paid off, and the money was placed on deposit at a bank as an interim investment, until a permanent investment could be found, and remained on deposit for fourteen months, when the bank failed, the trustees were held liable for the loss (*e*). And] if the trustee pay the money to his *own credit* and not to the separate account of the trust estate (*f*), or if he allow the drafts of another person to be honoured who draws upon the account and misapplies the

and a trustee whose trust arises by construction or implication of law.]

[(*a*) Sec. 12.]

(*b*) *Routh* v. *Howell*, 3 Ves. 565; *Jones* v. *Lewis*, 2 Ves. 241, *per* Lord Hardwicke; *Adams* v. *Claxton*, 6 Ves. 226; *Ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Attorney-General* v. *Randall*, 21 Vin. Ab. 534, *per* Lord Talbot; *Massey* v. *Banner*, 1 Jac. & W. 248, *per* Lord Eldon; *Horsley* v. *Chaloner*, 2 Ves. 85, *per* Sir J. Strange; *France* v. *Woods*, Taml. 172; *Lord Dorchester* v. *Earl of Effingham*, Id. 279; *Wilks* v. *Groom*, 3 Drew. 584; *Johnson* v. *Newton*, 11 Hare, 160; *Swinfen* v. *Swinfen* (No. 5), 29 Beav. 211.

(*c*) *Ex parte Kingston*, 6 L. R. Ch. App. 632.

(*d*) *Re Marcon's Estate*, W. N. 1871, p. 148; 40 L. J. N.S. Ch. 537.

[(*e*) *Cann* v. *Cann*, 33 W. R. 40; 51 L. T. N.S. 770.]

(*f*) *Wren* v. *Kirton*, 11 Ves. 377; *Fletcher* v. *Walker*, 3 Mad. 73; *Macdonnell* v. *Harding*, 7 Sim. 178; *Matthews* v. *Brise*, 6 Beav. 239; *Massey* v. *Banner*, 1 J. & W. 241. See observations of L. J. K. Bruce and L. J. Turner on this case in *Pennell* v. *Deffell*, 4 De G. M. & G. pp. 386, 392.

money (*a*), the trustee will be personally liable for the consequences.

Trustee must not put the trust-fund out of his own control.

6. And a trustee must not lodge the money in such a manner as to *put it out of his own control*, though it be not under the control of another. White, a receiver appointed by the Court, in order to induce Adams and Burlton to become his sureties, entered into an arrangement with them, that the rents, as received, should be deposited in a bank in the joint names of the sureties, and that all drafts should be in the *handwriting* of Anderson, who was Adams' partner, and should be signed by White. An account was opened upon this footing, and the bank failed, and a considerable loss was incurred. Sir J. Leach held that the receiver and his sureties were not to be answerable (*b*); but his Honour's decision was reversed on appeal by the Lord Chancellor (*c*); and this reversal was afterwards affirmed on the final appeal by the House of Lords (*d*). [So, by the Trustee Act, 1888 (*e*), although in specified cases a trustee is empowered to appoint a solicitor to be his agent to *receive* money, yet if he allows the money to remain under the control of such solicitor longer than is reasonably necessary to enable the solicitor to pay the money to him, his liability is expressly retained.]

Whether executors may place money in bank payable to either of the co-executors.

7. In a case before Sir A. Hart, in Ireland, an executor was held to be justified, though he had placed the assets in a bank so as to be under the control of the co-executor. The money was entered in the books to the *joint* account of the co-executors, but the bank was in the habit of answering the cheques of either co-executor *singly*. "It is the custom of bankers," said Lord Chancellor Hart, "that what is deposited by one to the joint account may be withdrawn by the cheque of the other; and for convenience of business, it is necessary this risk should be incurred, for it would be very hard to transact business if every cheque should be signed by all the executors" (*f*). However, his Lordship admitted that "if there were any fraud or collusion, wilful default or gross neglect, or if the executor had any reason to put a stop to the mismanagement by the co-executor, the case

(*a*) *Ingle* v. *Partridge*, 32 Beav. 661; 34 Beav. 411; *Evans* v. *Bear*, 10 L. R. Ch. App. 76; and see *Hardy* v. *Metropolitan Land and Finance Company*, 7 L. R. Ch. App. 427; reversing *S. C.* 12 L. R. Eq. 386.

(*b*) *Salway* v. *Salway*, 4 Russ. 60.

(*c*) 2 R. & M. 215.

(*d*) Id. 220. See the argument of Lord Brougham stated from MS. in 3rd Edition, p. 335. [The case in D. P. is reported *sub nom.*, *White* v. *Baugh*, 3 Cl. & F. 44; 2 Bli. N. S., 181.]

[(*e*) 51 & 52 Vict. c. 59, s. 2.]

(*f*) *Kilbee* v. *Sneyd*, 2 Moll. 186, see 200, 213.

would be altered" (*a*). But even with this qualification the doctrine is so contrary to the principle of other cases that no trustee or executor could be advised to rely upon it in practice (*b*).

Trustee responsible for bank if he ought not to have placed the money there.

8. The trustee will also be answerable for the failure of the bank, if he deposited the money there for safe custody, when it was his clear duty to have invested it in the funds for improvement (*c*), or if he left it there when he ought to have paid it to new trustees duly appointed (*d*), or into Court (*e*); or if, when the purposes of the trust do not require a balance to be kept in hand, he lend a sum to the bank at interest upon no other security than their notes, for this in effect cannot be distinguished from an ordinary loan on personal security, which the Court never sanctions (*f*). And if the trustees ought not under the circumstances to have left *so large* a balance in the hands of the bankers, they will be liable for the excess beyond the proper balance (*g*). But trustees will not be liable for having left moneys in the hands of a respectable bank during the first year from the testator's death, when there are no special directions in the will for investment, and the estate has not been wound up (*h*). But they will be liable, if, during the first year they draw out of one bank money which ought, by the will, to be invested in Government stocks, and deposit it in another bank at interest, for this is an irregular investment and not a deposit; and a direction in the will that the trustees should not be liable for any *banker* was held not to be material (*i*).

Mixing the trust property with private property.

9. The trustee, wherever the trust property may be placed, must always be careful not to amalgamate it with his own, for, if he do, the *cestui que trust* will be held entitled to every portion of the blended property, which the trustee cannot prove to be his own (*j*).

(*a*) *Kilbee* v. *Sneyd*, 2 Moll. 203, 213.
(*b*) See *Clough* v. *Dixon*, 8 Sim. 594; 3 M. & Cr. 490; *Gibbins* v. *Taylor*, 22 Beav. 344; *Ingle* v. *Partridge*, 32 Beav. 661; 34 Beav. 411.
(*c*) *Moyle* v. *Moyle*, 2 R. & M. 710; Sir W. P. Wood in *Johnson* v. *Newton*, 11 Hare, 169, called it a very strong case, and hard upon the executors.
(*d*) *Lunham* v. *Blundell*, 4 Jur. N. S. 3.
(*e*) *Wilkinson* v. *Bewick*, 4 Jur. N. S. 1010.
(*f*) *Darke* v. *Martyn*, 1 Beav. 525.
(*g*) *Astbury* v. *Beasley*, 17 W. R. 638.
(*h*) *Johnson* v. *Newton*, 11 Hare, 160; *Swinfen* v. *Swinfen* (No. 5), 29 Beav. 211.
(*i*) *Rehden* v. *Wesley*, 29 Beav. 213.
(*j*) *Lupton* v. *White*, 15 Ves. 432; and *Panton* v. *Panton*, cited Ib. 440; *Chedwcrth* v. *Edwards*, 8 Ves. 46; *White* v. *Lincoln*, 8 Ves. 363; *Fellows* v. *Mitchell*, 1 P. W. 83; *Gray* v. *Haig*, 20 Beav. 219; *Duke of Leeds* v. *Amherst*, 20 Beav. 239; *Mason* v. *Morley* (No. 1), 34 Beav. 471, and *S. C.* (No. 2), Ib. 475; *Cook* v. *Addison*, 7 L. R. Eq. 466.

SECTION III.

OF CONVERSION.

General principle.

1. EXPRESS trusts for conversion, must, of course, be strictly pursued according to the directions (*a*), and where the trustees have a discretionary *power* to convert or not, or at such time as they may think fit, the Court cannot interfere with the exercise of the power (*b*). But besides express trusts of this kind, there is frequently imposed upon trustees a duty to convert, not directed in terms, but arising out of the nature of the property and the relation in which the *cestuis que trust* stand to each other.

Implied conversion in cases of bequests of wasting property to persons in succession.

2. As a general rule, if a testator give his personal estate (*c*), or the residue of his personal estate (*d*), or the interest of his property (*e*), in trust for or directly to (*f*) several persons in succession, and the subject of the bequest is of a wasting nature, as leaseholds, long annuities, &c., the Court implies the intention that such perishable estate should assume a permanent character, and so become capable of succession. The Court accordingly, in these cases, directs a conversion into Consols (*g*), and trustees and executors are bound to observe the same rule in their administration of property out of Court, and if they fail to do so, will be liable as for a breach of trust (*h*).

Intention to give right of enjoyment *in specie* may be collected from the bequest.

3. But an intention that the property should be enjoyed *in specie* may appear from the form of the bequest, or be collected from the terms in which it is expressed. Thus if there be a *specific bequest* of leaseholds or of stock the specific legatee will take the rents or dividends (*i*). And a power of varying the

(*a*) See *Craven* v. *Craddock*, 20 L. T. N.S. 638.

(*b*) *In re Sewell's Trusts*, 11 L. R. Eq. 80. See *ante*, p. 306.

(*c*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 137.

(*d*) *Cranch* v. *Cranch*, cited *Howe* v. *Earl of Dartmouth*, 7 Ves. 141, note; *Powell* v. *Cleaver*, cited Ib. 142; *Lichfield* v. *Baker*, 2 Beav. 481; *Crawley* v. *Crawley*, 7 Sim. 427; *Sutherland* v. *Cooke*, 1 Coll. 498; *Johnson* v. *Johnson*, 2 Coll. 441; *Re Shaw's Trust*, 12 L. R. Eq. 124; [*Re Smith's Estate*, 48 L. J. Ch. 205.]

(*e*) *Fearns* v. *Young*, 9 Ves. 549; *Benn* v. *Dixon*, 10 Sim. 636. See *Oakes* v. *Strachey*, 13 Sim. 414.

(*f*) *House* v. *Way*, 12 Jur. 959.

[(*g*) *I.e.* formerly 3 per cent. Bank Annuities, and now $2\frac{3}{4}$ per cent. (after April 5, 1903, $2\frac{1}{2}$ per cent.) Consolidated Stock under 51 Vict. c. 2, see *post*, sec. iv.]

(*h*) *Bate* v. *Hooper*, 5 De G. M. & G. 338. [As to the power of trustees to invest otherwise than in 3 per cent. Bank Annuities, and as to the conversion of the old Government Annuities into stock of lower denomination, see *post*, sec. iv. of this chapter.]

(*i*) *Vincent* v. *Newcombe*, Younge, 599; *Lord* v. *Godfrey*, 4 Mad. 455. But it is not necessary that the bequest should technically be specific in order to entitle the tenant for life to enjoy

securities expressly given to the executors will not prejudice the right of the specific legatee, for the testator is held to have given the executors the authority, not with the intention of varying the relative rights of the legatees, but merely with the view of adding security to the property (*a*).

Use of word "*rents*."

4. Again, if after a mention of leaseholds, there is a general direction to pay *rents* to the tenant for life, this is held sufficient to prevent the application of the general rule (*b*), though it is doubtful upon the authorities whether the use of the word *rents* in connection with a gift containing no mention of leaseholds would have the same effect (*c*). A mere mention of "dividends" is certainly not sufficient to authorize the non-conversion of terminable annuities (*d*). But a bequest of the testator's public funds or government annuities (*e*), or of the "interest, dividends, or income of all monies or stock, and of all other property yielding income at the testator's death" has been held to be specific (*f*).

Conversion directed at a later period.

5. And if a testator negative a sale at the time of his death by authorizing or directing a conversion at a subsequent period (*g*); or if he use any other expressions which assume the leaseholds

the income in specie; see *Pickering* v. *Pickering*, 4 M. & Cr. 299; *Hubbard* v. *Young*, 10 Beav. 205; *Harris* v. *Poyner*, 1 Drew. 181. The case of *Mills* v. *Mills*, 7 Sim. 501, is contrary to the other authorities, and is not law.

(*a*) *Lord* v. *Godfrey*, 4 Mad. 455; and see *Morgan* v. *Morgan*, 14 Beav. 72; *Re Llewellyn's Trust*, 29 Beav. 171. [If leaseholds which a tenant for life is entitled to enjoy *in specie*, be taken by a company under the provisions of the Lands Clauses Consolidation Act, or sold under the Settled Estates Act, the purchase money should be converted into an annuity having the same duration as the lease, which should be paid to the person who would for the time being have received the rents of the leaseholds. *Askew* v. *Woodhead*, 14 Ch. Div. 27; *Re Walsh's Trusts*, 7 L. R. Ir. 554. As to the application of the purchase money in the case of sales under the Settled Land Act, 1882, of leasehold or reversionary interests; see sect. 34 of the Act.]

(*b*) *Blann* v. *Bell*, 2 De G. M. & G. 775; *Crowe* v. *Crisford*, 17 Beav. 507; *Hood* v. *Clapman*, 19 Beav. 90; *Marshall* v. *Bremner*, 2 Sm. & G. 237; *Re Elmore's Trusts*, 6 Jur. N. S. 1325; and see *Thursby* v. *Thursby*, 19 L. R. Eq. 395.

(*c*) See *Goodenough* v. *Tremamondo*, 2 Beav. 512; *Hunt* v. *Scott*, 1 De G. & Sm. 219; *Wearing* v. *Wearing*, 23 Beav. 99; *Pickup* v. *Atkinson*, 4 Hare, 624; *Craig* v. *Wheeler*, 29 L. J. N.S. Ch. 374; *Vachell* v. *Roberts*, 32 Beav. 140.

(*d*) *Blann* v. *Bell*, 2 De G. M. & G. 775; *Hood* v. *Clapham*, 19 Beav. 90; and see *Sutherland* v. *Cooke*, 1 Coll. 503; *Neville* v. *Fortescue*, 16 Sim. 333; *Pidgeon* v. *Spencer*, 16 L. T. N.S. 83.

(*e*) *Wilday* v. *Sandys*, 7 L. R. Eq. 455.

(*f*) *Boys* v. *Boys*, 28 Beav. 436.

(*g*) *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; *Bowden* v. *Bowden*, 17 Sim. 65; *Burton* v. *Mount*, 2 De G. & Sm. 383; *Alcock* v. *Sloper*, 2 M. & K. 699; [*Simpson* v. *Lester*, 4 Jur. N.S. 1269; 33 L. T. 6; *Gray* v. *Siggers*, 15 Ch. D. 74; *Re Leonard*, 29 W. R. 234; 43 L. T. N.S. 664;] *Hind* v. *Selby*, 22 Beav. 373; *Skirving* v. *Williams*, 24 Beav. 275; *Harvey* v. *Harvey*, 5 Beav. 134; *Hinves* v. *Hinves*, 3 Hare, 609; *Rowe* v. *Rowe*, 29 Beav. 276.

or stock to be unconverted when by the general rule it would be converted, the doctrine of conversion is excluded (*a*).

Rule does not assume *intention of a sale.*

6. The rule of the Court under which perishable property is converted does not proceed upon the assumption that the testator in fact intended his property *to be sold,* but is founded upon the circumstance that the testator intended the perishable property to be enjoyed by different persons in succession, which is accomplished by means of a sale (*b*). The Court presumes that intention unless a contrary intention appear on the face of the will, and the only difficulty is, what will constitute a sufficient indication of a contrary intention, the more recent decisions allowing smaller indications to prevail than were formerly deemed necessary (*c*).

Rule as to conversion where property is not wasting, but of a class not authorized by the Court.

7. The object of the rule, under which a direction to convert wasting property is implied, being to secure a fair adjustment of the rights of the tenant for life and those coming after him, it follows that where a residue which, without any express trust for conversion, is bequeathed to persons in succession, consists of property which, though not wasting, is of a class producing a high rate of interest in proportion to its money value, and liable consequently to additional risk, such as railway shares, shares of insurance or other companies, foreign bonds, or stocks, &c., the persons entitled in expectancy have a right to call for the conversion of such property into Consols (*d*). [But where trustees are expressly empowered to retain existing securities, the mere fact that some of the securities retained are of a hazardous nature will not disentitle the tenant for life to the receipt of the income in specie (*e*).]

Case of debts.

8. Even where the general estate or residue is directed to be enjoyed *specifically,* the tenant for life is not entitled to enjoy in specie what is not an investment, but a mere debt (*f*), and a special power for the executors and trustees "to *continue* in-

(*a*) *Collins* v. *Collins*, 2 M. & K. 703; see observations on this case in *Vaughan* v. *Buck*, 1 Ph. 78; *Lichfield* v. *Baker*, 13 Beav. 451; *Harris* v. *Poyner*, 1 Drew. 180; and contrast with the last case *Chambers* v. *Chambers*, 15 Sim. 190.

(*b*) *Cafe* v. *Bent*, 5 Hare, 35.

(*c*) *Craig* v. *Wheeler*, 29 L. J. N.S. Ch. 374; *Morgan* v. *Morgan*, 14 Beav. 82. [See *Macdonald* v. *Irvine*, 8 Ch. Div. 101.]

(*d*) *Thornton* v. *Ellis*, 15 Beav. 193; *Blann* v. *Bell*, 5 De G. & Sm. 658; 2 De G. M. & G. 775; *Wightwick* v. *Lord*, 6 H. L. Cas. 217. But the Court will not allow a mortgage to be called in, without an inquiry whether it is for the benefit of all parties to do so; *per* Lord Eldon, in *Howe* v. *Dartmouth*, 7 Ves. 150.

[(*e*) *Re Sheldon*, 39 Ch. D. 50, distinguishing *Porter* v. *Baddeley*, 5 Ch. D. 542.]

(*f*) *Holgate* v. *Jennings*, 24 Beav. 630, *per* M. R.; but it may be doubted whether the general doctrine laid down was rightly applied.

vested any of the testator's *government securities*" will not justify the trustees in continuing *long annuities* (*a*).

Direction for investment of personal estate and accumulations of income in land.

9. If a testator direct that his personal estate shall be converted and laid out in a purchase of lands, to be settled upon A. for life, with remainders over, and that *the interest of the personal estate shall be accumulated and laid out in a purchase of lands* to be settled to the same uses, the Court to prevent the hardship that would fall upon the tenants for life, if the purchases were deferred for a long period, either from unavoidable circumstances, or from the dilatoriness of the trustee, interprets the intention in such cases to be that the accumulation should be confined to one year from the testator's death. At the expiration of that period, the Court presumes the trustees to be in a condition to invest the personal estate, and gives the tenant for life the interest from that time (*b*). And, conversely, if a testator devise his real estate to be sold and the produce thereof, and also the *rents and profits of the said estate in the meantime, to be laid out in Bank Annuities or other securities*, upon trust for A. for life, with remainders over, the accumulation of the rents is not extended beyond one year from the testator's death, but the tenant for life is entitled to them from that period (*c*).

Devise of real estate upon trust to sell and invest proceeds and rents until sale.

Produce during first year from testator's death.

10. From the language used by Lord Eldon, in the case of *Sitwell* v. *Bernard* (*d*), (in which the rule, that the accumulation, where expressly directed, extends only to one year from the testator's death, was first established,) an impression prevailed that in no case was the tenant for life entitled to the income during the first year of the fund or land directed to be converted, and both Sir John Leach (*e*), and Sir Thomas Plumer (*f*), sanctioned this doctrine by their authority. However, Lord Eldon had no intention of laying down any such rule (*g*), and it has since been settled that where there is no express direction to accumulate, the tenant for life has an interest in the first year's income (*h*), but an interest varying according to the circumstances of the case, as will appear from the following distinctions.

(*a*) *Tickner* v. *Old*, 18 L. R. Eq. 422.

(*b*) *Sitwell* v. *Bernard*, 6 Ves. 520; *Entwistle* v. *Markland*, *Stuart* v. *Bruere*, cited Ib. 528, 529; *Griffith* v. *Morrison*, cited 1 J. & W. 311; *Tucker* v. *Boswell*, 5 Beav. 607; *Kilvington* v. *Gray*, 2 S. & S. 396; *Parry* v. *Warrington*, 6 Mac. 155; *Stair* v. *Macgill*, 1 Bligh, N.S. 662.

(*c*) *Noel* v. *Lord Henley*, 7 Price, 251; *Vickers* v. *Scott*, 3 M. & K. 500; and see *Vigor* v. *Harwood*, 12 Sim. 172; *Greisley* v. *Earl of Chesterfield*, 13 Beav. 288; *Beanland* v. *Halliwell*, 1 C. P. Cooper, *t.* Cottenham, 169, note (*a*).

(*d*) 6 Ves. 520.

(*e*) *Stott* v. *Hollingworth*, 3 Mad. 161.

(*f*) *Taylor* v. *Hibbert*, 1 J. & W. 308.

(*g*) See *Angerstein* v. *Martin*, T. & R. 238; *Hewitt* v. *Morris*, Ib. 244.

(*h*) *Macpherson* v. *Macpherson*, 16 Jur. 847.

Income of property applied in paying legacies.

(*a*.) The tenant for life of a residue is not entitled to the income accruing during the delay allowed for the *payment of legacies* on so much of the testator's property as is subsequently applied in paying them (*a*). Executors, as between themselves and the persons interested in the residue, are at liberty to have recourse to any funds they please for payment of debts and legacies, but in adjusting the accounts between the tenant for life and remainderman, they must be taken to have paid the debts and legacies not out of capital only or out of income only, but with *such portion of the capital, as together with the income of that portion for one year from the testator's death, was sufficient for the purpose* (*b*). As to *contingent legacies* which may or may not become payable, the tenant for life is, from a rule of convenience, entitled to the income of the fund as part of the residue, until the contingency arises (*c*).

Where funds are in the state they ought to be.

(β.) If a testator desire that his personal estate shall be laid out and invested either in Government or real securities, in trust for A. for life, with remainders over (*d*), or in a purchase of lands with a direction express (*e*) or implied (*f*) for the investment thereof in the mean time in Government or real securities, and that the lands to be purchased shall be in trust for A. for life, with remainders over, the income of the *Government and real securities* of which the testator was possessed at the time of his death (these being the very investments contemplated by his will), belongs *from the time of the death* to the tenant for life.

Where the proper investment is made before the end of the year.

(γ.) If, during the first year, the *conversion* directed by the testator is *actually made*, the tenant for life is also entitled to the produce of the property, in its converted form, from the time

(*a*) *Holgate* v. *Jennings*, 24 Beav. 623; *Crawley* v. *Crawley*, 7 Sim. 427; *Cranley* v. *Dixon*, 23 Beav. 512; *Fletcher* v. *Stevenson*, 3 Hare, 371; *Allhusen* v. *Whittell*, 4 L. R. Eq. 295; as to the principle to be applied where the debt is compromised, see *Maclaren* v. *Stainton*, 4 L. R. Eq. 448.

(*b*) *Allhusen* v. *Whittell*, 4 L. R. Eq. 295; *Lambert* v. *Lambert*, 16 L. R. Eq. 320; *Marshall* v. *Crowther*, 2 Ch. D. 199.

(*c*) *Allhusen* v. *Whittell*, 4 L. R. Eq. 305. [Where a fund was directed to be settled, and income undisposed of in the event of an interest in remainder not becoming vested, fell into the residue of the testator's estate, the income was held to pass as such to the tenant for life of the residue; *Fullerton* v. *Martin*, 1 Dr. & Sm. 31; and where a testator had covenanted for payment of an annuity which his personal estate was insufficient to provide for, it was held, as between tenant for life and remainderman of real estate, that the tenant for life paying the annuity would be entitled in respect of each payment to a charge upon the corpus, but must keep down the interest on the amount so charged; *Re Harrison*, 43 Ch. D. 55.]

(*d*) *Hewitt* v. *Morris*, T. & R. 241; *La Terriere* v. *Bulmer*, 2 Sim. 18; *Allhusen* v. *Whittell*, 4 L. R. Eq. 295.

(*e*) *Angerstein* v. *Martin*, T. & R. 232.

(*f*) *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312, 737.

of the conversion, as if land be directed to be sold, and the produce invested in Government or real securities (*a*), or money be directed to be laid out on land (*b*), the tenant for life is entitled to the dividends or interest in the first case, from the time of the sale and investment, and to the rents in the latter case from the time of the purchase, though made in the course of the first year.

Where the funds are not at the testator's death in the state they ought to be.

(δ.) Where, at the death of the testator, the property is not in the state in which it is directed to be, the tenant for life is, before the conversion, entitled, as the Court has now decided, not to the actual produce, but to a reasonable fruit of the property, from the death of the testator up to the time of the conversion, whether made in the course of the first year, or subsequently; as if personal estate be directed to be laid out in Government or real securities, and part of the personal estate consists of bonds, bank stock, etc. (not being Government or real securities), the tenant for life is entitled to the dividends *from the death of the testator on so much Consols as such part of the personal estate, not being Government or real securities, would have purchased at the expiration of one year from the testator's death* (*c*).

Case of *ultra* income, but without risk.

(ε.) Where the nonconversion is attended with any risk to the property, as in the case of bonds, &c., the *remainderman*, whose interest is thus imperilled, has a right to share in the extra profit of the annual produce (*d*); but suppose *land* to have

(*a*) *La Terriere* v. *Bulmer*, 2 Sim. 18; *Gibson* v. *Bott*, 7 Ves. 89.

(*b*) See *Angerstein* v. *Martin*, T. & R. 240.

(*c*) *Dimes* v. *Scott*, 4 Russ. 195. In *Douglas* v. *Congreve*, 1 Keen, 410, the M. R. gave the tenant for life the actual interest of the personal estate making interest from the death of the testator until the end of one year; and in *Robinson* v. *Robinson*, 1 De G. M. & G. 247, the tenant for life was allowed 4 per cent. from the expiration of one year; but in the cases of *Taylor* v. *Clark*, 1 Hare, 161; *Morgan* v. *Morgan*, 14 Beav. 72; *Holgate* v. *Jennings*, 24 Beav. 623; *Brown* v. *Gellatly*, 2 L. R. Ch. App. 752; *Allhusen* v. *Whittell*, 4 L. R. Eq. 295; *Re Llewellyn's Trust*, 29 Beav. 171; *Hume* v. *Richardson*, 4 De G. F. & J. 29, the authority of *Dimes* v. *Scott* was followed; but in the last case (*Hume* v. *Richardson*), the Court gave the tenant for life the income of so much 3 per cent. Consolidated Bank Annuities as would have been purchased had the conversion been made at the *testator's death*, and not at the *expiration of one year from the testator's death*. In *Allhusen* v. *Whittell*, 4 L. R. Eq. 295, V. C. Wood considered the true principle to be, to ascertain what part of the testator's estate (including the income of such part during the first year from the testator's death) was required for the payment of funeral and testamentary expenses, debts, and legacies, and to give the tenant for life the income of the residue from the testator's death, any part not in a proper state of investment to be taken as invested in Consols at the death of the testator.

(*d*) *Dimes* v. *Scott*, 4 Russ. 195. But see *Stroud* v. *Gwyer*, 28 Beav. 130, which M. R. distinguished from *Dimes* v. *Scott*, on the ground that in the latter the irregular investment existed at the death of the testator, but in *Stroud* v. *Gwyer*, the irregular investment had been made by the trustees. This appears to be a somewhat thin distinction, [and has been doubted in a recent case, *Re Hill*, 50 L. J. N.S.

yielded a rental beyond what would have been the annual produce of the purchase-money, and there has been no depreciation, can the remainderman call back the extra rent received by the tenant for life, or as the remainderman gets all that was ever intended for him, viz. the undepreciated property, may the tenant for life keep the full rent? If not, then, conversely, if the land yield no annual fruit, or less than the purchase-money would yield, the tenant for life should have a claim against the remainderman (*a*). But if the tenant for life be also a *trustee* for sale, and neglect to sell, he cannot be allowed to put into his own pocket the higher annual produce which has arisen from his own laches, for no trustee can derive a profit from the exercise of his own office (*b*).

Gibson *v.* Bott.

(ζ.) In *Gibson* v. *Bott* (*c*), leaseholds from a defect of title *could not be sold*, and the Court gave the tenant for life interest at 4 per cent. from the death of the testator on the value. It does not appear from the report at *what time* the value was to be taken, but according to recent cases it should have been ascertained at the expiration of one year from the testator's death (*d*).

Capital coming in by instalments.

(η.) If the testator's estate comprise funds not immediately convertible, but *receivable by instalments*, such as the testator's share in a partnership assessed at a certain sum and payable by instalments, carrying interest at 5 per cent., the tenant for life is allowed 4 per cent. from the *death of the testator* on the value taken at the *expiration of one year* from the testator's death (*e*).

Discretion expressly given by the testator.

(θ.) If it appear from the terms of the will that the testator intended to give his trustees a *discretion* as to the time of conversion, which discretion has been fairly exercised, and that the tenant for life was to have the actual income until conversion, the case must be governed by the testator's intention, and not by the general rule (*f*). But if the power be so expressed as to negative the intention of varying by its exercise the rights of the parties, the general rule will prevail (*g*).

Ch. 551; 45 L. T. N.S. 126. Where the consent of the tenant for life to change of investment is required, the Court will not readily order a conversion against his will, even though the investment is in bank shares involving personal liability; *Parke* v. *Thackray*, 28 W. R. 21; *Re Mullett*, W. N. 1885, p. 130.]

(*a*) See *Yates* v. *Yates*, 28 Beav. 637.

(*b*) See *Wightwick* v. *Lord*, 6 H. L. Cas. 217.

(*c*) 7 Ves. 89.

(*d*) See *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312, 737; *Sutherland* v. *Cooke*, 1 Coll. 503.

(*e*) *Re Llewellyn's Trust*, 29 Beav. 171; *Meyer* v. *Simonsen*, 5 De G. & Sm. 723.

(*f*) *Mackie* v. *Mackie*, 5 Hare, 70; *Wrey* v. *Smith*, 14 Sim. 202; *Sparling* v. *Parker*, 9 Beav. 524; *Johnstone* v. *Moore*, 4 Jur. N.S. 356; 27 L. J. Ch. 453; *Re Sewell's Trust*, 11 L. R. Eq. 80; [*Re Chancellor*, 26 Ch. Div. 42;] and see *Murray* v. *Glasse*, 17 Jur. 816.

(*g*) *Brown* v. *Gellatly*, 2 L. R. Ch.

[11. If the trust estate is improperly employed in trade, and large profits accrue, the tenant for life is only entitled to interest at 4 per cent. on the amount of capital so employed, and the rest of the profits must be added to the capital; but if the income is allowed to remain in the business and thereby conduces to subsequent accretions of profits, it would seem that the tenant for life is entitled to so much of these accretions as is attributable to his share of the income remaining in the business, and if necessary an inquiry will be directed to ascertain the amount (*a*).] [Trade profits.]

12. The principle upon which the Court implies in favour of those in remainder a direction to convert wasting property (namely, that both tenant for life and remainderman were intended to share in the enjoyment of it), demands equally in favour of the *tenant for life* a conversion of *future* or *reversionary* interests (*b*). Hence if a testator entitled to a reversion expectant on lives direct a conversion and investment of his personal estate, with a discretion to the trustees as to the time, and the trustees decline to sell until in event the reversion falls into possession, here had the reversion been sold at the end of one year from the testator's death, the tenant for life would have received the interest of the purchase-money, and the fund therefore, when it falls into possession, represents the capital with the interim interest; and the Court, under these circumstances [formerly gave] the tenant for life out of the capital the difference between the money [actually] received and the value of the reversion estimated at one year from the testator's death of the sum in question on the assumption of its being payable on the day, when, as afterwards happened, it actually fell into possession (*c*). [But this method of computation has since been slightly modified, and the method now adopted is to ascertain the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, amount on the day when the reversion falls in or is realized to the sum actually received. The sum so ascertained represents the corpus, and the difference between that sum and the sum actually received is income (*d*). This method of computation applies equally to any Reversionary interest converted in favour of tenant for life.

App. 751; [*Porter* v. *Baddeley*, 5 Ch. D. 542.]

[(*a*) *Re Hill*, 50 L. J. N.S. Ch. 551; 45 L. T. N.S. 126.]

(*b*) *Howe* v. *Lord Dartmouth*, 7 Ves. 148.

(*c*) *Wilkinson* v. *Duncan*, 23 Beav. 469; [*Wright* v. *Lambert*, 6 Ch. D. 649.]

[(*d*) *Beavan* v. *Beavan*, 24 Ch. D.

outstanding personal estate, the conversion of which the trustees in the exercise of their discretion postpone for the benefit of the estate, and which eventually falls in, as for instance a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy (*a*).

[Principle applied to legacies.]

13. Where a reversionary interest, which was available for the payment of pecuniary legacies, was retained unsold for many years for the benefit of the estate, it was held, when the reversion fell in, that the legatees were entitled to interest on their legacies from the expiration of one year from the testator's death (*b*).]

SECTION IV.

OF INVESTMENT.

[It will be convenient in the first instance to treat this subject comprehensively so as to show the general powers which trustees possess as to the investment of trust money; and secondly, to consider more in detail the circumstances under which particular investments may be made, and the care to be observed in making them.

First. Of a trustee's general powers of investment.]

Of investment of trust-money.

1. Where trust-money (*c*) cannot be applied, either immediately or by a short day, to the purposes of the trust, it is the duty of the trustee to make the fund productive to the *cestui que trust* by the *investment* of it on some proper security.

Trustee may not invest on personal security.

2. It was the opinion of Lord Northington that a trustee might be justified in lending on personal credit. "The lending money on a note," he said, "is not a breach of trust, without other circumstances *crassæ negligentiæ*" (*d*). But the case from which this *dictum* is taken has been called by Lord Eldon, from the extraordinary doctrines contained in it, "a curious document

649, n.; *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; *Wright* v. *Lambert*, 6 Ch. D. 649; *Re Hobson*, 55 L. J. N.S. Ch. 422; 53 L. T. N.S. 627; 34 W. R. 70; *Re Flower, Matheson* v. *Goodwyn*, 62 L. T. N.S. 217, reversed on appeal on the construction of the will, W. N. (1890) p. 152.]

[(*a*) *Beavan* v. *Beavan*; *Re Earl of Chesterfield's Trusts*; *Re Hobson*; *ubi sup.*]

[(*b*) *Re Blachford*, 27 Ch. D. 676; as to the mode of apportionment between tenant for life and remainderman where a mortgage security proves insufficient, see *Re Moore*, 54 L. J. N.S. Ch. 432; *Re Ancketill*, 27 L. R. Ir. 331.]

[(*c*) The expression "trust money," it may be observed, comprises (1) money passing into the hands of the trustees at the inception of the trust; (2) money belonging to the trust which is outstanding at its inception, and is subsequently received by the trustees; and (3) money received by the trustees as the proceeds of the conversion of trust property.]

(*d*) *Harden* v. *Parsons*, 1 Eden, 148.

in the history of trusts" (*a*); and certainly it is now indisputably settled that a trustee *cannot* lend on personal security (*b*). Lord Hardwicke said, "a promissory note is *evidence* of a debt, but no *security* for it" (*c*); and Baron Hotham observed, that "lending on personal credit for the purpose of gaining a larger interest was a species of *gaming*" (*d*); and Lord Kenyon said, that "no rule was better established than that a trustee could not lend on mere personal security, and it ought to be *rung in the ears* of every one who acted in the character of trustee" (*e*). And it will not alter the case that the money is lent on the *joint* security of *several* obligors (*f*), or to a person to whom the testator himself had been in the habit of advancing money on personal security (*g*).

Investment on stock of private company.

3. A trustee may not invest the trust fund in the *stock of any private company*, as South Sea *stock*, &c., for the capital depends upon the management of the governors and directors, and is subject to losses. The South Sea Company, for instance, might trade away their whole capital, provided they kept within the terms of their charter (*h*). Nor until Lord St. Leonards' Act (*i*) (to be presently mentioned), could a trustee invest in Bank stock (*j*). "Bank stock," said Lord Eldon, "is as safe, I trust and believe, as any Government security, but it is not Government security, and therefore this Court does not lay out or leave property in Bank stock; and what this Court will decree, it expects from trustees and executors" (*k*). But a trustee or

(*a*) *Walker* v. *Symonds*, 3 Sw. 62.

(*b*) *Adye* v. *Feuilleteau*, 1 Cox, 24; *Vigrass* v. *Binfield*, 3 Mad. 62; *Darke* v. *Martyn*, 1 Beav. 525; *Holmes* v. *Dring*, 2 Cox, 1; *Terry* v. *Terry*, Pr. Ch. 273; *Ryder* v. *Bickerston*, cited *Harden* v. *Parsons*, 1 Eden, 149, note (*a*), and more fully *Walker* v. *Symonds*, 3 Sw. 80, note (*a*); *Walker* v. *Symonds*, 3 Sw. 63; *Anon. case*, Lofft, 492; *Keble* v. *Thompson*, 3 B. C. C. 112; *Wilkes* v. *Steward*, G. Coop. 6; *Clough* v. *Bond*, 3 M. & Cr. 496, *per Cur.*; and see *Pocock* v. *Reddington*, 5 Ves. 799; *Collis* v. *Collis*, 2 Sim. 365; *Blackwood* v. *Borrowes*, 2 Conn. & Laws, 477; *Watts* v. *Girdlestone*, 6 Beav. 188; *Ex parte Geaves*, 8 De G. M. & G. 291.

(*c*) *Ryder* v. *Bickerton*, cited *Walker* v. *Symonds*, 3 Sw. 81 note (*a*).

(*d*) *Adye* v. *Feuilleteau*, 1 Cox, 25.

(*e*) *Holmes* v. *Dring*, 2 Cox, 1.

(*f*) Ib.

(*g*) *Styles* v. *Guy*, 1 Mac. & G. 423.

(*h*) *Trafford* v. *Boehm*, 3 Atk. 440; see 444; *Mills* v. *Mills*, 7 Sim. 501; *Adie* v. *Fennilitteau*, cited *Hancom* v. *Allen*, 2 Dick. 499, note; *Emelie* v. *Emelie*, 7 B. P. C. 259. The reporter speaks in the last case of South Sea *Annuities*; but no doubt the investment had been made in South Sea *stock*. In *Trafford* v. *Boehm* the investment had been in South Sea *stock*, but the reporter cites the case by a similar mistake as one of investment in South Sea *Annuities*. For the difference between the two see *Trafford* v. *Boehm*, 3 Atk. 444. *Adie* v. *Fennilitteau*, or, more correctly, *Feuilleteau*, has been examined in the Registrar's Book, but the point does not appear.

(*i*) 22 & 23 Vict. c. 35, s. 32.

(*j*) *Hynes* v. *Redington*, 1 Jones & Lat. 589; 7 Ir. Eq. Rep. 405.

(*k*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 150.

executor who by *mistake* invested in Bank stock instead of Bank Annuities, was not liable for the actual loss in sterling value, but only for the excess of the loss beyond that which would have resulted if the investment had been made in Bank Annuities (*a*).

Where no express power, trustees might invest in Consols.

4. In the absence of express powers created by the settlement and irrespective of powers conferred by statute, trustees, executors, or administrators have always been held justified in investing in one of the *Government* or *Bank Annuities;* for here, as the directors have no concern with the principal, but merely superintend the payment of the dividends and interest till such time as the Government may pay off the capital, it is not in their power, by mismanagement or speculation, to hazard the property of the shareholder (*b*). It should be observed that all *public* annuities are not necessarily *Government* annuities (*c*); and of the Government or Bank Annuities, the one which the Court thought proper to adopt was the *Three per Cent. Consolidated Bank Annuities* (*d*), the fund which at the time when the rule of the Court was established was considered from its low rate of interest the least likely to be determined by redemption (*e*). If a trustee, who had money in hand which he ought to have rendered productive, invested it on this security, he was held to have done his duty, and not to be answerable for any subsequent depreciation (*f*).

Investment on other stock ordered under particular circumstances.

5. The Court [would, however, even before the Acts to be afterwards referred to], under *special* circumstances [have invested] in other Government Stock than Consols. Thus, a testator gave his residuary estate to executors upon trust to pay the annual produce to A. for life in equal portions at *Lady-day* and *Michaelmas-day*, and after his decease in trust for other purposes. A motion was made that the executors might invest a sum in their hands in the Three per Cent. Consolidated Bank Annuities, but it was objected that the dividends of this stock were payable in January and July; whereas, if the money were

(*a*) *Hynes* v. *Redington*, 7 Ir. Eq. Rep. 405; 1 Jones & Lat. 589; see *post*, Chap. xxx. s. 3.

(*b*) *Trafford* v. *Boehm*, 3 Atk. 444, *per* Lord Hardwicke.

(*c*) *Sampayo* v. *Gould*, 12 Sim. 435.

[(*d*) Now converted under 51 Vict. c. 2, see *post*, p. 338.]

(*e*) See *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, 151.

(*f*) *Ex parte Champion*, cited *Franklin* v. *Frith*, 3 B. C. C. 434; *Powell* v. *Evans*, 5 Ves. 841, and *Howe* v. *Earl of Dartmouth*, 7 Ves. 150; *Knight* v. *Earl of Plymouth*, 1 Dick. 126, *per* Lord Hardwicke; *Peat* v. *Crane*, cited *Hancom* v. *Allen*, 2 Dick. 499, note; *Clough* v. *Bond*, 3 M. & Cr. 496, *per* Lord Cottenham; *Holland* v. *Hughes*, 16 Ves. 114, *per* Sir W. Grant; *Moyle* v. *Moyle*, 2 R. & M. 716, *per* Lord Brougham; and see *Jackson* v. *Jackson*, 1 Atk. 513.

laid out in the *Three per Cent. Reduced Annuities*, the dividends would be payable at the time directed by the testator; and Sir John Leach made the order accordingly (*a*).

Whether trustees might invest on any other Government security.

6. In the report of *Hancom* v. *Allen* (*b*) it is said, "The trust money had been laid out by the trustees in *funds* which sunk in their value, without any *mala fides;* but the same not being laid out in *the fund* in which the Court directs trust money to be laid out, the trustees were ordered to account for the principal and pay it into the Bank, and then that it should be laid out in *Bank Three per Cent. Annuities.*" It might be inferred from this statement, that, if a trustee before the recent Acts had invested in any other Government Security than the Three per Cent. Consols, the Court would have held him accountable for any loss by a fall of the stock; but such a doctrine would have been extremely severe against trustees (*c*), and the case, as extracted from the Registrar's book, is no authority for any such proposition. Thomas Phillips, a trustee of 1500*l.*, instead of investing the money in a purchase of land and in the mean time on some sufficient security, as required by the trust, had advanced it to his brother, John Phillips, a banker, without taking any other precaution than accepting a simple acknowledgment of the loan. John Phillips continued to pay interest upon the money for some time, but eventually became insolvent, and the fund was lost. The Court, under these circumstances, called upon the trustee to make good the amount. The decision was reversed in the House of Lords, probably on the ground of the plaintiff's acquiescence (*d*).

Investments on mortgage.

7. With respect to investments upon *mortgage* Lord Harcourt said, "The case of an executor's laying out money without the indemnity of a decree, if it were on a *real security and one that there was no ground at the time to suspect*, had not been settled: but it was his opinion that the executor, under such circumstances, was not liable to account for the loss" (*e*). And Lord Hardwicke (*f*), and Lord Alvanley (*g*), appear likewise to have held that a trustee or executor would be justified in laying out the trust-fund upon well-secured *real estates*. But

(*a*) *Caldecott* v. *Caldecott*, 4 Mad. 189.
(*b*) 2 Dick. 498.
(*c*) See *Angell* v. *Dawson*, 3 Y. & C. 316; *Ex parte Projected Railway*, 11 Jur. 160; *Matthews* v. *Brise*, 6 Beav. 239; *Baud* v. *Fardell*, 7 De G. M. & G. 628.
(*d*) *Allen* v. *Hancorn*, 7 B. P. C. 375.
(*e*) *Brown* v. *Litton*, 1 P. W. 141; and see *Lyse* v. *Kingdon*, 1 Coll. 188.
(*f*) *Knight* v. *Earl of Plymouth*, 1 Dick. 126.
(*g*) *Pocock* v. *Reddington*, 5 Ves. 800.

Lord Thurlow, upon application made to him to lay out on mortgage money belonging to a lunatic, observed, that "in *latter* times the Court had considered it as improper to invest any part of a lunatic's estate upon *private* security" (*a*). And Sir John Leach refused a similar application with reference to the money of infants, at the same time expressing his surprise that any precedent could have been produced to the contrary (*b*). Where there was no power of investing on mortgage, and the trustees intending to invest on government securities, afterwards, *at the instance of the tenant for life,* and to procure a higher rate of interest, invested on mortgages which proved deficient, they were held to be liable for the difference to the *cestui que trust* in remainder. The ground of the decision, however, was, that the trustees had consulted the benefit of the tenant for life at the expense of the remainderman, and the Court gave no opinion upon the dry question, whether trustees without a power could safely invest on mortgage, but did not encourage the idea that they could (*c*). Trustees, until the Acts to be presently mentioned, were certainly not justified in lending upon *mortgage,* when by the terms of their instrument of trust they were expressly directed to invest in the *funds* (*d*).

22 & 23 Vict. c. 35. East India Stock.

8. By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 32 (*e*), trustees, executors, and administrators, where not expressly forbidden by the instrument creating the trust, were authorised to invest trust funds in the stock of the Bank of England or Ireland, or on East India stock; but the Act was held not to apply where a particular fund was settled specifically and there was no power of varying securities (*f*). The section was rightly held by Sir John Romilly, M. R. (*g*), (in accordance with the view taken by V. C. Kindersley, in reference to the 27th section (*h*), but in opposition to V. C. Stuart (*i*)), not to apply to trusts

(*a*) *Ex parte Cathorpe*, 1 Cox, 182; *Ex parte Ellice*, Jac. 234.

(*b*) *Norbury* v. *Norbury*, 4 Mad. 191; and see *Widdowson* v. *Duck*, 2 Mer. 494; *Ex parte Ellice*, Jacob, 234; *Ex parte Fust*, 1 C. P. Cooper, T. Cott. 157, note (c); *Ex parte Franklyn*, 1 De G. & Sm. 531; *Barry* v. *Marriott*, 2 De G. & Sm. 491; *Ex parte Johnson*, 1 Moll. 128; *Ex parte Ridgway*, 1 Hog. 309.

(*c*) *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104.

(*d*) *Pride* v. *Fooks*, 2 Beav. 430; *Waring* v. *Waring*, 3 Ir. Ch. Rep. 331.

[(*e*) Repealed by the Trust Investment Act, 1889, *post*, p. 340.]

(*f*) *Re Warde's Settlement*, 2 J. & H. 191; but see *contra*, *Waite* v. *Littlewood*, 41 L. J. N.S. Ch. 636, in which case, however, the case before V. C. Wood was not cited [*Re Dick*, (1891) 1 Ch. (C.A.) 423; and as to power to vary securities under the Trust Investment Act, 1889, s. 3, see *post*, p. 342.]

(*g*) *Re Miles's Will*, 5 Jur. N. S. 1236.

(*h*) *Dodson* v. *Sammell*, 6 Jur. N.S. 137; see *S. C.* 1 Dr. & Sm. 575.

(*i*) *Re Rich's Trusts*, Jan. 27, 1860;

created by an instrument dated before the Act, but by the Amendment Act 23 & 24 Vict. c. 38, s. 12, the 32nd section of the original Act was made retrospective.

The Court refused under this Act to sanction an investment in stock created under the India Loan Act, 22 & 23 Vict. c. 39 (*a*), but by 30 & 31 Vict. c. 132, s. 1, the words East India stock were to be taken to include as well the old East India stock as "*East* India stock charged on the revenues of India, and created under and by virtue of any Act of Parliament," passed on or after the 13th day of August, 1859 (*b*). 30 & 31 Vict. c. 132.

The stock under the India Loan Act was issued under the name of *India*, and not of *East* India stock, and hence a doubt was suggested whether India stock was within the purview of 30 & 31 Vict. c. 132, but it is conceived that the doubt was purely technical, and without solid foundation. [India Loan Acts.]

[The capital stocks created under the subsequent East India Loan Acts were, by those Acts, expressly directed to be deemed to be East India stock within 22 & 23 Vict. c. 35, s. 32, unless and until Parliament should otherwise provide (*c*). By the Conversion of India Stock Act, 1887 (*d*), provision has been made for the conversion of India 4 per cent. stock into India 3½ per cent. stock; and by sec. 3, a power, whether subject or not to any restrictions or conditions, to invest in India 4 per cent. stock is to extend to authorise investment, subject to the same conditions and restrictions (if any), in India 3½ per cent. stock. By section 2, where a trustee of the converted stock has no power to vary investments, the consent of every person interested is required for the purpose of an exchange of such stock for the new stock; and in the case of an infant or person of unsound mind, the consent must be that of his guardian, committee, or *curator bonis*, or of a judge of the Chancery Division in England and Ireland, or of the Court of Session in Scotland.]

Railway Stock guaranteed by the *Indian Government* was held not to be within the Act (*e*). Indian Railway Stock.

By section 32, already referred to, Lord St. Leonards' Act Real securities.

and see *Page* v. *Bennett*, 2 Giff. 117; *Re Simson's Trusts*, 1 J. & H. 89.

(*a*) *Re Colne Valley Railway*, Johns. 528; 29 L. J. N.S. Ch. 33; *Re Simson's Trusts*, 1 J. & H. 89; *Equitable Reversionary Interest Society* v. *Fuller*, 1b. 382, *per Cur.*

(*b*) The day on which the India Loan Act received the Royal Assent.

[(*c*) See 32 & 33 Vict. c. 106, s. 16; 36 Vict. c. 32, s. 16; 37 Vict. c. 3, s. 17; 40 & 41 Vict. c. 51, s. 18; 42 & 43 Vict. c. 60, s. 18; 43 Vict. c. 10, s. 14; 48 & 49 Vict. c. 28, s. 14.]

[(*d*) 50 & 51 Vict. c. 11.]

(*e*) *Green* v. *Angell*, W. N. 1867, p. 305.

further provided (*a*) that when a trustee, executor, or administrator, should not "by some instrument creating his trust be expressly forbidden to invest any trust fund on *real securities in any part of the United Kingdom*," he should be at liberty to make such investment, provided it were in other respects reasonable and proper. Under this enactment, therefore, trustees might lend on real security in *England* or *Wales*, or *Ireland*, but not in the *Isle of Man*, and as the Act by the last section was not to extend to *Scotland*, and as the Scotch real property law is quite different from the English, trustees could not be advised to lend money on real security in Scotland (*b*).

Scotland.

23 & 24 Vict. c. 38.

9. By 23 & 24 Vict. c. 38, s. 11 (*c*), and the general order of February, 1861, subsequently mentioned, trustees having power to invest on Government or Parliamentary securities were expressly authorised to invest not only in Consols, but also in *Three per Cent. Reduced Annuities* and New Three per Cent. Annuities, and might also invest on real securities in *England* or *Wales*, and such investments might be made by corporations and trustees holding moneys in trust for any public or charitable purpose notwithstanding the statutes of mortmain (*d*).

Investments by the Court.

10. Previously to these Acts the Court had, even where an express power existed to lend on real security, refused to exercise it by sanctioning a loan on mortgage, on the ground that in ninety-nine cases out of a hundred the expense of the mortgage more than counterbalanced the increase of income (*e*). But the rule was afterwards relaxed (*f*).

23 & 24 Vict. c. 38.

11. By s. 10 of 23 & 24 Vict. c. 38, the Court of Chancery was empowered to issue general orders from time to time as to the investment of cash subject to its jurisdiction, either "in Three per Cent. Consolidated, or Reduced, or New Bank Annuities, or in such other stocks, funds, or securities" as the Court should think fit; and by the following section, trustees, executors, or administrators, "having power to invest their trust funds upon

(*a*) Made retrospective by 23 & 24 Vict. c. 38, s. 12.

(*b*) See *Re Miles's Will*, 5 Jur. N. S. 1236.

[(*c*) Repealed by the Trust Investment Act, 1889, *post*, p. 340.]

(*d*) 33 & 34 Vict. c. 34.

(*e*) *Barry* v. *Marriott*, 2 De G. & Sm. 491; and see *Ex parte Franklyn*, 1 De G. & Sm. 531.

(*f*) See *Ungless* v. *Tuff*, 9 W. R. 729; 30 L. J. Ch. 784. [By section 9 of the Trustee Act, 1888, a power to invest trust money in real securities shall authorise and shall be deemed to have always authorised an investment upon mortgage of property held for an unexpired term of not less than 200 years, and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition for re-entry except for non-payment of rent.]

Government securities, or upon parliamentary stocks, funds, or securities, or any of them," might invest "in any of the stocks, funds, or securities, in or upon which, by such general order," cash might be invested by the Court (*a*).

General order, as to investment of cash under control of Court.

12. A General Order, dated February 1, 1861, was issued under the powers of this Act, but was annulled by the Rules of the Supreme Court, 1883, its place being supplied, in a slightly modified form, by Order 22, Rules 17 and 18, as follows :—

R. 17. "Cash under the control of, or subject to the order of, the Court may be invested in *Bank stock*, *East India stock*, *Exchequer bills*, and 2*l.* 10*s.* *per cent. Annuities*, and upon *mortgage* of freehold and copyhold estates respectively in *England* and *Wales*, as well as in *Consolidated*, *Reduced*, and *New* 3*l.* per cent. Annuities."

R. 18. "Every application for the purpose of the conversion of any stocks, funds, or securities into any other stocks, funds, or securities authorised by the last preceding rule, shall be served upon the trustees thereof if any, and upon such other persons if any as the Court or judge shall think fit."

Meaning of East India Stock.

13. It was at one time considered that the East India stock referred to in the Order of 1st February, 1861, was the old East India stock (*i.e.* the capital stock of the East India Company), as the new loan had not then acquired the distinctive name of East India stock. But in a case in the Court of Appeal, the late M. R. stated that it had always been held that new East India stock was within the *intention* of the General Order, and it was held that new 3*l.* 10*s.* per cent. East India stock created under the powers of 42 & 43 Vict. c. 60, was within the Order (*b*).

Applications under 23 & 24 Vict. c. 38.

The old East India stock has been redeemed or commuted, and has ceased to exist (*c*), and the loans under the several East India Loan Acts are (as we have seen) now known as East India stock.

14. Upon applications under the Order of 1st February, 1861, the Court at first sanctioned investments in East India stock (*d*)

[(*a*) In this section the power is a general one, without the exception contained in 22 & 23 Vict. c. 35, s. 32, and it will not be overruled by an express direction in the instrument creating the trust that the investments are to be confined to those enumerated therein; *In re Wedderburn's Trusts*, 9 Ch. D. 112. As to the reinvestment of stock converted or exchanged into new stock under 51 Vict. c. 2, see *post*, p. 338.]

[(*b*) *Ex parte St. John Baptist College, Oxford*, 22 Ch. Div. 93.]

(*c*) See 36 Vict. c. 17, which provided for the redemption or commutation of the stock on or before 30 April, 1874.

(*d*) That is the old East India stock, technically known by that name; *Equitable Reversionary Interest Society* v. *Fuller*, 1 J. & H. 382; *Colne Valley*

upon the petition of the tenant for life, even though the market price of investment exceeded, as it commonly did, the fixed rate at which the stock would be redeemable in 1874, viz. 200*l.* per cent (*a*). But in a subsequent case Lord Chancellor Campbell and the Lords Justices upon appeal concurred in refusing the application, on the ground that it would work an injury to the remainderman. Lord Campbell observed that no more precise rule could safely be laid down than "that in the absence of any special circumstances which might make the desired transfer asked by the tenant for life beneficial to those in remainder, *irrespective of pecuniary calculations*, the transfer ought not to be permitted, if *on pecuniary calculations* it might be injurious to those in remainder." And Turner, L.J., appears to have assented to this view, giving as an instance in which the Court might properly make such investment, where "from the exigency of a family it would be desirable for the *children* that the income of the *parents* should be increased." But he added that the decision was "not intended to embarrass trustees where the fund was not in Court, and that they would, in making such an investment, be entitled to the protection of the Court if they acted *bonâ fide* to the best of their discretion" (*b*).

Accordingly where trustees were directed to invest in the public stocks or funds, and they retained English and Irish Bank stock and East India stock *in specie*, it was held (there being no imputation on their *bona fides*) that they had not exceeded their duty, and the tenant for life was declared to be entitled to the actual income which had arisen from those securities since the passing of the Act which authorised them, but not to the actual income which had accrued before the passing of 23 & 24 Vict. c. 38 (*c*).

And where Bank stock stood settled upon A. for life, with remainder to his children, if any, with remainder to certain persons absolutely, and A. (who had been married twenty-seven years without issue) applied, with the consent of the ultimate remain-

and Halstead Railway Company, 1 De G. F. & J. 53; *Re Fromow's Estate*, 8 W. R. 272.

(*a*) *Bishop* v. *Bishop*, 9 W. R. 549; 30 L. J. Ch. 624; *Cohen* v. *Waley* 7 Jur. N. S. 937; 3 L. T. N.S. 436; 9 W. R. 137; *Equitable Reversionary Interest Society* v. *Fuller*, 1 J. & H. 379. This cause was heard on appeal before L.J.J. on 17th July, 1861, when L. J. Knight Bruce thought the order should be sustained on special grounds, so that any expression of opinion by L. J. Turner became unnecessary; but both L.JJ. assented to the principle laid down in *Cockburn* v. *Peel*, 3 De G. F. & J. 170.

(*b*) *Cockburn* v. *Peel*, 3 De G. F. & J. 170; and see *Re Boyces Minors*, 1 Ir. R. Eq. 45; *Ungless* v. *Tuff*, 9 W. R. 729; 30 L. J. Ch. 784; *Waite* v. *Littlewood*, 41 L. J. N.S. Ch. 636.

(*c*) *Hume* v. *Richardson*, 4 De G. F. & J. 29.

dermen, for an investment in East India stock, the M. R. said he never sanctioned such an investment where infants were interested, unless an increase of income was absolutely required for their maintenance; but considering the improbability of there being children in that case, he made the order (*a*).

In another case the tenant for life of a residue applied for the sale of Bank Annuities and the investment of the proceeds upon Bank stock, and the Court, after taking time to consider, declined to make any order, on the ground that the exercise of the power by the Court was discretionary, and that there were no special circumstances to call for such a change of investment (*b*).

But where a tenant for life had a wife and five children, and his income, exclusive of the dividends of the fund in Court (6357*l.* 15*s.* 2*d.* Consols), was only 70*l.* per annum, the Court thought these circumstances sufficient to justify an investment in Bank stock, and made the order accordingly (*c*).

So where the tenant for life was suffering from ill-health and was straitened in his circumstances, and asked for an investment of one moiety in India stock and the other moiety in Bank stock, the Court assented to the prayer, with the qualification that as investment in India stock involved a possible loss of capital, the whole fund should be invested in Bank stock (*d*).

So where a fund was charged with an annuity of 500*l.* per annum, and was insufficient for its purpose, the Court, though it would not have listened to an application with the mere view of augmenting the income of the tenant for life, directed an investment in East India stock, in order to aid the primary intention of providing for the annuity (*e*).

Powers in Acts of Parliament.

[15. There was great conflict of opinion as to whether] the powers conferred by 23 & 24 Vict. c. 38 applied to moneys paid into Court under *Acts of Parliament* directing the moneys to be invested on securities other than those mentioned in the Act under consideration; [but the question was finally settled in favour of the application of the powers (*f*).]

(*a*) *Montefiore* v. *Guedella*, W. N. 1868, p. 87.

(*b*) *Maclaren* v. *Stainton*, M. R. July 4, 1861.

(*c*) *Peillon* v. *Brooking*, M. R. July 6, 1861; and see *Re Boyces Minors*, 1 Ir. R. Eq. 45; *Re Ingram's Trusts*, 11 W. R. 980, where the tenant for life by the change would receive more than two dividends in the year.

(*d*) *Re Longford's Trusts*, 2 J. & H. 458; and see *Vidler* v. *Parrott*, 4 N. R. 392; 12 W. R. 976.

(*e*) *Mortimer* v. *Picton*, 4 De G. J. & Sm. 166; 10 Jur. N. S. 83; and see *Hurd* v. *Hurd*, 11 W. R. 50; 7 L. T. N.S. 590.

(*f*) [*Ex parte St. John Baptist College, Oxford*, 22 Ch. Div. 93; *Re Brown*, 59 L. J. Ch. 530; 63 L. T. N.S. 131; see] *Re Birmingham Bluecoat School*, 1 L. R. Eq. 632; *Re Wilkinson's*

23 & 24 Vict. c. 145.

[16. By the Act 23 & 24 Vict. c. 145, s. 25, trustees under an instrument dated *since 28th August*, 1860, and having money in their hands which it was their duty to invest at interest, might invest the same in *any* of the Parliamentary stocks or public funds, or in Government securities, *with power of variation*, but no investment except in Consols was to be made without [such consent as therein mentioned. But this section was rarely acted upon, and has since been repealed (*a*).]

30 & 31 Vict. c. 132, s. 2.

17. By another Act (*b*) it was enacted, that it should be lawful for any trustee, executor, or administrator to invest any trust fund in his possession or under his control in *any securities*, the *interest* of which was or should be *guaranteed by Parliament*.

Metropolitan Board of Works stock.

18. By another Act (*c*) a trustee, executor, or other person empowered to invest money in public stocks or funds, or other Government securities, might, unless forbidden by the will or other instrument under which he acted, whether prior in date to the Act or not, invest the same in consolidated stock created by the *Metropolitan Board of Works*. [By section 70 of the Local Government Act, 1888 (*d*), where county stock is created or issued under that section, the Local Government Board may prescribe regulations applicable to the stock, and such regulations may apply any enactments of any Act relating to stock issued by the Metropolitan Board of Works.]

[Indian Railway annuities.]

[19. By the East Indian Railway Company Purchase Act, 1879 (*e*), certain annuities were authorised to be created for the purpose of carrying out the terms which had been agreed upon between the Secretary of State for India and the Railway Company, and by sect. 37 any trustee having power under the instrument constituting his trust to invest the trust funds in the shares or stock of any Indian railway the interest on which is guaranteed by the Secretary of State, may invest such trust

Settled Estate, 9 L. R. Eq. 343; *Re Cook's Settled Estate*, 12 L. R. Eq. 12; *Re Thorold's Settled Estate*, 14 L. R. Eq. 31; *Reading* v. *Hamilton*, W. N. 1872, p. 91; *Re Taddy's Settled Estates*, 16 L. R. Eq. 532; [*Re Fryer's Settlement*, 20 L. R. Eq. 468; *Re Foy's Trusts*, 23 W. R. 744; *Re Southwold Railway Company's Bill*, 1 Ch. D. 697; *Jackson* v. *Tyas*, 52 L. J. N.S. 830; *Secus*,] *Re Shaw's Settled Estates*, 14 L. R. Eq. 9; *Re Boyd's Settled Estates*, 21 W. R. 667; *Re Vicar of St. Mary, Wigton*, 18 Ch. D. 646; *Ex parte Rector of Kirksmeaton*, 20 Ch. D. 203.]

[(*a*) 44 & 45 Vict. c. 41, s. 71.]

(*b*) 30 & 31 Vict. c. 132, s. 2. [The whole Act is repealed by the Trustee Investment Act, 1889, *post*, p. 340.]

(*c*) 34 & 35 Vict. c. 47, s. 13.

[(*d*) 51 & 52 Vict. c. 41, providing for the transfer of the powers of the Metropolitan Board of Works to the London County Council. As to investment on stock of local corporations, see Local Loans Acts, *post*, p. 349.]

[(*e*) 42 & 43 Vict. c. ccvi.]

funds in the purchase of annuities of Class B. thereby authorised to be created (*a*). Under this section the Court has, upon the application of a tenant for life, sanctioned the conversion into annuities of Class B. of Bank Annuities in Court (*b*).

[Church trustees.]

20. Church trustees incorporated under the Compulsory Church Rate Abolition Act, 1868, are by that Act empowered to invest any funds in their hands in Government or real securities (*c*).

Consent.

21. Powers of investment are generally to be exercised with the consent of the tenant for life, and it was doubted whether the several Acts enlarging the power of trustees apply where such consent is required. It is conceived, however, that the effect of the Acts was to authorise trustees to invest on the extended securities, provided the investments were accompanied with all the conditions required for investment upon the securities specified in the settlement. Any other construction would be a trap into which many trustees must already have fallen. [And under the Trust Investment Act, 1889, to be presently noticed, all difficulty on this head is removed.

[Settled Land Act.]

22. Under sections 21 and 32 of the Settled Land Act, 1882, all *moneys in Court* (*d*) which are liable to be laid out in the purchase of land to be made subject to a settlement may be "invested on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorised to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares."

Under these sections moneys in Court which have arisen from the purchase under the Lands Clauses Consolidation Act, 1845, of land belonging absolutely to a charity, have been invested in railway debenture stock (*e*).

By section 33 of the same Act, where under a settlement *money* is *in the hands of trustees*, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees

[(*a*) And trustees having power to retain, but not to invest in East Indian Railway Company's stock might accept the B. annuities; *Re Chaplin*, 28 W. R. 132.]

[(*b*) *Re Mansel*, 30 W. R. 133; 45 L. T. N.S. 741.]

[(*c*) 31 & 32 Vict. c. 109, s. 9.]

[(*d*) 45 & 46 Vict. c. 38.]

[(*e*) *Re Byron's Charity*, 23 Ch. D. 171.]

have independently of the Act, they may, at the option of the tenant for life, invest the same as above mentioned.

[Investment not permitted by terms of will.]

23. Where under a will money was bequeathed to trustees in trust to lay it out in the purchase of real estate, to be settled in strict settlement, with a direction that until the purchase "the legacy should be invested in Government or real securities, but not in any other mode of investment," it was held that the trustees, on the direction of the tenant for life, might invest the legacy in debenture stock (*a*), for this was only doing directly what the tenant for life could have done circuitously under the powers of the Act, by reselling the estate when purchased, and directing the investment of the money in the manner proposed. And in another case where the will contained no clause authorising an interim investment, the Court sanctioned the postponement of the purchase of real estate in Ireland until such a purchase could be prudently effected, and allowed an interim investment under section 21 (*b*).]

[Conversion of Government annuities.]

24. [By the National Debt (Conversion) Act, 1888 (*c*), provision is made for the conversion and exchange of Three per Cent. Consolidated Bank Annuities, Three per Cent. Reduced Bank Annuities, and New Three per Cent. Annuities into a new Government stock of a lower denomination which is to be called Two and Three-quarters per Cent. Consolidated Stock until the 6th of April, 1903, and thereafter Two and a Half per Cent. Consolidated Stock (*d*), and trustees having power to invest in the old stocks are empowered to invest in the new stock in lieu thereof (*e*). The new stock yields dividends, payable *quarterly*, at the rate of $2\frac{3}{4}$ per cent. until the 4th of April, 1903, and $2\frac{1}{2}$ per cent. after that date (*f*); and is not to be redeemable until the 8th of April, 1923, after which date it will be redeemable at par in such manner as Parliament shall direct (*g*). Special provision is made for the protection of trustees of stock appropriated to provide annuities (*h*), and it is enacted (*i*) that when any stock converted or exchanged by virtue of the Act into new stock, is held by a trustee, such trustee shall be at liberty to sell the same, and to invest the proceeds in any of the securities for

[Reinvestment.]

[(*a*) *Re Mackenzie's Trusts*, 23 Ch. D. 750; and see *Re Tennant*, 40 Ch. D. 594; *Re Mundy's Settled Estates*, (1891) 1 Ch. (C. A.), 399.]

[(*b*) *Re Maberley*, 33 Ch. D. 455; and see *post*, Chap. xxii.]

[(*c*) 51 Vict. c. 2.]

[(*d*) Sec. 2, sub-s. 4.]

[(*e*) Sec. 19.]

[(*f*) Sec. 2, sub-ss. 1, 3.]

[(*g*) Sec. 2, sub-s. 2.]

[(*h*) Sec. 20.]

[(*i*) Sec. 27; see *Re Tuckett's Trusts*, 57 L. J. Ch. 760; 58 L. T. N.S. 719; 36 W. R. 542.]

the time being authorised for the investment of cash under the control of the High Court (*a*), notwithstanding anything to the contrary contained in the instrument creating the trust.

The conversion of the new Three per Cent. stock was effected on the 29th of March, 1888, and all holders of that stock who had not by that date dissented from the conversion received in lieu thereof an equal nominal amount of the new stock. The redemption of the Consolidated Three per Cent. Annuities and the Reduced Three per Cent. Annuities was effected on the 6th of July, 1889, and all holders of such stock on that day were paid off.

[Power to hold stock on different accounts.]

By section 10 of the same Act it is provided that in the registers of new stock the Bank shall allow any holder or joint holders to have more than one account, provided that each account is distinguished either by a number or by such other designation as may be directed by the Bank, and that the Bank shall not be required to permit more than four accounts to be opened in the same name or names. This provision will be convenient for trustees holding several funds on distinct trusts, and will relieve them from the necessity of resorting to the devices of varying the order of names in the account in the bank books (*b*).

[Recent order of Court as to investment of cash under its control.]

25. By an order of Court of August, 1888 (which was to come into operation on the 24th of October, 1888), Order XXII. r. 17, of the Rules of the Supreme Court, 1883, above referred to was superseded (*c*), but the new order was annulled and replaced by an Order dated the 14th of November, 1888, which came into operation on the 26th of that month. That order provides as follows:—

"Cash under the control of or subject to the order of the Court may be invested in the following stocks, funds, or securities; namely—

Two and Three-quarters per Cent. Consolidated Stock (to be called after the 5th of April, 1903, Two and a Half per Cent. Consolidated Stock);

Consolidated Three Pounds per Cent. Annuities (*d*);

Reduced Three Pounds per Cent. Annuities (*d*);

[(*a*) See *post*; and *ante*, p. 333.]

[(*b*) See Vaizey on Investments, pp. 86, 87, where it is stated that in practice the Bank distinguishes the four permissible accounts by the letters A, B, C, and D, and has ceased to distinguish from each other accounts in the same names but in various orders.]

[(*c*) It is believed that the Paymaster General did not make any investments in reliance on the authority of this order. Certain investments in colonial stock authorised by the order of August are not authorised by that of November, and if any investments in such stock have been made by trustees between October 24th and November 24th, 1888, there may be some question as to their propriety. See Vaizey on Investments, p. 67.]

[(*d*) These have now been redeemed

Two and Three-quarters per Cent. Annuities;

Two Pounds Fifteen Shillings per Cent. Annuities;

Two Pounds Ten Shillings per Cent. Annuities;

Local Loans Stock under the National Debt and Local Loans Act, 1887;

Exchequer Bills;

Bank Stock;

India Three and a Half per Cent. Stock;

India Three per Cent. Stock;

Indian guaranteed railway stocks or shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment;

Stocks of Colonial Governments guaranteed by the Imperial Government;

Mortgage of freehold and copyhold estates respectively in England and Wales;

Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent.;

Three per Cent. Metropolitan Consolidated Stock;

Debenture, preference, guaranteed, or rent-charge stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock or shares;

Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment (*a*).

[Trust Investment Act, 1889.]

By the Trust Investment Act, 1889 (*b*) (which (*c*) is applicable as well to trusts created before as to trusts created subsequently to that Act), 22 & 23 Vict. c. 35, sec. 32, 23 & 24 Vict. c. 38, sec. 11, and 30 & 31 Vict. c. 132, are, without prejudice to the validity of any act done thereunder, repealed, and extensive powers of investment are conferred on trustees, it being provided by section 3, that it shall be lawful for a trustee unless expressly forbidden by the instrument (if any) creating the trust (*d*) to invest any trust funds in his hands in manner following, that is to say—

and ceased to exist, 51 Vict. c. 2, *sup.*; 52 Vict. c. 4.]

[(*a*) As to the practice under the corresponding rule in Ireland, and the circumstances under which the Court will sanction investments in securities newly authorised, see *Roberts* v. *Morgan*, 23 L. R. Ir. 118; *Re Phelan*, Ib. 336; *Johnson* v. *O'Neil*, Ib. 430; *Re Nesbitt's Trusts*, 25 L. R. Ir. 430.]

[(*b*) 52 & 53 Vict. c. 32.]

[(*c*) See sec. 6.]

[(*d*) This provision appears to exclude from the benefit of the enactment the numerous cases in which trustees are directed by the instrument creating

(a.) In any of the Parliamentary Stocks or public funds or Government securities of the United Kingdom; [Public Funds.]

(b.) On real or heritable securities in Great Britain or Ireland (*a*); [Real securities.]

(c.) In the stock of the Bank of England or the Bank of Ireland; [Bank stock.]

(d.) In India Three and a Half per Cent. stock, and India Three per Cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India, under the authority of Act of Parliament, and charged on the revenues of India (*b*); [India stock.]

(e.) In any securities the interest of which is or shall be guaranteed by Parliament (*c*); [Securities guaranteed by Parliament.]

(f.) In Consolidated stock created by the Metropolitan Board of Works, or which may at any time hereafter be created by the London County Council, or in Debenture stock created by the Receiver for the Metropolitan Police District (*d*); [Metropolitan Board of Works or London County Council stock.]

(g.) In the Debenture, or Rent-charge, or Guaranteed or Preference stock of any railway company in Great Britain or Ireland, incorporated by special Act of Parliament (*e*), and having, during each of the ten years last past before the date of investment, paid a dividend at the rate of not less than three per centum per annum on its ordinary stock (*f*); [Railway securities.]

(h.) In the stock of any railway or canal company in Great Britain or Ireland, whose undertaking is leased in perpetuity, (*g*) or for a term of not less than two hundred years, at a fixed rental to any such railway company as is mentioned in sub-section (g.) either alone or jointly with any other railway company;

(i.) In the Debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India (*h*); [Debenture stock of Indian railway.]

(j.) In the B. Annuities of the Eastern Bengal, the East Indian, [Indian railway "B." annuities.]

the trust, to invest in specified funds and securities, "but not in any other mode of investment."]

[(*a*) As to investments on mortgage of land in Ireland under 4 & 5 Will. 4. c. 29 (which Act is repealed by the Act above stated), see *post*, p. 303.]

[(*b*) As to East India Stock, see *ante*, p. 331.]

[(*c*) See Vaizey on Investments, 148.]

[(*d*) See *ante*, p. 336.]

[(*e*) As to the meaning of these words, cf. *Elve* v. *Boyton*, (1891) 1 Ch. C. A. 501. It may in some cases be matter of difficulty to ascertain whether particular stocks are "preference" or "ordinary" within the meaning of this sub-section.]

[(*f*) This requirement as to the *rate* of dividend is not contained in the rule of Court, *ante*, p. 340. It remains to be seen whether the Court will adopt the requirement when authorising such investments under the rule.]

[(*g*) The expression "leased in perpetuity," is of doubtful meaning.]

[(*h*) See *ante*, p. 336.]

and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway (*a*);

[Indian railway guaranteed stock.]

(k.) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India;

[Water companies stock.]

(l.) In the Debenture or Guaranteed or Preference Stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock;

[Corporation or County Council stock.]

(m.) In nominal (*b*) or inscribed stock, issued or to be issued by the corporation of any municipal borough, having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order (*c*);

[Water commissioners stock.]

(n.) In nominal or inscribed stock, issued or to be issued by any Commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such Commissioners shall not have exceeded eighty per cent. of the amount authorised by law to be levied;

(o.) In any of the stocks funds or securities for the time being authorised for the investment of cash under the control or subject to the order of the Court;

And also from time to time to vary any such investment.

[Power to vary investments extends to all investments of specified classes.]

It has been held by the Court of Appeal, upon the construction of the concluding words of this section, that, in the absence of

[(*a*) See *ante*, p. 336, and see *Re Blue Ribbon Life Assurance*, 59 L. J. Ch. 276; 61 L. T. N.S. 660, where North, J., without deciding whether the Court would accept B. annuities as a proper investment for funds under its control, sanctioned, under the Board of Trade rules, the investment therein of a deposit paid in under the Life Assurance Companies Act, 1870, sect. 3.]

[(*b*) As to the meaning of nominal stock, see *post*, p. 349, note (*b*).]

[(*c*) As to the Local Loans Act, 1875, and investments thereunder, see *post*, p. 349.]

any express prohibition in the instrument creating the trust, the power of varying investments thereby given applies to investments of the classes specified in clauses (a.) to (o.) existing previously to and not made under the Act, as well as to the like investments when made under the powers of the Act, so that trustees under an instrument which contains no power to vary securities, may sell Government stocks purchased previously to the Act for the purpose of investing in any of the other securities which the Act authorises (*a*).

[But power to vary may still be necessary.]

However, in the case cited it was observed by Kay, J. (*b*), that even if, as matter of construction, the whole section be read into the particular will or settlement, "there might be under the will or settlement investments of descriptions not mentioned in the section, and, if the will or settlement contained no power to vary, they would not be variable under the power given in this section." Wherever, therefore, a power of investment of a wider character than that contained in the section is conferred upon the trustees of an instrument it will be desirable to insert the usual words, enabling them to vary investments.

[Trustees within the meaning of the Act.]

A corporation incorporated by a special Act, holding funds for charitable purposes and empowered to invest the same are trustees within the meaning of the Act (*c*); but not so trustees holding moneys which belong to a building society, and are to be dealt with only under the direction of the board of directors (*d*), nor yet the directors themselves (*e*).

[Purchase of redeemable stocks.]

Section 4 of the same Act enacts: "(1) It shall be lawful for a trustee under the powers of this Act to invest in any of the stocks, funds, shares, or securities mentioned or referred to in section 3 of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value. (*f*) (2) Provided that it shall not be lawful for a trustee under the powers of this Act to purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (g.), (i.), (k.), (l.), and (m.), which is liable to be redeemed within

[(*a*) *Re Dick*, (1891) 1 Ch. (C. A.) 423, overruling the decision of North, J., in *Re Manchester Royal Infirmary*, 43 Ch. D. 420, who was of opinion that the concluding words of sec. 3 were introduced in order to prevent any question whether the power of varying investments contained in the instrument creating the trust could extend to investments which were authorised not by the instrument, but by the Act.]

[(*b*) *Re Dick*, *ubi sup.* at p. 430.]

[(*c*) *Re Manchester Royal Infirmary*, *sup.*]

[(*d*) *Re National Permanent Mutual Building Society*, 43 Ch. D. 431.]

[(*e*) *S. C.*]

[(*f*) An exercise of the power of this section by trustees to the fullest extent might be unduly detrimental to a remainderman; see Vaizey on Investments, p. 137.]

fifteen years of the date of purchase at par or at some other fixed rate, or to purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate. (3) It shall be lawful for a trustee to retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act." By section 5, "Every power conferred by this Act shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument (if any) creating the trust with respect to the investment of the trust funds." By section 9, for the purposes of the Act, "the expression 'trustee' shall include an executor or administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee; the expression 'stock' shall include fully paid-up shares," and "the expression 'instrument' shall include a private Act of Parliament."

[Discretion of the trustee.]

Secondly. Of particular investments.

Trustee, if expressly empowered, may lend on personal security.

1. A trustee may lend even on *personal* security, where he is *expressly empowered* to do so by the instrument creating the trust (*a*). But no such authority is communicated by a direction to place out the money at interest *at the trustee's discretion* (*b*), or *on such good security as the trustee can procure, and may think safe* (*c*). And if joint trustees be empowered to lend on personal security, they *may not lend to one of themselves*, for the settlor must be taken to rely upon the united vigilance of *all* the trustees with respect to the solvency of the *borrower* (*d*): and trustees having a power, with the *consent of the tenant for life*, to lend on personal security, cannot lend on personal security to the *tenant for life himself* (*e*). And when the Court has assumed the administration of the estate by the institution of a suit, it has declined to direct an investment on personal security, though there was a *power* to lay out on either personal

(*a*) See *Forbes* v. *Ross*, 2 B. C. C. 430; *S. C.* 2 Cox, 113; *Paddon* v. *Richardson*, 7 De G. M. & G. 563.

(*b*) See *Pocock* v. *Reddington*, 5 Ves. 794; *Potts* v. *Britton*, 11 L. R. Eq. 423; *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

(*c*) *Wilkes* v. *Steward*, G. Coop. 6; *Styles* v. *Guy*, 1 Mac. & G. 422; *Attorney-General* v. *Higham*, 2 Y. & C. C. C. 634; and see *Mills* v. *Osborne*, 7 Sim. 30; *Westover* v. *Chapman*, 1 Coll. 177.

(*d*) —— v. *Walker*, 5 Russ. 7; and see *Stickney* v. *Sewell*, 1 M. & Cr. 14; *Westover* v. *Chapman*, 1 Coll. 177.

(*e*) *Keays* v. *Lane*, 3 I. R. Eq. 1. But a tenant for life whose consent is necessary to the exercise of a power of sale by trustees, may purchase from the trustees. See *post*, Chap. xviii. s. 3.

or Government security, but has ordered all future investments to be made on Government security (*a*).

A power to lend on personal security may mean on the security of personal property, or the security of the personal undertaking of the borrower, and where the trustees had the last-mentioned power and lent upon a note of hand, the Court allowed the loan, but directed a bond to be taken (*b*).

Where empowered to lend on personal security, trustee may not *accommodate* a person.

2. Where the trustees of a sum of money for A. for life, remainder for her children, were authorised by the settlement to lend the trust fund upon real or *personal security* as should be thought good and sufficient, and the trustees lent it to a person in *trade* whom A. had married, and the money was lost, they were made responsible for the amount. Sir William Grant said, "The authority did not extend to an *accommodation:* it was evident the trustees had, upon the marriage, been induced to *accommodate* the husband with the sum, which they had no power to do" (*c*). And in another case, where a trustee was even *required* at the request of the wife to advance money to the husband upon his bond, and the husband took the benefit of the Insolvent Act, and the wife requested the trustee to advance 80*l.* to the husband upon his bond, and the trustee refusing, the wife filed her bill to have the trustee removed, the Court said, "that so total a change had taken place in the circumstances and position of the husband, that the clause in question became no longer applicable to him and ceased to have any effect, and the trustee had done his duty when he refused to lend the money" (*d*).

Tenant for life not to be favoured.

3. No applications from *cestuis que trust* to their trustees are so frequent as for a more productive investment for the benefit of the tenant for life. In these cases the trustees must remember that any special power which the settlement may give them was not created for the purpose of favouring one party more than another, but for the benefit of *all*, and that if they lend themselves improperly to the views of the tenant for life, at the expense of the remaindermen, they will be held personally responsible (*e*); and where trustees have the ordinary power of

Trustees bound to protect the remaindermen.

(*a*) *Holmes* v. *Moore*, 2 Moll. 328.

(*b*) *Pickard* v. *Anderson*, 13 L. R. Eq. 608.

(*c*) *Langston* v. *Ollivant*, G. Coop. 33. In this case, as the person to whom the money was lent was a *trader*, it has been inferred that under a power to lend on personal security the trustee cannot lend to a *trader*, but the Court has never yet gone to that extent.

(*d*) *Boss* v. *Godsall*, 1 Y. & C. C. C. 617; and see *Luther* v. *Bianconi*, 10 Ir. Ch. Rep. 194; *Costello* v. *O'Rorke*, 3 Ir. R. Eq. 172. Compare cases, at p. 363, note (*b*), *infrà*.

(*e*) *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104; and see *Stuart* v. *Stuart*, 3 Beav. 430; *Fitzgerald* v. *Fitzgerald*, 6

varying securities *with the consent of the tenant for life*, the trustees must consider the intention to be that as the control is given to the tenant for life for *his* protection, so the trustees have a particular discretion reposed in them for the protection of the *remaindermen* (*a*). And on the other hand where every change of investment is to be with the *consent* of the tenant for life, and he withholds his consent though the fund is in danger, the trustee can proceed in equity and compel a change of investment, against the wishes of the tenant for life (*b*). [And in one case the Court refused to hear counsel for trustees in support of an application by the tenant for life whose interest was opposed to those of the remaindermen (*c*).]

Consent.

4. All the conditions annexed to the power must be strictly observed, as if the authority be to lend to the husband *with the consent of the wife*, the trustees cannot make the advance on their own discretion, and take the consent of the wife at a subsequent period (*d*). And if the consent of two trustees be required, the consent of one of them does not operate as the consent of both (*e*). And where the consent of a married woman was necessary to authorise an investment with the sanction of the Court, a *petition* by the husband and wife praying for such investment was no consent by the wife, for the petition was regarded as that of the husband only (*f*), nor will a married woman be deemed to have consented to an investment by joining in a deed of appointment of new trustees, in which such an investment is recited or noticed, for the deed is executed *alio intuitu* (*g*). Where the consent of two trustees is not required to be by *deed*, one may consent by deed and the other by parol (*h*). Where the nature and object of the power and the circumstances of the case point to a *previous* or *contemporaneous* consent, then

Ir. Ch. Rep. 145; *Vickery* v. *Evans*, 3 N. R. 286; [*Re Dick*, (1891) 1 Ch. (C. A.), 423, 431.]

(*a*) See *Harrison* v. *Thexton*, 4 Jur. N. S. 550.

(*b*) *Costello* v. *O'Rorke*, 3 Ir. R. Eq. 172.

[(*c*) *Re Hotchkin's Settled Estates*, 35 Ch. D. 41 (North, J.).]

(*d*) *Bateman* v. *Davis*, 3 Mad. 98.

(*e*) *Greenham* v. *Gibbeson*, 10 Bing. 363.

(*f*) *Norris* v. *Wright*, 14 Beav. 291, see 303. [But now, by 45 & 46 Vict. c. 75, and Rules of the Supreme Court, Order 16, Rule 16, a married woman petitions without a next friend, and a petition by husband and wife is not necessarily regarded as the petition of the husband only; and such a petition would, it is conceived, if presented under the wife's instructions, operate as a consent by her.]

(*g*) *Wiles* v. *Gresham*, 2 Drew. 258, see 267; [and in order to show consent, it is necessary that there should be knowledge of the nature of the proposed investment; *Re Massingberd's Settlement*, 63 L. T. N.S. 296, 299 (C. A.).]

(*h*) *Offen* v. *Harman*, 1 De G. F. & J. 253.

such previous or contemporaneous consent is necessary although not *expressly* required by the terms of the power (*a*). If for instance, a consent be required for the substitution of one estate for another, the consent must precede or at all events accompany the execution of the power, for the question must be determined by the relative values of the two estates, at the time of substitution (*b*). [And a consent by a wife to the exercise by the trustees of a power to lend the trust money to her husband cannot be given *prospectively* (*c*).] But if an investment has been made without the required consent, a *cestui que trust* cannot complain of it, who, being *sui juris* at the time, had acquiesced in and adopted the investment (*d*).

Investment in trade.

5. A power to "invest at the *discretion* of the trustees" will not authorise an investment on the securities of the *United States*, or of the railway companies in that country (*e*), and a power "to place out at *interest*, or other way of *improvement*," will not authorise an investment of the money in any trading concern (*f*); or in fact any investment but a Government or real or other unobjectionable security (*g*); but it has been held that a direction not to "invest" but to "employ" the money, savours of a trading concern (*h*); but the distinction appears too thin to be relied upon with safety.

Loan by way of annuity.

6. Upon a marriage the wife's portion was settled upon the intended husband and wife for their respective lives, with remainder to the issue, and a power was given to the trustees to "call in and lay out the money at greater interest if they could." The trustees sold out stock to the amount of 400*l*., and laid it out in the purchase of an *annuity* for one life, and *insured* the life, and Lord Manners said the purchase of the annuity was not a proper disposition of a trust fund settled as this was (*i*).

Loans upon shares of companies.

7. A power to invest "upon *security* of the funds of any company incorporated by Act of Parliament," will not authorise an investment in "Great Northern Preference *shares*," which are not a security upon the property of the company, but a participation in the partnership (*j*). [But a power to invest on the

(*a*) *Greenham* v. *Gibbeson*, 10 Bing. 374, *per* Tindal, C.J.

(*b*) *Greenham* v. *Gibbeson*, 10 Bing. 363.

[(*c*) *Child* v. *Child*, 20 Beav. 50.]

(*d*) *Stevens* v. *Robertson*, 37 L. J. N.S. Ch. 499; 18 L. T. N.S. 427; 16 W. R. 724.

(*e*) *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

(*f*) *Cock* v. *Goodfellow*, 10 Mod. 489.

(*g*) *Dickonson* v. *Player*, C. P. Cooper's cases, 1837–8, 178.

(*h*) *S. C.*

(*i*) *Fitzgerald* v. *Pringle*, 2 Moll. 534.

(*j*) *Harris* v. *Harris*, No. 1, 29 Beav. 107.

securities of any "railway or other public company" includes securities of companies incorporated under the Companies Acts, as such companies are incorporated by public statute, the instruments forming their constitution are accessible to the public, and their shares are transferable to the public (*a*); and a power to invest in the shares of a "company incorporated by Act of Parliament" was held to extend to shares in The London Assurance, a company constituted under a charter which derived its force from a preceding Act of Parliament (*b*).]

[Company incorporated by Act of Parliament.]

Debentures.

8. A power to lend on the *debentures* (*c*) of a public company did not, it is conceived, authorise an investment on debenture *stock*, for the settlor in allowing debentures relied on the liability of the company to pay the capital; but in debenture stock the dividend only can be recovered, and there are no means of realising the capital but by transfer, and the value in the market may have greatly sunk. Debenture bonds are a temporary loan, but debenture stock is perpetual.

34 Vict. c. 27.

But by 34 Vict. c. 27 (29 June, 1871), it was enacted that where power had been before the passing of the Act or should at any time thereafter be given to trustees to invest in the mortgages or bonds of a railway or other company, such power should, unless the contrary be expressed in the instrument, be deemed to include a power to invest in the *debenture stock* of a railway or other company, and an investment in debenture stock may now be made accordingly.

[28 & 29 Vict. c. 78.]

9. [By the Mortgage Debenture Act, 1865, (*d*) trustees having a general power to invest trust moneys in or upon the security of shares, stocks, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, are empowered to invest such moneys on the security of mortgage debentures issued under and in accordance with the provisions of that Act.]

[East India Unclaimed Stock Act, 1885.]

[10. By the East India Unclaimed Stock Act, 1885, 48 & 49 Vict. c. 25, s. 23, Indian railway companies are empowered, with the sanction of the Secretary of State, and subject to such regulations and conditions as he may think fit to impose, to issue debenture bonds payable to bearer, which shall be negotiable by

[(*a*) *Re Sharp*, 45 Ch. Div. 286.]

[(*b*) *Elve* v. *Boyton*, (1891) 1 Ch. (C. A). 501.]

[(*c*) It has been held that any document which either creates a debt or acknowledges it is a "debenture;" *Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 215; *Levy* v. *Abercorris Slate Co.*, 37 Ch. D. 260.]

[(*d*) 28 & 29 Vict. c. 78, s. 40.]

delivery; but the section provides that trustees (unless expressly authorised by the terms of their trust to hold securities payable to bearer) may not hold such debenture bonds.]

[11. By "The Local Loans Act, 1875," 38 & 39 Vict. c. 83, s. 27, trustees or other persons for the time being authorised or directed to invest in the debentures or debenture stock of any railway or other company, unless the contrary is expressed in the instrument, are empowered to invest in any nominal debentures or nominal debenture stock issued under the Act (*a*). And a similar power is frequently given by Local Acts to invest in corporation and county stocks issued thereunder, but a proviso is sometimes added to prevent the investment in redeemable stock from being made at a price exceeding its redemption value (*b*).] [Local Loans Act.]

12. And where a fund is settled upon trust for one for life with remainders over, a power to "invest upon Government real or personal security, or in such stocks, funds, or shares, as the trustees in their *absolute discretion may think fit*," will not authorize a purchase of ordinary consolidated stock, or of preference or guaranteed stock of a *terminable character* (*c*). Terminable securities.

13. If a testator direct his "personal estate invested in Government or *other securities in bonds or shares* of whatever nature or kind, to be held in the same or the like investments," the executors are justified in retaining in specie Victoria bonds, Brazilian and Russian bonds, and English and Indian Railway stock, and East India stock (*d*). [If shares in a banking company are given to trustees "upon trust to permit them to remain in their then state of investment," but the Company is reconstituted, and the shares which were originally fully paid up with unlimited liability are converted into shares of limited liability, but with a margin of uncalled capital, the authority to retain the shares is exhausted, as they have ceased to be in the same state of investment (*e*).] Direction to retain investments.

14. If a trust fund be given to *three* trustees, with power to sell out and invest in the shares of a company, the trustees may Shares which must stand in one name only.

[(*a*) *Semble*, that when the authority to invest in the Railway Debenture Stock arises under sect. 21 of the Settled Land Act, 1882, the local authority must have paid a dividend for ten years before the investment on their debentures or stock is authorised; *Re Maberly*, 33 Ch. D. 455.]

[(*b*) A debenture payable to a person named, his executors, administrators, and assigns, is in the Act referred to as a nominal debenture (s. 5), and debenture stock in respect of which a stock certificate has not been issued is referred to as nominal debenture stock (s. 6).]

(*c*) *Stewart* v. *Sanderson*, 10 L. R. Eq. 26.

(*d*) *Arnould* v. *Grinstead*, W. N. 1872, p. 216; 21 W. R. 155.

[(*e*) *Re Morris*, 54 L. J. Ch. 388; 33 W. R. 445; 52 L. T. N.S. 462.]

not sell out and invest in the shares of a company which requires the shares to be held by a *single person*. But if shares in such a company be specifically bequeathed to three trustees, they are justified from the nature of the case in taking the shares in the name of *one* of themselves (*a*).

Exchequer bills.

15. Where moneys paid into Court were directed by an Act to be invested in "Three per cent. Consols, or Three per cent. Reduced, or *any Government securities*," the Court refused to allow an investment on Exchequer bills as not within the meaning of the Act (*b*); but where a trustee had engaged to lend a sum upon mortgage, which was authorised by the powers of the will, and instead of leaving the money idle at his bankers, laid it out in Exchequer bills as a temporary investment, and productive of interest with little fluctuation of value during the interval while the mortgage was in preparation, the Court held that such a dealing with the funds was justifiable (*c*); and it has since been ruled that Exchequer bills do fall within the description of Government securities (*d*); and they were expressly authorised as an investment by 23 & 24 Vict. c. 38, s. 11, and the general order [of 1861, by the Rule of the Supreme Court, November, 1888, and by the Trust Investment Act, 1889, already referred to (*e*).]

Foreign securities.

16. Stock of the United States, and even the bonds and debentures of the particular states, come under the description of "*foreign funds*," but not so the bonds or debentures of municipal towns or railway companies abroad (*f*). [And where a power was given to trustees to invest "upon any of the stocks or funds of the Government of the United States of America or of the Government of France, or *any other Foreign Government*," it was held that investments in New York and Ohio stocks and Georgia bonds were authorised by the power (*g*).] And where trustees were empowered to "continue or change securities from time to time, *as to the majority should seem meet*," and they

(*a*) *Consterdine* v. *Consterdine*, 31 Beav. 330; and see *Mendes* v. *Guedella*, 2 J. & H. 259; [*Lewis* v. *Nobbs*, 8 Ch. D. 591.]

(*b*) *Ex parte Chaplin*, 3 Y. & C. 397.

(*c*) *Matthews* v. *Brise*, 6 Beav. 239. But the trustee having left the Exchequer bills in the hands of the broker for more than a year, and without being earmarked, and the broker having disposed of the Exchequer bills for his own purposes, and become bankrupt, the trustee was, on *that ground*, made responsible for the value of the bills at the date of the bankruptcy, with 4 per cent. interest.

(*d*) *Ex parte South Eastern Railway Company*, 9 Jur. 650.

[(*e*) For some practical information as to the nature of Exchequer bills and bonds and Treasury bills see Vaizey on Investments, 89, 90.]

(*f*) *Ellis* v. *Eden*, 23 Beav. 543; *Re Langdale's Settlement Trust*, 10 L. R. Eq. 39.

[(*g*) *Cadett* v. *Earle*, 5 Ch. D. 710.]

proposed to call in certain securities and invest in American Government and American railway securities, the Court in an administration suit would not allow the trustees to exercise their discretion in this way, though great part of the testator's own estate was left by him thus invested (*a*). [But where a testator gave all his residue to trustees upon trust to invest in the parliamentary stocks or funds, or upon real securities, and the will contained a proviso authorising the trustees, as often as they should think it expedient so to do, to sell out, transfer or otherwise vary the trust moneys, funds, and securities, and to invest the same in or on *any other funds or securities whatsoever*, it was held that the trustees were acting within their powers in selling out New Three per cent. annuities, and investing the proceeds in Russian Railway bonds and Egyptian bonds (*b*).

[Indian railways.]

17. The Court has even in an administration action sanctioned the conversion of Bank Annuities into East India Railway stock annuity B, and into Scinde, Punjaub and Delhi Railway 5*l.* per cent. guaranteed stock, where the will authorised an investment in the guaranteed stock of any Railway Company in India, notwithstanding that the Scinde, Punjaub and Delhi Railway was, like most of the Indian Railways, held only on a lease under Government (*c*).

[Shares in companies.]

18. However large the power of investment may be it is the duty of the trustees to exercise their discretion as to the choice of investment, and they should, before investing in the shares of a company, have regard to its constitution and its rights against its shareholders (*d*). But if their discretion be exercised *bonâ fide*, the mere fact that the shares are not fully paid up will not make the investment an improper one (*e*).]

Greek bonds.

19. Where a testator directed all his property, except ready money or moneys in the *funds*, to be converted, and the proceeds to be invested in Three per cent. Consols or *other Government securities in England*, it was held that Greek *bonds*, though guaranteed by this country, were not comprehended in the words "*funds*," and that they ought to be converted, though the Court disavowed any intention of saying that bonds of that description might not, in other cases, be deemed Government securities (*f*).

(*a*) *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

[(*b*) *Lewis* v. *Nobbs*, 8 Ch. D. 591; and see *Blount* v. *O'Connor*, 17 L. R. Ir. 620.]

[(*c*) *Re Mansel*, 30 W. R. 133; 45 L. T. N.S. 741. See 42 and 43 Vict. c. ccvi. s. 37.]

[(*d*) *New London and Brazilian Bank* v. *Brocklehurst*, 21 Ch. Div. 302.]

[(*e*) *Re Johnson*, W. N. 1886, p. 71.]

(*f*) *Burnie* v. *Getting*, 2 Coll. 324.

Colony or foreign country.

20. A power to invest on "the bonds, debentures, or other securities, or the stocks or funds of any *colony or foreign country*," will not authorise an investment upon the Preference Bonds of a *Foreign Railway Company*, though a sinking fund for paying off the capital expended, and the payment of the interest in the meantime, are guaranteed by the foreign government (*a*). Where trustees are empowered to invest "in such mode or modes of investment as they in their uncontrolled discretion shall think proper," they cannot be made personally liable for investments made *bonâ fide* in the purchase of bonds of a foreign government, bonds of a colonial railway company, or shares of a bank on which there is a further liability; but if an action is pending for the administration of the estate, the Court will not allow such investments to be retained; but has under such a power authorised an investment in the inscribed stocks of the Government of New Zealand, Victoria, and New South Wales (*b*).]

[Colonial stock.]

[21. By the Colonial Stock Act, 1877 (*c*), trustees are not to apply for or hold stock certificates payable to bearer issued under that Act, unless expressly authorised to do so by the terms of their trust.]

[Isle of Man stock.]

[22. By the Isle of Man Stock Act, 1880 (*d*), trustees in that island, and any trustees authorised or directed to invest in the securities of the government of a colony, may, unless expressly prohibited, invest in any securities of the Government of the Isle of Man.]

East India stock.

23. Government or Parliamentary stocks or funds are such as are managed by Parliament, or paid out of the revenues of the British Government, or at least guaranteed by it, and therefore *East India stock*, under the charter of the East India Company, as possessing none of these requisites, was never a *Government* stock (*e*).

Trustees, where there is power to vary, may sell out stock and invest on mortgage.

24. Trustees may be, and generally are, *expressly* empowered to invest on *real* as well as Government security, and where this was the case, and there was a power to vary securities (*f*),

(*a*) *Re Langdale's Settlement Trusts*, 10 L. R. Eq. 39. As to investments by the Court on foreign securities, as Italian, see *In re Brackenbury's Trusts*, 31 L. T. N.S. 79; 22 W. R. 682.

[(*b*) *Re Brown*, 29 Ch. D. 889.]

[(*c*) 40 & 41 Vict. c. 59, s. 12.]

[(*d*) 43 & 44 Vict. c. 8.]

(*e*) *Brown* v. *Brown*, 4 K. & J. 704, [and India 3½ per cent. stock, being only charged on the revenues of India, is not within a power to invest on securities guaranteed by authority of Parliament; *Re National Permanent Building Society*, W. N. (1890) 117.

[(*f*) As to the power to vary investments under the Trust Investment Act, 1889, section 3, see *ante*, p. 342.]

the trustees might safely sell out Three per cent. Bank Annuities, and invest the proceeds on a mortgage; for, in such a case, although the tenant for life may obtain a higher rate of interest, yet no injury is done to the remainderman, as the capital is a constant quantity, and on the tenant for life's death the remainderman himself will have the benefit. A notion is sometimes entertained that where the stock has become depreciated since the original purchase of it by the trustees, the trustees cannot sell out the stock and lend the money on mortgage without being answerable for the difference between the bought and the sale price. But there is no ground for this apprehension, for if the trust authorise the purchase of stock at all, the trustees cannot be wrong in dealing with it at the market price of the day. No doubt if there were a sudden fall under peculiar circumstances, the trustees should not, without good reason, sell out at the very moment of casual depreciation, but if the power be *bonâ fide* exercised, the mere fact of a depreciation below the bought price cannot *per se* constitute a breach of duty.

Apportionment in respect of dividends upon a change of investment.

25. The trustees in changing the investment should have regard to the *tenant for life's interest* in the *income*. The stock, for instance, should be sold so as to make the time of accruer of the last dividend the starting-point as nearly as possible for the commencement of the interest on the mortgage. However, if the sale of the stock be made on an intermediate day between two dividends, although the price may be enhanced by the near approach of the dividend, it is not the practice to pay to the tenant for life the estimated amount of the current dividend out of the proceeds (*a*), although it was held in one case under *very special circumstances*, that the tenant for life was entitled to an apportionment (*b*). [And so after a purchase of stock between two dividend days the tenant for life will be entitled to the whole dividend which is declared on the dividend day subsequent to the purchase (*c*).]

Mortgage to replace stock and pay interim dividends.

26. Under the ordinary power of varying securities, a trustee would not be justified in lending a sum of stock upon a mortgage of real estate, conditioned for the replacement of the specific *stock* at a future day, and the payment of half-yearly sums equal to

(*a*) *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173; *Freeman* v. *Whitebread*, 1 L. R. Eq. 266; and see *Re Ingram's Trust*, 11 W. R. 980; 8 L. T. N.S. 758; *Bostock* v. *Blakeney*, 2 B. C. C. 654.

(*b*) *Lord Londesborough* v. *Somerville*, 19 Beav. 295.

[(*c*) *Re Clarke*, 18 Ch. D. 160.]

what would have been the *dividends* in the meantime. For the exercise of the power must be supposed to be beneficial to the parties interested, or some of them; whereas, in this case, it is difficult to point out what possible advantage can accrue, though the dividends be paid and the stock replaced. Nothing more is secured to the trust than would have been the effect of the original investment had it remained in *statu quo;* while a Government security is changed for the risk of a private security, and perhaps some expense incurred, and all this for no purpose. In short, such an arrangement would look like an accommodation to a friend, rather than as an investment in furtherance of the trust (*a*).

Mortgage to replace stock and pay interim interest.

27. The case is not so objectionable when the stock is to be replaced, and in the meantime *interest* exceeding the dividend is to be paid on the amount produced by the sale; for here, one of the persons whose interest is to be consulted, viz., the tenant for life, does receive a benefit *in præsenti*, and the remainderman, if he outlive the tenant for life and the mortgage continue so long, will derive the same advantage (*b*).

[Care to be observed in lending on mortgage.]

28. [The question, already adverted to (*c*), as to the degree of care and prudence which a trustee is called upon to exercise in the conduct of the trust is in no case of more prominent importance than when he is called upon to invest trust moneys on mortgage or other private securities. A clear and authoritative statement of the law upon this subject, as expounded in modern decisions, is to be found in the following words of Lord Watson:—

"As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all

(*a*) Since the above remarks were written, judicial opinions have been expressed to this effect; *Pell* v. *De Winton*, 2 De G. & J. 18; *Whitney* v. *Smith*, 4 L. R. Ch. App. 519, 521.

[(*b*) Under 51 Vict. c. 2, s. 21 and preamble and s. 2 (4), an agreement to transfer any of the old 3 per cent. Government stocks may be satisfied by a transfer of new ($2\frac{3}{4}$ per cent.) consols.]

[(*c*) See *ante*, p. 313.]

investments of that class which are attended with hazard. So long as he acts in the honest observance of those limitations, the general rule already stated will apply" (*a*).]

Attention to value and title in lending on mortgage.

29. When trustees propose to lend upon mortgage, their attention should be directed to two leading topics—the [value and] sufficiency of the [security] and the title of the borrower (*b*). Trustees who accept a security without making proper inquiries as to its nature and adequacy, though it may have been previously valued by a surveyor (*c*); or who rely upon a valuation made by a surveyor employed by the mortgagor, without having a survey made by a valuer employed by themselves, will be held personally liable for any deficiency of the security (*d*).

[Value.]

30. [In reference to the question of value there are two matters of primary importance—the mode in which the value is to be ascertained, and the proportion of the ascertained value which the trustee is justified in lending. Both these matters are now regulated by sub-section 1 of section 4 of the Trustee Act, 1888 (*e*), an enactment which applies to (*f*) "transfers of existing securities as well as to new securities, and to investments made as well before as after the passing of the Act" (Dec. 24, 1888) except where some action or other proceeding is pending with reference thereto at the passing of the Act." This important sub-section is as follows:—

[Trustee Act, 1888.]

"No trustee (*g*) lending money upon the security of any pro-

[(*a*) *Learoyd* v. *Whiteley*, 12 App. Cas. 753 at p. 733, quoted or referred to in *Rae* v. *Meek*, 14 App. Cas. 558, at pp. 569 and 570; *Re Salmon*, 42 Ch. D. 351, at p. 367; *Sheffield Society* v. *Aizlewood*, 44 Ch. D. 412, at p. 454. In applying this principle, it must, however, be borne in mind that "the business of the trustee, and the business which the ordinary prudent man is supposed to be conducting for himself, is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide." *Per* Lindley, L.J., *Re Whiteley*, 33 Ch. Div. 347, 355. And see the observations of Lord Halsbury and Lord Walton in *S. C.* in D. P., *Learoyd* v. *Whiteley*, *ubi sup.*; and see *Bullock* v. *Bullock*, 56 L. J. Ch. 221; 55 L. T. N.S. 703.]

(*b*) See *Waring* v. *Waring*, 3 Ir. Ch. Rep. 336.

(*c*) *Bell* v. *Turner*, W. N. 1874, p. 113.

(*d*) *Ingle* v. *Partridge* (No. 2), 34 Beav. 411; and see *Hopgood* v. *Parkin*, 11 L. R. Eq. 74; *Budge* v. *Gummow*, 7 L. R. Ch. App. 719; *Bell* v. *Turner*, W. N. 1874, p. 113; [*Smethurst* v. *Hastings*, 30 Ch. D. 490; *Re Olive*, 34 Ch. D. 70; *Walcott* v. *Lyons*, 54 L. T. N.S. 786; *Rae* v. *Meek*, 14 App. Cas. 558.]

[(*e*) 51 & 52 Vict. c. 59.]

[(*f*) Sec. 4, sub-s. 4.]

[(*g*) The expression "trustee" by sec. 1, sub-s. 3, is to be deemed to include an executor or administrator and a trustee whose trust arises by construc-

perty shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report, and that the loan was made under the advice of such surveyor or valuer expressed in such report. And this section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend."

[Report as to value.]

31. In order that the trustee should bring himself within the protection of this enactment, it is an essential condition that he should obtain such a report as to value as the statute indicates. The first requisite is that the trustee should have a reasonable belief that the person appointed is an able, practical surveyor or valuer. The choice of the surveyor is a matter upon which the trustee is bound to exercise his own judgment (*a*), and he cannot properly leave the nomination to his solicitor (*b*). But it is no longer necessary (*c*) that the surveyor should be possessed of special knowledge of the locality in which the property is situate, though of course in many cases the possession of such knowledge may be very material with regard to his ability (*d*). As to the mode of employment of the surveyor, the statute requires, as did in effect the pre-existing law, that he should be instructed and employed independently of any owner of the property, and every precaution should be taken to secure the services of an entirely independent person who can in no sense be regarded as instructed and employed on behalf of, or even recommended by (*e*), the

tion or implication of law as well as an express trustee, but not the official trustee of charitable funds. And by sub-s. 4 the provisions of the Act relating to a trustee are to apply as well to several joint trustees as to a sole trustee; see *Moore* v. *Knight*, (1891) 1 Ch. 547, at p. 553.]

[(*a*) See *Re Walker*, 59 L. J. Ch. 386, 391; 62 L. T. N.S. 449; 38 W. R. 766.]

[(*b*) See *Fry* v. *Tapson*, 28 Ch. D. 268.]

[(*c*) As formerly held, see *Fry* v. *Tapson*, *ubi sup.*; and *Budge* v. *Gummow*, L. R. 7 Ch. 717, 722.]

[(*d*) See *Budge* v. *Gummow*, *Fry* v. *Tapson*, *sup.*]

[(*e*) See *Hopgood* v. *Parkin*, 11 L. R. Eq. 74.]

mortgagor. And he should be paid by the trustee, although the charge is ultimately to be borne by the mortgagor, and the amount of the fee should not be subject to increase if the mortgage is carried out (*a*). The report must not merely state the value of the property, but must be of such a character that the loan can properly be said to have been made "under the advice of the surveyor or valuer as expressed in such report." The surveyor should therefore state what amount may in his opinion safely be advanced upon the security of the particular property (*b*), and expressly advise that such amount should be advanced.

[Amount of loan.]

32. If the trustee, by compliance with the provisions of the recent enactment, has brought himself within its protection, the only requirement as to the amount of the loan is that it must not exceed *two-thirds* of the value of the property as appearing by the report, and as the section applies to loans upon "any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend," there is now established one uniform rule as to the amount of money proportionate to the value of the property which the trustee may safely advance. Formerly a distinction was made, and it was considered that while trustees] could not be advised to advance more than *two-thirds* of the actual value of the estate if it were *freehold land* (*c*), if the property consist of *freehold houses*, they should not lend so much as two-thirds (*d*), but (say) one-half of the actual value (*e*). [It has often been said that the "two-thirds rule," as it is called, is not a hard and fast rule, but] only a general one (*f*); and where trustees have lent on the security of property of less value, but acted honestly, they have been protected by the Court, and allowed their costs (*g*). [But the rule has certainly been regarded as one which ought not lightly to be departed from (*h*), and as

Value of the security.

[(*a*) *Smith* v. *Stoneham*, W. N. 1886, p. 178.]

[(*b*) *Re Walker*, 59 L. J. Ch. 386; 62 L. T. N.S. 449; 38 W. R. 766.]

(*c*) *Stickney* v. *Sewell*, 1 M. & Cr. 8; *Norris* v. *Wright*, 14 Beav. 307; *Macleod* v. *Annesley*, 16 Beav. 600; *Ingle* v. *Partridge* (No. 2), 34 Beav. 411; *Roddy* v. *Williams*, 3 Jones & Lat. 16, *per Cur.*

(*d*) *Stickney* v. *Sewell*, *Norris* v. *Wright*, *ubi sup.*; *Phillipson* v. *Gatty*, 7 Hare, 516; *Drosier* v. *Brereton*, 15 Beav. 221.

(*e*) *Stretton* v. *Ashmall*, 3 Drew. 12; *Macleod* v. *Annesley*, 16 Beav. 600; *Budge* v. *Gummow*, 7 L. R. Ch. App. 719; [*Hoey* v. *Green*, W. N. 1884, p. 236.]

[(*f*) *Stretton* v. *Ashmall*, 3 Drew. 12; *Re Godfrey*, 23 Ch. D. 483, 490; *Smethurst* v. *Hastings*, 30 Ch. D. 490.]

(*g*) *Jones* v. *Lewis*, 3 De G. & Sm. 471. Reversed on appeal, it is believed, by Lord Truro, on Feb. 26, 1852, but on what grounds not known. [*Re Godfrey*, 23 Ch. D. 483; *Re Olive*, 34 Ch. D. 70; *Re Pearson*, 51 L. T. N.S. 692.] And see *Vickery* v. *Evans*, 3 N. R. 286.

[(*h*) *Learoyd* v. *Whiteley*, 12 App. Cas. 727, 734; 33 Ch. Div. 347; and

it has now received the recognition of the Legislature, trustees will do well to adhere to it in every case.

Sufficiency of security.

33. It has been held that as to buildings used in *trade*,] and the value of which must depend on external and uncertain circumstances, trustees would not, in general, be justified in lending so much as one-half (*a*). [And where trustees having a power to invest on real securities invested on the security of freehold property used as brick-works to an amount which was excessive, having regard to the value of the property independently of its capability of being used for trade purposes, they were held responsible (*b*). So, too, it has been held that trustees should not lend on the security of unlet houses, especially if the mortgagor is a builder (*c*); and cottage property in a town, the value of which necessarily depends on changing circumstances (*d*), cannot be regarded as an eligible investment for trustees, though the mere fact that new buildings on the security of which trustees are lending are unfinished may not be material if due security is taken for their completion (*e*). In reference to decisions of this kind, it must be borne in mind that by the recent statute the duty which the trustee is empowered to delegate is that of ascertaining the value of the property, but the statute will not protect him from a breach of trust on the ground that the security "is one of a class which is attended with hazard" (*f*), and, generally, it is conceived that in reference to the sufficiency of the security he is bound to exercise the same care and prudence as theretofore. Where the question is simply one of value, which, in the ordinary course of business, it is within the functions of a surveyor or valuer to determine, the protection afforded by the statute seems to be complete. But further than this it does not appear to extend, and a trustee, while, of course, eschewing altogether all investments of a speculative character, will be well advised if he obtains in every case from his surveyor and valuer a report as full and ample as may be, setting forth all particulars requisite

see *Knox* v. *Mackinnon*, 13 App. Cas. 753; *Re Olive*, 34 Ch. D. 70; *Rae* v. *Meek*, 14 App. Cas. 558; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337.]

(*a*) *Stickney* v. *Sewell*, 1 M. & Cr. 8; and see *Stretton* v. *Ashmall*, 3 Drew. 9; *Royds* v. *Royds*, 14 Beav. 54, cases of trade and manufacturing premises.

[(*b*) *Re Whiteley*, 32 Ch. D. 196; 33 Ch. Div. 347; *S. C.* in D. P. *nom. Learoyd* v. *Whiteley*, 12 App. Cas, 727; *Re Pearson*, 51 L. T. N.S. 692.]

[(*c*) *Hoey* v. *Green*, W. N. 1884, p. 236; *Fry* v. *Tapson*, 28 Ch. D. 268; *Smethurst* v. *Hastings*, 30 Ch. D. 490.]

[(*d*) *Re Salmon*, 42 Ch. Div. 351, 368; *Re Olive*, 34 Ch. D. 74.]

[(*e*) *Rae* v. *Meek*, 14 App. Cas. 558, 571, a Scotch case, *per* Lord Herschell.]

[(*f*) *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 354, *per* Stirling, J., referring to *Learoyd* v. *Whiteley*, 12 App. Cas. 727, 733.]

in order to enable the trustee to judge not merely as to the present, the special, or the temporary value of the property, but as to its permanent value for all purposes (*a*).

34. With reference to the liability of a trustee who makes an excessive advance upon a mortgage security, it is now enacted (*b*) that where a trustee shall have improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects (*c*) for a less sum than was actually advanced thereon, the security shall be deemed an authorised investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest, and the section applies "to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act." [Liability of trustee lending excessive sum.]

Where trust money has been invested on an insufficient security, and the trustee is ordered to replace the fund, but the existing securities are retained at the instance of the trustee to await a more favourable time for realising them, the cestuis que trust are entitled to a lien on the securities until the fund is replaced (*d*).

35. The duty of the trustee in considering the sufficiency of the title to the mortgaged property is not distinguishable in principle from his duty in the case of a purchase (*e*). Mortgages of leaseholds, however, formerly rested on a different footing from purchases by reason that the provisions of the Vendor and [Title.]

[(*a*) As to the form and contents of the report, see *Re Olive*, 34 Ch. D. 74; *Re Whiteley*, 33 Ch. Div. 351, *S. C. nom. Learoyd* v. *Whiteley*, 12 App. Cas. 735.

The following are suggested as some of the most material points to be attended to by the trustee: 1. The instructions to the valuer should be in writing. 2. It should appear how the trustees became acquainted with the property. 3. The valuer should be informed that the loan is one of trust-money; and (4) generally of all material circumstances known to the trustees or their adviser in reference to the property and neighbourhood. 5. The report should be in writing. 6. It should particularly describe the character of the property, and should not extend to any property other than that on which the loan is to be made (see *Re Walker*, 59 L. J. Ch. 386, 391; 62 L. T. N.S. 449; 38 W. R. 766). 7. All matters connected with the property tending to decrease its value in reference to repairs, outgoings, and the like, should be stated (*S. C.*). 8. The means of knowledge and capacity of the valuer should be clearly made to appear, especially his experience, if any, in the locality, and his information as to actual recent sales in the district. 9. The report should be expressed in plain business-like language, and not in inflated phraseology.]

[(*b*) 51 & 52 Vict. c. 59, s. 5.]

[(*c*) See *Re Walker*, *sup.*]

[(*d*) *Re Whiteley*, 33 Ch. D. 347; *S. C.* in D. P. *nom. Learoyd* v. *Whiteley*, 12 App. Cas. 727.]

[(*e*) As to which see *post*, Chap. xix.]

Purchaser Act, 1874 (*a*), and the Conveyancing Act, 1881 (*b*), were not applicable to mortgages. This is remedied by the Trustee Act, 1888, which provides (*c*) that no trustee lending money upon the security of any leasehold property shall be chargeable with breach of trust only upon the ground that in making such loan he dispensed, either wholly or partially, with the production or investigation of the lessor's title. It was held by Lord Romilly, M.R., that, as trustees are bound to employ competent persons as their solicitors, if, through the ignorance or negligence of their solicitors, the trustees lend money upon a bad title, they are personally responsible to the *cestuis que trust*. But the decision was appealed against, and the case was compromised with the sanction of the Lords Justices on behalf of infants (*d*).

[Duty of solicitor to trustee.]

36. [The duty of a solicitor advising a trustee in reference to an investment of trust money is not so much himself to form or express an opinion on the value of the property offered as security, (though the law does not prohibit him from doing so if he thinks fit,) as to see that the trustee has before him the proper materials for forming a judgment of his own. He ought therefore to see not only that the trustee has before him proper valuations of the property, but that he is made acquainted with any facts known to the solicitor and not appearing by the valuations which may affect the value of the property, and that his attention is directed to any rules laid down by the courts for the guidance of trustees with reference to such matters (*e*).]

Ground rents.

37. A power of investment upon the security of freehold or copyhold hereditaments will authorise trustees to invest upon freehold ground rents reserved out of houses, and upon the question of value it will be borne in mind that the value of the houses is included, as, if the ground rents be not paid, the landlord can enter (*f*).

Trustees may not lend on mortgage to one of themselves.

38. Trustees are precluded from lending on mortgage to one of themselves, as all must exercise an impartial judgment as to the sufficiency of the security (*g*).

[(*a*) 37 & 38 Vict. c. 78, ss. 2, 3.]

[(*b*) 44 & 45 Vict. c. 41, s. 9. See *post*, Chap. xviii. sect. 1.]

[(*c*) 51 & 52 Vict. c. 59, s. 4, sub-s. 2.]

(*d*) *Hopgood* v. *Parkin*, 11 L. R. Eq. 74. The M. R. added, that if the mortgagor had wilfully and knowingly deceived the solicitor by assertion of what was false, or by the suppression of what was true, it might have altered the case and the liability of the trustees, Ib. 79; [and see *Re Speight*, 22 Ch. Div. 727; 9 App. Cas. 1.]

(*e*) *Blyth* v. *Fladgate*, (1891) 1 Ch. 337 at p. 360, *per* Stirling, J.]

(*f*) *Vickery* v. *Evans*, 3 N. R. 286.

(*g*) *Stickney* v. *Sewell*, 1 M. & Cr. 8; and see —— v. *Walker*, 5 Russ.

Existing mortgages.

39. Where trustees and executors are empowered by will to lay out money upon *real securities*, they are authorised in *continuing* it upon existing mortgages (*a*); but the trustees should first satisfy themselves as to the sufficiency of the security.

[Power "to continue to hold" investments.]

40. [Where trustees are authorised to "continue to hold" special investments, the power must, *primâ facie*, be held to apply to such of the trusts as are continuous, and the trustees may appropriate to a special continuous trust any of the investments which the settlor has authorised to be held (*b*).]

Fowler *v.* Reynal.

41. If trustees have a power of lending to *three* on a mortgage of their joint interest in a particular property, they cannot lend to *two* of them. Neither can the trustees lend to the *three* without taking any security at the time, though after an interval of two years they succeed in obtaining the security. It is no excuse to say that the delay in taking the security did not occasion the loss. The answer is, that the terms of the power were not complied with (*c*).

Road bonds.

42. Road bonds, or mortgages of tolls and toll-houses, are *real* securities, though they may not be eligible real securities (*d*); and where a testator, having road bonds, empowered his executor to *leave* any part of his assets on existing "real securities," it was held that they were not bound to call in the road bonds, but might exercise a discretion. The Court, however, gave no opinion whether the executor would have been justified in lending trust money on road bonds as an original investment (*e*).

Railway mortgages.

43. It has since been determined, that a power to lend on *real securities* does not authorise a loan upon *railway* mortgages (*f*), and *à fortiori* a power to invest "upon the security by way of mortgage of any freehold, copyhold, or leasehold hereditaments," does not authorise an investment on railway mortgages (*g*). And even a power to lend on "approved securities," though it will justify an investment on an ordinary mortgage, might not be held to extend to railway securities (*h*). And where trustees are empowered to lend "on such securities as they may approve,"

7; *Francis* v. *Francis*, 5 De G. M. & G. 108; *Crosskill* v. *Bower*, 32 Beav. 86; *Fletcher* v. *Green*, 33 Beav. 426.

(*a*) *Angerstein* v. *Martin*, T. & R. 239; *Ames* v. *Parkinson*, 7 Beav. 379.

[(*b*) *Fraser* v. *Murdoch*, 6 App. Cas. 855.]

(*c*) *Fowler* v. *Reynal*, 3 Mac. & G. 500; 2 De G. & Sm. 749.

[(*d*) See *Holgate* v. *Jennings*, 24 Beav. 623.]

(*e*) *Robinson* v. *Robinson*, 1 De G. M. & G. 247; [*Cavendish* v. *Cavendish*, 24 Ch. D. 685.]

(*f*) *Mant* v. *Leith*, 15 Beav. 525; *Harris* v. *Harris* (No. 1), 29 Beav. 107.

(*g*) *Mortimore* v. *Mortimore*, 4 De G. & J. 472.

(*h*) See *Re Simson's Trusts*, 1 J. & H. 89.

they are still bound to make inquiries, and exercise a sound discretion whether the securities are of sufficient value; and if in such a case the trustees lend on any irregular securities, the *onus* lies on the trustees to show the sufficiency of the security (*a*).

Loan upon a judgment.

44. Trustees, with power to lend on *real securities*, could not lend on *personal* security with a *judgment* entered up against the borrower, [even when] by 1 & 2 Vict. c. 110, judgments were a charge on all the lands of the debtor, in the same manner as if he had, by writing under his hand, agreed to charge the same (*b*).

Upon leaseholds for lives.

45. Trustees having power to lend on *mortgage*, ought not to invest on security of leaseholds for *lives*, for there can be no security without resorting to a policy of insurance, and then, *quatenus* the policy, they rely upon the funds and credit of a private company (*c*). In the case of leaseholds, the lessee generally does not know the lessor's title; and where this is the case, it is an additional reason why trustees cannot accept the security. This restriction, however, does not apply to leases for lives in Ireland renewable for ever (*d*).

Upon leaseholds for years.

"Real securities."

46. Although where there is a power to lend on *mortgage* of real estates generally, there may be no objection on principle, to an investment on *long terms of years* at a peppercorn rent, which beneficially are equal to freeholds, yet it was held that technically long terms of years did not answer the description of real securities (*e*). [Now, however, by the Trustee Act, 1888 (*f*), it is provided that a power to invest trust money in real securities shall authorise and shall be deemed to have always authorised an investment upon mortgage of property held for an unexpired term of not less than two hundred years, and not subject to any reservation of rent greater than 1*s.* a year, or to any

(*a*) *Stretton* v. *Ashmall*, 3 Drew. 9; and see *Zambaco* v. *Cassavetti*, 11 L. R. Eq. 439; [*New London and Brazilian Bank* v. *Brocklebank*, 21 Ch. Div. 302.]

(*b*) *Johnston* v. *Lloyd*, 7 Ir. Eq. Rep. 252. Decided upon the corresponding enactment in the Irish Act, 3 & 4 Vict. c. 105. [As to judgments not charging lands until they have been actually delivered in execution, see 27 & 28 Vict. c. 112.]

(*c*) See *Lander* v. *Weston*, 3 Drew. 389; *Fitzgerald* v. *Fitzgerald*, 6 Ir. Ch. Rep. 145.

(*d*) *Macleod* v. *Annesley*, 16 Beav. 600.

(*e*) *Townend* v. *Townend*, 1 Giff. 211; [*Re Chennell*, 8 Ch. Div. 507; *Re Boyd's Settled Estates*, 14 Ch. D. 626; *Leigh* v. *Leigh*, 56 L. J. N.S. Ch. 125; 56 L. T. N.S. 634; 35 W. R. 121; but under the Conveyancing Acts, 44 & 45 Vict. c. 41, s. 65, and 45 & 46 Vict. c. 39, s. 11, a long term of years at a peppercorn rent may, in the cases provided by the Acts, be enlarged into a fee simple.]

[(*f*) 51 & 52 Vict. c. 59, s. 9. Nevertheless, when it is practicable for the mortgagors to enlarge the long term into a fee simple previous to the mortgage, this course should always be adopted.]

right of redemption, or to any condition for re-entry except for non-payment of rent.]

Mortgage for long term.

47. [Formerly, although] the mortgagor was seised *in fee*, a demise for a long term of years was often thought the more convenient form of mortgage, in order that the land and the money might devolve together upon the personal representative of the mortgagee, [but modern legislation has rendered such a device unnecessary, and it has consequently fallen into disuse.]

Leaseholds with onerous covenants.

48. As to *leaseholds* of short duration, and incumbered with covenants and clauses of forfeiture, although no rule can be laid down that a trustee would not be justified under any circumstances in lending on such a security, yet he would at least be treading on very delicate ground, and the *onus* would lie heavily upon him to make out the perfect propriety of the investment (*a*). If the trustees be authorised and *required*, at the instance of the tenant for life, to invest the trust fund in a *purchase* of leaseholds, they have no option if the tenant for life insist upon his right (*b*).

Copyholds.

49. There can be no objection to *copyholds* as a real security, but the trustees should of course take care that they are of adequate value, and not rely on the mere covenant to surrender, but procure an actual surrender (*c*).

Mortgage of an undivided share or of a reversion.

50. There does not appear to be any *absolute* objection to a loan by trustees on the security of an *undivided share* or of a *reversion;* but they must not advance more than the proper proportion of the value of the undivided share, or of the reversion as such, that is, the *present value of the future interest*, and in taking securities of this kind a full power of sale (*d*) would be an essential provision.

Lending on real security in Ireland.

51. Where trustees were expressly authorised to lend on real securities in England, Wales, or Great Britain, they were empowered by 4 & 5 Will. 4. c. 29, to lend on real securities in *Ireland*. But the second section enacted, that all loans in which

(*a*) See *Townend* v. *Townend*, 1 Giff. 201; *Wyatt* v. *Sharratt*, 3 Beav. 498; *Fuller* v. *Knight*, 6 Beav. 209; [*Re Chennell*, 8 Ch. Div. 492.]

(*b*) *Cadogan* v. *Earl of Essex*, 2 Drew. 227; *Beauclerk* v. *Ashburnham*, 8 Beav. 322; see *ante*, p. 345.

(*c*) See *Wyatt* v. *Sharratt*, 3 Beav. 498.

[(*d*) The law now supplies a power of sale, see 44 & 45 Vict. c. 41, s. 19. It must, however, be borne in mind that an investment on an undivided share involves a complication with the rights of other persons, and, in the case of small estates, the possibility that the costs of a partition action may exceed the margin of the security; while in the case of a reversion there is no income available for payment of the interest, and the value of the mortgaged property is in many cases matter of speculation rather than of reasonable certainty.]

any *minor, unborn child,* or *person of unsound mind* was interested, should be made by the direction of the Court of Chancery, to be obtained *in any cause,* or (*a*) *upon petition* in a summary way (*b*). And by 22 & 23 Vict. c. 35, s. 32 (*c*), trustees, executors, and administrators, where not expressly forbidden by the instrument creating the trust, might invest the trust-fund in real securities in any part of the *United Kingdom,* and investments on real securities in Ireland might therefore be made; [but these enactments have now been repealed (but without prejudice to the validity of any act done thereunder) by the Trust Investment Act, 1889, already adverted to (*d*).]

Lord St. Leonards' Act.

Securities in Scotland.

52. Where trustees have a power of investing upon "real securities," it is conceived that real securities in *Scotland,* where the law is wholly different, would not fall within the description; and though the above-mentioned Act of 22 and 23 Vict. c. 35, allowed investments in real securities in any part of the United Kingdom, yet as by the 33rd section the Act was not to extend to Scotland, it was not considered safe for trustees to invest in Scotch securities, [and under the Trustee Investment Act, 1889, by which 22 & 23 Vict. c. 53 has been replaced, and which also does not extend to Scotland, it would seem that such investments are no more advisable than they previously were.]

Land Improvement Act.

53. By the Improvement of Land Act, 1864 (*e*), trustees having a power to lend on *real* securities shall (unless the settlement provide the contrary) have power, at their discretion, to invest their trust-money on charges under the Act or mortgages thereof. But as the provisions are apparently prospective, trustees under a settlement dated before 29 July, 1864, when the statute passed, cannot safely assume that the Act applies to their case.

Second mortgages.

54. Trustees cannot be advised to make advances upon a *second* mortgage, for they neither get the legal estate nor the title deeds, and they may be placed under serious difficulties by the acts of the first mortgagee. If he bring an action for foreclosure, the trustees forfeit their interest unless they redeem,

(*a*) *Ex parte French,* 7 Sim. 510.

[(*b*) As to this Act see *Stuart* v. *Stuart,* 3 Beav. 430; *Re Kirkpatrick's Trusts,* 15 Jur. 941. *Ex parte French, sup.*; *Ex parte Pawlett,* Ph. 570; *Re Settlement of Allies and Ux.,* M. R. 24, Jan. 1857, in which the Court sanctioned a proviso that the mortgage money should not be called in for five years. As to how trustees, on the sale of any holding under the Purchase of Land (Ireland) Act, 1885, may invest the proceeds of sale, see Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33, s. 11).]

(*c*) Made retrospective by 23 & 24 Vict. c. 38, s. 12; see *ante,* p. 332.

[(*d*) 52 & 53 Vict. c. 32; see *ante,* p. 340.]

(*e*) 27 and 28 Vict. c. 114, s. 60.

which they may have no means of doing out of their own estate, and they may experience a difficulty in procuring a person to take a transfer; and if the first mortgage contain a power of sale, the mortgagee may sell the property at a great disadvantage, and the trustees cannot prevent it, unless by redemption, which may not be practicable (*a*). In addition to which it is extremely difficult to guard satisfactorily against the possible event of the mortgagor obtaining an advance upon a third mortgage without disclosing the second, and should this occur the third mortgagee might as a purchaser for value without notice get in the first mortgage, and *tack* his original mortgage to it, and squeeze out the second mortgage; or the first mortgagee or his transferee might by *consolidation* of his mortgage with a mortgage of other property of the same mortgagor, oust the trustees of their security (*b*). [But by the Conveyancing and Law of Property Act, 1881 (*c*), sect. 17, in cases of mortgages made, or one of which is made, after the 31st December, 1881, and subject to any stipulation to the contrary, the right of consolidating separate mortgages of different properties is taken away.]

But a *charge under the Improvement of Land Act*, 1864, is declared by that Act not to be deemed such an incumbrance as to preclude trustees of money, with power to invest the same in the purchase of land or on mortgage, from investing it upon land so charged, unless the terms of the trust or power expressly provide that the security to be so taken shall not be subject to any prior charge (*d*).

Equitable mortgages.

55. An investment upon a *deposit* of title deeds has this advantage over a second mortgage, that it would be difficult for the mortgagor to deal with the property in the absence of the deeds. At the same time it is possible that by some accident or fraud, the legal estate might get into the hands of a purchaser for value without notice, and if so the trustees would be ousted. Sir J. Romilly, M.R., observed, "I do not know that it has ever been determined, and I do not mean to express an opinion, that a trustee is ever justified in lending money on real security,

(*a*) See *Norris* v. *Wright*, 14 Beav. 308; *Robinson* v. *Robinson*, 16 Jur. 256; *Drosier* v. *Brereton*, 15 Beav. 226; *Waring* v. *Waring*, 3 Ir. Ch. Rep. 337; *Lockhart* v. *Reilly*, 1 De G. & J. 464, 476.

(*b*) But a third mortgagee holding a security which had no existence at the date of the second mortgage, and taking with notice of that mortgage, cannot consolidate a first mortgage with his own third mortgage as against the second mortgagee, *Baker* v. *Gray*, 1 Ch. D. 491; [and see *Jennings* v. *Jordan*, 6 App. Cas. 698; *Harter* v. *Colman*, 19 Ch. D. 630.]

[(*c*) 44 & 45 Vict. c. 41.]

(*d*) 27 & 28 Vict. c. 114, s. 61.

when he does not get the legal estate" (*a*). [And in a recent case the late M. R. said that "it had never been decided that an investment upon equitable mortgage was unauthorised when there was a power to invest on real securities, because it had always been assumed to be the law of the Court without calling for a decision," and he acted upon that view (*b*). There seems to be no objection to trustees investing upon a submortgage where they get the legal estate, and are put in a position to exercise the powers arising under the original mortgage deed (*c*).]

Contributory mortgage.

56. [It is a breach of trust for trustees empowered to invest "in their names" upon real security, to invest upon a contributory mortgage of freeholds (*d*), and in general it is apprehended that] trustees should not join with others in a mortgage, so as to *mix* up the trust fund with the rights of strangers. Still less could they take a joint mortgage in the name of a common trustee, for this would also be a delegation of their duty.

Mixing trust-money in a mortgage.

Powers of sale.

57. Mortgagees at the present time almost invariably have powers of sale, [either expressed in the mortgage or arising under the recent Act (*e*),] but formerly it was otherwise, and trustees would no doubt be held justified in taking a transfer of an old mortgage not accompanied with a power of sale. Where, however, it is practicable, trustees should always insist on a power of sale, though the omission might not amount to a breach of trust (*f*).

Caution in payment of the money.

58. When trustees lend on mortgage, they should be careful not to part with the money, except on delivery of the security; for they will be liable for all the consequences if they sell out stock, and allow their solicitor or agent to receive the money on his representation that the mortgage is ready, and it afterwards turns out that the proposed security was a pure invention, and that the money has been misapplied (*g*).

Clause not to call in the money.

59. A power of investment does not justify trustees in admitting a clause that the mortgage shall not be called in for a certain

(*a*) *Norris* v. *Wright*, 14 Beav. 308; and see cases cited p. 364, note (*a*).

[(*b*) *Swaffield* v. *Nelson*, W. N. 1876, p. 255.]

(*c*) *Smethurst* v. *Hastings*, 38 Ch. D. 490.

[(*d*) *Webb* v. *Jonas*, 39 Ch. D. 660; *Re Massingberd's Settlement*, 63 L. T. N.S. 296 (C. A.); and see *Re Walker*, 59 L. J. Ch. 386; 62 L. T. N.S. 449; 38 W. R. 766.]

[(*e*) Under 44 & 45 Vict. c. 41, s. 19, *et seq.*, a statutory power of sale arises under every mortgage by deed unless expressly excluded.]

(*f*) See *Farrar* v. *Barraclough*, 2 Sm. & G. 231.

(*g*) *Rowland* v. *Witherden*, 3 Mac. & G. 568; *Hanbury* v. *Kirkland*, 3 Sim. 265; [*Re Speight*, 22 Ch. Div. 727; 9 App. Cas. 1;] and see *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16.

period, and if the interests of the *cestuis que trust* were thereby affected, the trustees would be personally responsible (*a*).

In loans of trust-money, the trust kept out of sight.

60. Where trust-money is lent upon *mortgage*, it is desirable to keep the trust out of sight, in order that when the money is paid off, the trust deed may not become an essential link in the mortgagor's title. It is usual, therefore, to insert in the mortgage deed a declaration, that the money advanced belongs to the trustees (not described in that character, but by name) on a joint account, and that the receipt of the survivors or survivor, his executors or administrators, their or his assigns, shall be a sufficient discharge (*b*); a practice which, assuming the trust settlement to confer the power of executing the trusts and giving receipts on the survivors or survivor, his executors or administrators, their or his assigns, does not seem open to much objection, and has received the sanction of general usage. Any declaration of trust of the mortgage that may be requisite is executed by a separate deed. The trustees should, however, also execute the mortgage deed, as doubts have been entertained (though it is conceived without reason (*c*)) whether, if they omit to execute, the declaration will bind them. By this method, should the mortgage be called in or transferred before any change of trustees occurs, no inconvenience arises (*d*). Upon a change of trustees, however, the difficulty of framing a transfer of the mortgage to the new trustees so as not to disclose the trust is very great. Some conveyancers, indeed, treat the difficulty as insurmountable, and disclose the trust; others recite in the transfer an actual payment of the mortgage money by the new trustees to the old, a practice open to the objection that it involves a recital absolutely contrary to fact (*e*). Another and middle course fre-

(*a*) *Vickery* v. *Evans*, 3 N. R. 286. See *ante*, p. 364, note (*b*).

[(*b*) See now 44 & 45 Vict. c. 41, s. 61, which, subject to a contrary intention being expressed in the instrument, makes the receipt of the survivors or survivor, or of the personal representatives of the last survivor, a complete discharge in all cases where, in a mortgage or transfer made since the 31st December, 1881, the money advanced or owing is expressed to be advanced by or owing to more persons than one out of money or as money belonging to them on a joint account, or the mortgage or transfer is made to more persons than one jointly and not in shares.]

(*c*) How can a person claim at the same time under and against a deed? If he claim under the mortgage at all, he must admit the declaration that the money was a joint advance. Besides, the presumption (unless and until the contrary is proved) would be, that the solicitor who prepared the deed had sufficient authority to insert the clause.

[(*d*) *Re Harman and Uxbridge, &c., Railway Company*, 24 Ch. D. 720, 726.]

(*e*) In a note to Jarman's Bythewood, vol. 6, p. 381, it is stated that "some gentlemen introduce a declaration that the mortgagees are *trustees*, and have no beneficial interest, con-

quently adopted, is as follows: A. and B. being appointed new trustees in the room of C. and D., the recitals omit to notice the appointment of A. and B. as new trustees, and merely state that A. and B. "have become entitled to the mortgage, and have required C. and D. to convey and assign to them." But this last method is by no means free from difficulty. The degree of inaccuracy of statement is perhaps no greater than that involved in the original joint account clause; but the absence of consideration creates embarrassment, and there seems room for contention by a future purchaser of the mortgaged estate that he has a right to know *how* A. and B. became entitled. Another mode is to recite that C. and D. are possessed of the mortgage moneys and security *in trust for A. and B.* to whom the same belong on a joint account, and who are desirous of having the same vested in them; a method affording a greater prospect of success than those previously mentioned, and on the whole perhaps to be preferred. [This mode of effecting the transfer has recently been approved, and the Court expressed an opinion that purchasers were entitled to rely on such a recital as a protection against any trusts which might affect the property (*a*).]

Mortgage where the trust is disclosed.

61. Where trust-money is secured upon a mortgage and the trust appears upon the title, the mortgagor generally requires a [statutory acknowledgment of the right to] production of the settlement for the purpose of satisfying a future purchaser that the estate has been discharged, and it is conceived that the trustee should give such [an acknowledgment.

[Friendly society.]

62. If the trustees of a friendly society lend the funds of the society on personal security not authorised by the Friendly Societies Act, 1875, the transaction is not an illegal contract upon which the trustees cannot sue, but amounts only to a breach of trust on the part of the trustees (*b*).]

Scale must be held evenly by trustees.

63. Where *successive estates* are limited, the scale in investments should of course be held evenly as between all parties, and the tenant for life should not be allowed, by an investment on a security less safe or less permanent than the usual one, and

ceiving, and, it is apprehended, rightly, that this affirmation, which refers to no specific trust, would not render it incumbent on any person paying the mortgage to inquire into the nature of the trust." This proposition, it is conceived, cannot safely be acted upon. [And see now 5th edit. of same work, vol. iii. p. 851, note (*f*).] See on the doctrine of notice, *Jones* v. *Smith*, 1 Hare, 43; 1 Ph. 244; *Bridgman* v. *Gill*, 24 Beav. 306; *Jones* v. *Williams*, 24 Beav. 47.

[(*a*) *Re Harman and Uxbridge, &c., Railway Company*, 24 Ch. D. 720, 726; and see *Carritt* v. *Real and Personal Advance Co.*, 42 Ch. D. 263, 272.

[(*b*) *Re Coltman*, 19 Ch. Div. 64.]

therefore yielding to the present holder an increased rate of interest, to advance himself at the expense of the remainderman (*a*).

Long Annuities, &c.

64. If a testator's estate consist of Long Annuities, or other fund either not a Government security or not of the most permanent character, the Court, as we have seen, as soon as its observation is attracted to the circumstance, has been accustomed to direct a conversion of such estate into Consols (*b*); and even Four per cent. and Five per cent. Bank Annuities, while that description of stock existed, were ordered to be similarly converted (*c*). It follows that trustees, who must be guided by the practice of the Court, would not be justified, in the absence of a special power, in investing trust moneys settled upon several persons successively upon any securities, which, by the rule of the Court referred to, would be liable to be converted into other securities. Even where the trustees were empowered by the will to *continue* any of the testator's *Government Stocks*, it was held that they were not justified in continuing *Long Annuities* (*d*).

Navy 5 per cents.

65. However, where the trustees were directed by the will to invest on "*Government* or other *good* security," and part of the testator's estate consisted of Navy Five per cents., and the tenant for life continued to receive the dividends for more than thirty years, the Court refused to hold the trustees liable, for not having converted the Navy Five per cents. into Three per cent. Consols (*e*).

Selling out Consols.

66. Where the fund is already invested in *Consols*, it would be a clear breach of trust to sell out and invest the proceeds in an irregular fund, as, for instance, in *Long Annuities* (*f*).

Where trust funds are irregularly invested, the tenant for life and the trustees may be called upon to answer the difference.

67. Where a tenant for life has been wrongly in possession of the dividends of a stock producing an extraordinary income, he will be accountable to the remainderman for the excess of his receipts beyond the income which he would have received had the fund been properly invested (*g*). Upon the question whether, if the tenant for life be insolvent, the trustees should be decreed to make compensation to the suffering party, Lord Eldon said, he

(*a*) See *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104; [*Re Dick* (1891), 1 Ch. (C. A.) 423, 431.]

(*b*) See pp. 318, 320, *supra*. [As to the extinction or conversion of the annuities here mentioned, see Vaizey on Investments, chap. xi.]

(*c*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 151, *per* Lord Eldon; *Powell* v. *Cleaver*, and other cases, cited Id. 142;

(*d*) *Tickner* v. *Old*, 18 L. R. Eq. 422; [and see *Re Sheldon* 39, Ch. D. 50.]

(*e*) *Baud* v. *Fardell*, 7 De G. M. & G. 628.

(*f*) *Kellaway* v. *Johnson*, 5 Beav. 519. [But as to varying investments, authorised by the Trust Investment Act, 1889, see section 3 thereof, p. 342, *ante*.]

(*g*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, see 150, 151; *Mills* v. *Mills*, 7 Sim. 501; and see *Pickering* v. *Pickering*, 4 M. & Cr. 289.

would not state what the Court would do in such a case, for it depended on many circumstances (*a*). In the case of *Dimes* v. *Scott* (*b*), where the executors were *expressly directed* to convert the testator's personal estate into money, and invest the proceeds in Government or real securities in trust for A. for life, remainder to B., and the executors for eleven years permitted A. to receive 10 per cent. interest upon an Indian loan, it was held they were chargeable with the difference between 10 per cent. interest which they had wrongfully paid, and the interest that would have resulted from a conversion into Three per cent. Consols at the expiration of one year from the testator's decease. And in other later cases the Court, under similar circumstances, has apparently viewed the trustees as liable, and the tenant for life as liable over to the trustees, to the extent of his benefit (*c*).

Of conversion of assets in India.

68. Where a testator dies in India, and neither the fund nor the parties entitled to it are under the jurisdiction of the Court of Chancery, it is not the duty of the executor in India to transmit the assets to England to be invested in Consols, but he may invest the property in the securities of the government of India, and the tenant for life will be entitled to the dividends or interest, whatever the amount. If the parties return to England, and so come under the jurisdiction of the Court, the fund may then be brought over at the instance of the remainderman, and the tenant for life must submit to the consequential reduction of his income (*d*).

Trust to invest in the funds and the money is retained.

69. If trustees be *expressly* bound by the terms of their trust to invest in the *public funds*, and instead of so doing they retain the money in their hands, the *cestuis que trust* may clearly elect to charge them with the amount of the money or with the amount of the stock which they might have purchased with the money (*e*).

(*a*) See *Howe* v. *Earl of Dartmouth*, 7 Ves. 150; *Holland* v. *Hughes*, 16 Ves. 114.

(*b*) 4 Russ. 195; and see *Mehrtens* v. *Andrews*, 3 Beav. 72.

(*c*) *Hood* v. *Clapham*, 19 Beav. 90; *Bate* v. *Hooper*, 5 De G. M. & G. 338.

(*d*) *Holland* v. *Hughes*, 16 Ves. 111; *S. C.* 3 Mer. 685. [As to the investment in India under the Indian Trusts Act, 1882, of money which cannot be paid at once to beneficiaries, see Vaizey on Investments, p. 151.]

(*e*) *Shepherd* v. *Mouls*, 4 Hare, 504, *per* Sir J. Wigram; *Robinson* v. *Robinson*, 1 De G. M. & G. 256, *per Cur.*; *Byrchall* v. *Bradford*, 6 Mad. 13, 235. And it was said, that if a trust were of a permanent character, in which case the Court expected trustees to invest in Consols, though the settlement contained no express direction to that effect, trustees who improperly retained the funds in their hands might perhaps be held liable, at the option of the *cestuis que trust*, for the principal sum or the amount of stock which it would have purchased; *Robinson* v. *Robinson*, 1 De G. M. & G. 256, *per Cur.* [But since the Trust Investment Act, 1889, cases of the kind last-mentioned cannot occur, as trustees, in the absence of express directions in the trust instrument, have discretionary powers of investment.]

Trustees ordered to invest in stock or on real securities and neglecting to do either.

70. If trustees or executors be directed by the will to convert the testator's property and invest it in *Government or real securities*, it was long a question whether they should be answerable for the principal money with interest, or the amount of stock which might have been purchased at the period when the conversion should have been made with subsequent dividends, at the option of the *cestuis que trust* (*a*); or whether they should be charged with the amount of principal and interest only, without an option to the *cestuis que trust* of taking the stock and dividends (*b*). It has now been decided that the trustee is answerable only for the *principal money and interest*, and that the *cestuis que trust* have no option of taking the stock and dividends. The principle upon which the Court proceeds is, that the trustee is liable only for not having done what it was his duty to have done, and the measure of his responsibility is that which the *cestuis que trust* must have been entitled to in whatever mode that duty was performed; that the trustee might have discharged his duty without purchasing Three per cent. Bank Annuities; that the trustee is not to be deemed retrospectively to have exercised the discretion one way or the other, but is answerable only for the consequences of not having exercised the discretion; that to compel the trustee to purchase a sum of stock because the price has since risen, is to regulate the liability by an accidental subsequent occurrence, and not by the superiority of the stock over a mortgage at the time when the investment ought to have been made (*c*).

Trustees selling out stock improperly.

71. If the trust fund be *standing on a proper security*, and the trustee calls it in for no purpose connected with the trust, and therefore in dereliction of his duty, or for a purpose not authorised by the terms of the trust, he will be compellable, at the option of the *cestuis que trust, either* to replace the specific stock, or the stock into which, if not sold out, it would have been converted by Act of Parliament (*d*), with the intermediate

(*a*) *Hockley* v. *Bantock*, 1 Russ. 141; *Watts* v. *Girdlestone*, 6 Beav. 188; *Ames* v. *Parkinson*, 7 Beav. 379; *Ouseley* v. *Anstruther*, 10 Beav. 456.

(*b*) *Marsh* v. *Hunter*, 6 Mad. 295; *Gale* v. *Pitt*, M. R. 10th May, 1830; *Shepherd* v. *Mouls*, 4 Hare, 500; *Rees* v. *Williams*, 1 De G. and Sm. 319.

(*c*) *Robinson* v. *Robinson*, 1 De G. M. & G. 247.

(*d*) *Phillipson* v. *Gatty*, 7 Hare, 516; *Norris* v. *Wright*, 14 Beav. 304, 305; *Phillipo* v. *Munnings*, 2 M. & Cr. 309; [*Re Massingberd's Settlement*, 63 L. T. N.S. 296 (C. A.); and from the case last cited it would seem, notwithstanding some observations in *Re Salmon* (42 Ch. Div. 351, 368), that (except in the particular and exceptional case provided for by section 5 of the Trustee Act, 1888), this liability equally attaches whether the improper purpose be an unauthorised investment or an improvident one. In

dividends (*a*), *or* to account for the proceeds of the sale (*b*) with interest at 5 per cent. (*c*). And the breach of trust will not be cured by a subsequent reinvestment upon the trusts unless the reinvestment be the same *in specie* (*d*). But in a case where the trustee did not seek to make anything himself, but was honourably unfortunate in having yielded to the importunity of one of the *cestuis que trust*, it was held by Sir A. Hart, that, although the trustee was bound to replace the specific stock, the *cestuis que trust* should not have the option of taking the proceeds with interest (*e*). If the trustee become bankrupt, the *cestuis que trust* may at their option prove for the proceeds with interest, or for the price of the specific stock at the date of the bankruptcy with interim dividends (*f*). [And where the trustee has retired from the trust and transferred the security to new trustees, they are entitled to realise the security and hold the former trustee liable for the deficiency, without giving him the option of replacing the money and taking the security (*g*).]

Neglect to invest property.

72. If trustees be under an obligation to invest in the funds, and they pay the money into a *bank* with a direction to lay it out in Bank Annuities, and the bankers neglect to do it, and the trustees make no inquiry for five months, and the bankers fail, the trustees are answerable for the money or the stock at the option of the *cestuis que trust* (*h*).

[Postponement of investment.]

73. [Where trustees are expressly directed to make a particular investment, which when the time for investment arrives has become a perilous one, they may, in the exercise of their discretion as prudent men, postpone the investment, but where such postponement is against the letter of the trust they should apply to the Court for its sanction to the proposed course (*i*)].

either case the trustee has taken money belonging to the trust, and has improperly invested the money so taken, and it is difficult to see any sound reason for drawing a distinction between the position of the *cestuis que trust* in the one case and in the other.]

(*a*) *Davenport* v. *Stafford*, 14 Beav. 335.

(*b*) *Bostock* v. *Blakeney*, 2 B. C. C. 653; *Ex parte Shakeshaft*, 3 B. C. C. 197; *O'Brien* v. *O'Brien*, 1 Moll. 533, *per* Sir A. Hart; *Raphael* v. *Boehm*, 11 Ves. 108, *per* Lord Eldon; *Harrison* v. *Harrison*, 2 Atk. 121; *Bate* v. *Scales*, 12 Ves. 402; *Phillipson* v. *Gatty*, 7 Hare, 516; *Norris* v. *Wright*, 14 Beav. 305; *Rowland* v. *Witherden*, 3 Mac. & G. 568; *Wiglesworth* v. *Wiglesworth*, 16 Beav. 269.

(*c*) *Crackelt* v. *Bethune*, 1 J. & W. 587; *Mosley* v. *Ward*, 11 Ves. 581; *Pocock* v. *Reddington*, 5 Ves. 794; *Piety* v. *Stace*, 4 Ves. 620; *Jones* v. *Foxall*, 15 Beav. 392.

(*d*) *Lander* v. *Weston*, 3 Drew. 309; [*Re Massingberd's Settlement*, 63 L. T. N.S. 296 (C. A.).]

(*e*) *O'Brien* v. *O'Brien*, 1 Moll. 533.

(*f*) *Ex parte Shakeshaft*, 3 B. C. C. 197; *Ex parte Gurner*, 1 Mont. Deac. & De G. 497.

[(*g*) *Re Salmon*, 42 Ch. Div. 351.]

(*h*) *Challen* v. *Shippam*, 4 Hare, 555.

[(*i*) *Re Maberly*, 33 Ch. D. 455.]

Trustees may not invest so as to subject the fund to the control of any *one* trustee.

74. Trustees would not be justified in making any investment that would subject the trust money to the power or control of any *one* of the trustees singly; they could not, for instance, lay out the fund upon Indian bills (supposing such a security to be warranted by the settlement), if made payable, not to all the trustees in their joint capacity, but to one of the trustees individually (*a*).

Solicitors.

75. Solicitors employed in negociating a loan of trust monies, may not be liable for a breach of trust if they have no other privity with the transaction than what arises from their professional duty, but they will be deemed trustees and be responsible as such if they act professionally in carrying out a transaction which they know to be a breach of trust, and which is calculated to promote their own private ends (*b*).

Trustees lending should not employ the same solicitor as the borrower.

76. In laying out trust monies, trustees would do well not to employ the solicitor who acts for the borrower. Besides the inconveniences that arise from the doctrine of implied notice, there is in this case such a conflict of duties on the part of the solicitor, that he cannot adequately represent the interests of both lender and borrower (*c*).

[Directors not trustees.]

77. [Directors of trading companies are not trustees in the sense in which that term is used with reference to settlements and wills (*d*). They are confidential agents having a large discretion (*e*), and may properly make advances on securities of a more speculative character than could be accepted by trustees (*f*).

[Liquidator.]

And a liquidator is an agent of the company, and not strictly speaking a trustee either for creditors or contributories (*g*).]

(*a*) *Walker* v. *Symonds*, 3 Sw. 1, see 66; and see *Salway* v. *Salway*, 2 R. & M. 218; *Ex parte Griffin*, 2 Gl. & J. 114; *Clough* v. *Dixon*, 8 Sim. 594; 3 M. & Cr. 490. But see *ante*, p. 315; *Mendes* v. *Guedalla*, 2 J. & H. 259; *Consterdine* v. *Consterdine*, 31 Beav. 330; [*Lewis* v. *Nobbs*, 8 Ch. D. 591.]

(*b*) *Alleyne* v. *Darcy*, 4 Ir. Ch. Rep. 199, see 204, 208; *Fyler* v. *Fyler*, 3 Beav. 550, and see *Barnes* v. *Addy*, 9 L. R. Ch. App. 244, and *post*, Chap. xxx. s. 3.

(*c*) See *Waring* v. *Waring*, 3 Ir. Ch. Rep. 331.

(*d*) *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood*, 44 Ch. D. 412.

[(*e*) *Marzetti's case*, 28 W. R. 541; 42 L. T. N.S. 206.]

[(*f*) *Knowles* v. *Scott* (1891), 1 Ch. 717.]

[(*g*) *S. C.*]

SECTION V.

LIABILITY OF TRUSTEES TO PAYMENT OF INTEREST.

General laches.

1. It may be stated as a general rule, that if a trustee be guilty of any unreasonable delay in investing the fund or transferring it to the hand destined to receive it, he will be answerable to the *cestui que trust* for interest during the period of his *laches;* and a trustee has been decreed to pay interest even where it was not prayed by the bill (*a*); and in a suit establishing *laches*, will be decreed to pay personally the costs up to the hearing of a suit arising out of the *laches* (*b*).

Executor must pay testator's debts as soon as he has assets.

2. An *executor* or *administrator* should discharge the testator's liabilities as soon as he has collected assets sufficient for the purpose, and therefore if he keep money in his hands idle, when there is an outstanding debt upon which interest is running, he will himself be charged with interest on a sum equal in amount to the debt, and if the outstanding debt carry interest at 5 per cent. the executor will be charged with interest at the same rate (*c*).

After payment of debts and legacies executor must account for surplus.

3. After payment of debts and legacies, if the executor or administrator be guilty of *laches* in accounting for the surplus estate to the residuary legatee (*d*) or next of kin (*e*), he will be charged by the Court with interest for the balance improperly retained.

Trustee in bankruptcy must not neglect to pay dividends.

4. So, if the *trustee* of a bankrupt's estate neglect to pay a dividend to the creditors (*f*), or the *receiver* of an estate do not

(*a*) *Woodhead* v. *Marriott*, C. P. Coop. Cases, 1837–38, 62; *Turner* v. *Turner*, 1 J. & W. 39; *Stafford* v. *Fiddon*, 23 Beav. 286; *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; *Chugg* v. *Chugg*, W. N. 1874, p. 185. But the court is not in the habit of giving interest on what may be found due for arrears of income, *Blogg* v. *Johnson*, 2 L. R. Ch. App. 225.

(*b*) *Tickner* v. *Smith*, 3 Sm. & G. 42.

(*c*) *Dornford* v. *Dornford*, as cited in *Tebbs* v. *Carpenter*, 1 Mad. 301; *Hall* v. *Hallet*, 1 Cox, 134; *Turner* v. *Turner*, 1 J. & W. 39.

(*d*) *Forbes* v. *Ross*, 2 Cox, 113; *Seers* v. *Hind*, 1 Ves. jun. 294; *Younge* v. *Combe*, 4 Ves. 101; *Longmore* v. *Broom*, 7 Ves. 124; *Rocke* v. *Hart*, 11 Ves. 58; *Piety* v. *Stace*, 4 Ves. 620; *Ashburnham* v. *Thompson*, 13 Ves. 402; *Raphael* v. *Boehm*, 11 Ves. 92; *S. C.* reheard, 13 Ves. 407; *S. C.* spoken to, 11 Ves. 590; *Dornford* v. *Dornford*, 12 Ves. 127; *Franklin* v. *Frith*, 3 B. C. C. 433; *Littlehales* v. *Gascoyne*, 3 B. C. C. 73; *Newton* v. *Bennet*, 1 B. C. C. 359; *Lincoln* v. *Allen*, 4 B. P. C. 553; *Crackelt* v. *Bethune*, 1 J. & W. 586; *Tebbs* v. *Carpenter*, 1 Mad. 290.

(*e*) *Hall* v. *Hallet*, 1 Cox, 134; *Perkins* v. *Baynton*, 1 B. C. C. 375; *Stacpoole* v. *Stacpoole*, 4 Dow, 209, see 224; *Heathcote* v. *Hulme*, 1 J. & W. 122; *Holgate* v. *Haworth*, 17 Beav. 259.

(*f*) *Treves* v. *Townshend*, 1 B. C. C. 384; *In re Hilliard*, 1 Ves. jun. 89; *Hankey* v. *Garret*, 1 Ves. jun. 236.

move the Court in proper time to have the rents in his hands made productive (*a*), they will be ordered to account for the money with interest from the time when the breach of duty commenced.

No excuse that the trustee or executor did not use the money.

5. And an executor or other fiduciary cannot excuse himself by saying that he made no actual use of the money, but lodged it at his banker's (*b*), and to a separate account (*c*), for it was a breach of trust to retain the money.

Delay may be explained by the mistake of the trustee or executor.

6. But, where an executor conceived himself to be entitled to the residue, and the Court considered his claim to be just in itself, but was obliged from a particular circumstance in the case to give judgment against him, it was thought too severe to put him in the situation of one who had neglected his duty, and the demand against him for interest was consequently disallowed (*d*).

Formerly the executor might have used the assets.

7. Formerly it was held that an executor might employ the assets in his trade, or lend them upon security, and he should not be called upon to account for the profits or interest (*e*). And such was the case even where money which had been lent by the testator on good security was called in by the executor for the express purpose of being re-lent by himself. For the executor, it was argued, was not bound to lend the assets, and if he did so, it was at his peril, and he was answerable for losses, and if accountable for any loss, he was surely entitled to any gains (*f*). But Lord North overruled the doctrine in spite of the alleged practice of the Court for the last twenty years, and the authority of above forty precedents; and as to the argument, that, if the money should be lost, the executor would be personally responsible, his Lordship said, it was very well known that a man might insure his money at the rate of *one per cent.* (*g*).

At least where he was solvent.

8. A distinction was afterwards taken between a *solvent* and an *insolvent* executor; that the former, as he might suffer a loss, should take the gain, but, as an executor who was insolvent at the time of the loan could incur no risk of a loss personally, he should not be allowed to take to himself any benefit (*h*).

(*a*) *Foster* v. *Foster*, 2 B. C. C. 616; *Hicks* v. *Hicks*, 3 Atk. 274.

(*b*) *Younge* v. *Combe*, 4 Ves. 101; *Franklin* v. *Frith*, 3 B. C. C. 433; *Treves* v. *Townshend*, 1 B. C. C. 384; *In re Hilliard*, 1 Ves. jun. 89; *Dawson* v. *Massey*, 1 B. & B. 230; *Browne* v. *Southouse*, 2 B. C. C. 107; and see *Rocke* v. *Hart*, 11 Ves. 60.

(*c*) *Ashburnham* v. *Thompson*, 13 Ves. 402.

(*d*) *Bruere* v. *Pemberton*, 12 Ves. 386. But see *Sutton* v. *Sharp*, 1 Russ. 146; *Turner* v. *Maule*, 3 De G. & Sm. 497; [*Evans* v. *Evans*, W. N. 1876, p. 205.]

(*e*) *Grosvenor* v. *Cartwright*, 2 Ch. Ca. 21; *Linch* v. *Cappy*, 2 Ch. Ca. 35; and see *Brown* v. *Litton*, 1 P. W. 140.

(*f*) See *Ratcliff* v. *Graves*, 2 C. Ca. 152.

(*g*) *Ratcliff* v. *Graves*, 1 Vern. 196; *S. C.* 2 Ch. Ca. 152.

(*h*) *Bromfield* v. *Wytherley*, Pr. Ch. 505; *Adams* v. *Gale*, 2 Atk. 106.

And where the assets used were not specifically bequeathed.

9. And Lord Hardwicke drew another distinction; that if an executor had *placed out* assets that were *specifically bequeathed*, he would be made to account for the interest, but that the Court never directed interest against an executor who made use in the way of his trade of *general* assets come to his hands (*a*).

Rule now general that executor must account for all profits.

10. But all these refinements have long since been swept away (*b*); and the rule is now *universal*, that, whether the executor be solvent or insolvent, whether the money be part of the general assets or specifically bequeathed, whether it be lent upon security or employed in the way of trade, the executor shall account for the utmost actual profits to the testator's estate (*c*).

Trustee using trust money in trade must account for it with 5 per cent. interest, or the actual profits.

11. Where the money has been employed by breach of trust in trade, the *cestui que trust* has the option of taking the actual profits or of charging the executor with interest (*d*). And executors cannot disguise the employment of the money in their business under the garb of a *loan* to one of themselves (*e*). And an executor who is a trader is considered to employ the money in trade, if he lodge it at his banker's and place it in his own name, for a merchant must generally keep a balance at his banker's, and this answers the purpose of his credit as much as if the money were his own (*f*).

Executor charged with 4 per cent. interest only unless he made more.

12. The rate of interest with which an executor is usually charged is 4 per cent. (*g*); but the rule holds only where it does

(*a*) *Child* v. *Gibson*, 2 Atk. 603.

(*b*) As to the former distinction, see *Newton* v. *Bennet*, 1 B. C. C. 361; *Adye* v. *Feuilleteau*, 1 Cox, 25; and as to the latter, see *Newton* v. *Bennet*, 1 B. C. C. 361.

(*c*) *Tebbs* v. *Carpenter*, 1 Mad. 304, *per* Sir T. Plumer; *Lee* v. *Lee*, 2 Vern. 548; *Adye* v. *Feuilleteau*, 1 Cox, 24; *Piety* v. *Stace*, 4 Ves. 622, *per* Lord Alvanley.

(*d*) *Heathcote* v. *Hulme*, 1 J. & W. 122; *Anon. case*, 2 Ves. 630, *per* Sir T. Clarke; *Docker* v. *Somes*, 2 M. & K. 655; *Ex parte Watson*, 2 V. & B. 414; *Brown* v. *Sansome*, 1 M'Clel. & Y. 427; *Robinson* v. *Robinson*, 1 De G. M. & G. 257; see *ante*, pp. 293, 294.

(*e*) *Townend* v. *Townend*, 1 Giff. 201.

(*f*) *Treves* v. *Townshend*, 1 B. C. C. 384; 1 Cox 50; *Moons* v. *De Bernales*, 1 Russ. 301; *In re Hilliard*, 1 Ves. jun. 90; *Sutton* v. *Sharp*, 1 Russ. 146; *Rocke* v. *Hart*, 11 Ves. 61; but see *Browne* v. *Southouse*, 3 B. C. C. 107.

(*g*) See *Fletcher* v. *Green*, 33 Beav. 426; *Forbes* v. *Ross*, 2 Cox, 116; *Hall* v. *Hallet*, 1 Cox, 138; *Tebbs* v. *Carpenter*, 1 Mad. 306; *In re Hilliard*, 1 Ves. jun. 90; *Browne* v. *Southouse*, 3 B. C. C. 107; *Mosley* v. *Ward*, 11 Ves. 582; *Perkins* v. *Baynton*, 1 B. C. C. 375; *Treves* v. *Townshend*, 1 B. C. C. 386; *Hicks* v. *Hicks*, 3 Atk. 274; *Younge* v. *Combe*, 4 Ves. 101; *Rocke* v. *Hart*, 11 Ves. 58; *Hankey* v. *Garret*, 1 Ves. jun. 236; but see *Bird* v. *Lockey*, 2 Vern. 744, 4th point; *Carmichael* v. *Wilson*, 3 Moll. 79; *Attorney-General* v. *Alford*, 4 De G. M. & G. 843; *Johnson* v. *Prendergast*, 28 Beav. 480. [*Re Emmet's Estate*, 17 Ch. D. 142. It has been contended that the rate of interest, having regard to the value of money, ought now to be reduced from 4 per cent. to 3, and from 5 per cent to 4. In *In re Metropolitan Coal Consumers Association, Wainwright's case* (62 L. T. N. S. 30, 33), Kay, J., allowed 4 per cent. in lieu of the usual mercantile rate of 5 per cent., but this was done on the submission of the applicant, and Kekewich, J., has re-

not appear that the executor has made greater interest, for the Court invariably compels the executor to account for every farthing he has actually received (*a*).

Under what circumstances trustees will be charged with extra interest.

13. It is not easy to define the circumstances under which the Court will charge executors and trustees with *more than* 4 *per cent.* interest, or with *compound* interest. In a late case, it was laid down by Sir John Romilly, M.R.: 1. That if an executor retain balances in his hands, which he ought to have invested, the Court will charge him with simple interest, at 4 per cent. 2. That if, in addition to such retention, he has *committed a direct breach of trust,* or if the fund has been taken by him from a proper state of investment, in which it was producing 5 per cent., he will be charged with interest after the rate of 5 per cent. per annum. 3. That if in addition to this, he has employed the money so obtained by him in trade or speculation, for his own benefit or advantage, he will be charged either with the profits actually obtained from the use of the money, or with interest at 5 per cent. per annum, and also with yearly rests, that is, with compound interest (*b*).

Trustee charged with 5 per cent. where gross misconduct.

14. The dicta and decisions undoubtedly seem to establish, in accordance with the view just quoted, that an executor will be charged with interest at 5 per cent. where he is guilty, not merely of negligence, but of actual corruption or misfeasance, amounting to a wilful breach of trust (*c*). But in *Attorney-General* v. *Alford* (*d*), Lord Cranworth expressed his disapprobation of charging the executor with a higher rate of interest by way of *penalty;* and laid it down that an executor was chargeable only with the interest which he had received, *or* which he ought to have received, *or* which it was so fairly to be presumed

cently (see *London, Chatham, and Dover Railway Co.* v. *South Eastern Railway Co.*, W. N. 1891, p. 70) expressed the opinion that such a change, though desirable, can only be effected by some consensus of judicial opinion or by higher authority.]

(*a*) *Forbes* v. *Ross*, 2 Cox, 116, *per* Lord Thurlow; *In re Hilliard*, 1 Ves. jun. 90, *per eundem*; *Hankey* v. *Garret*, 1 Ves. jun. 239; *per eundem*; *Brown* v. *Litton*, 10 Mod. 21, *per* Lord Harcourt; *Hall* v. *Hallet*, 1 Cox, 138, *per* Lord Thurlow.

(*b*) *Jones* v. *Foxall*, 15 Beav. 392; and see *Saltmarsh* v. *Barrett* (No. 2), 31 Beav. 349; [*Gilbert* v. *Price*, W. N. 1878, p. 117. In Jamaica interest at the rate of 6 per cent. per annum will be allowed; *De Cordova* v. *De Cordova*, 4 App. Cas. 692.]

(*c*) *Tebbs* v. *Carpenter*, 1 Mad. 306, *per* Sir T. Plumer; *Bick* v. *Motley*, 2 M. & K. 312; *Mousley* v. *Carr*, 4 Beav. 53, *per* Lord Langdale; and see *Crackelt* v. *Bethune*, 1 J. & W. 588; *Docker* v. *Somes*, 2 M. & K. 670; *Munch* v. *Cockerell*, 5 M. & Cr. 220; *Ex parte Ogle*, 8 L. R. Ch. App. 716; *Hooper* v. *Hooper*, W. N. 1874, p. 174. But see *Meader* v. *M'Cready*, 1 Moll. 119.

(*d*) 4 De G. M. & G. 851, 852; and see *Vyse* v. *Foster*, 8 L. R. Ch. App. 333; affirmed 7 L. R. H. L. 318.

that he had received that he was estopped from saying that he did not receive it. And it was subsequently observed by V. C. Wood that there were three cases where the Court charged more than 4 per cent. upon balances in the hands of a trustee:—1. Where he *ought* to have received more, as by improperly calling in a mortgage carrying 5 per cent.; 2. Where he had *actually received* more than 4 per cent.; and 3. Where he must be *presumed* to have received more, as if he had traded with the money (*a*). But in a subsequent case, Lord Cranworth offered some explanatory remarks (*b*) upon the notions imputed to him; L. J. James, however, in a recent case (*c*) approved of the doctrine thought to have been laid down by Lord Cranworth, viz. that the Court had no jurisdiction to punish an executor for misconduct by making him account for more than he actually received, or which it presumed he did receive, or ought to have received, and that the Court was not a Court of penal jurisdiction.

Money used in trade.

15. Where money has been employed in trade, the *rate of* interest has been almost invariably 5 per cent. (*d*), the Court presuming every business to yield a profit to that amount. But Lord Thurlow, in one case, offered an inquiry whether, under the circumstances, such a rate of interest might not be too high (*e*); and in another, where an executor could plead extenuating circumstances 4 per cent. only was charged (*f*).

Whether simple or compound interest chargeable where moneys used by executor or trustee in trade.

16. Whether, where the money has been employed in trade, *simple* or *compound* interest shall, *as a general rule*, be charged, is a point upon which the decisions are in conflict, the older authorities pointing to *simple* interest as the proper measure of liability, and the more recent to *compound* interest. The earliest

(*a*) *Penny* v. *Avison*, 3 Jur. N. S. 62; and see *Burdick* v. *Garrick*, 5 L. R. Ch. App. 233; [*Price* v. *Price*, 42 L. T. N.S. 626; but see *Re Jones*, 49 L. T. N.S. 91, where the executors and trustees were charged 5 per cent. on the balance in their hands, V. C. Bacon observing that if a man choose not to invest money, but pays it into his account at his banker's, he borrows it, and must pay 5 per cent. from the date of the payment of the testator's debts and liabilities.]

(*b*) *Mayor of Berwick* v. *Murray*, 7 De G. M. & G. 519; and see *Townend* v. *Townend*, 1 Giff. 212.

(*c*) *Vyse* v. *Foster*, 8 L. R. Ch. App. 333, affirmed 7 L. R. H. L. 318. But see *Ex parte Ogle*, 8 L. R. Ch. App. 716.

(*d*) *Treves* v. *Townshend*, 1 B. C. C. 384; *Rocke* v. *Hart*, 11 Ves. 61, *per* Sir W. Grant; *Heathcote* v. *Hulme*, 1 J. & W. 122, see 134; *Attorney-General* v. *Solly*, 2 Sim. 518; *Mousley* v. *Carr*, 4 Beav. 53, *per* Lord Langdale; *Westover* v. *Chapman*, 1 Coll. 177; *Williams* v. *Powell*, 15 Beav. 461; *Robinson* v. *Robinson*, 1 De G. M. & G. 257; *Burdick* v. *Garrick*, 5 L. R. Ch. App. 233.

(*e*) *Treves* v. *Townshend*, 1 B. C. C. 384.

(*f*) *Melland* v. *Gray*, 2 Coll. 295.

reported case in which a trustee who had used trust money in trade appears to have been charged compound interest is that of *Walker* v. *Woodward* (*a*). The late Vice-Chancellor of England refused to charge a trustee of a charity estate, who had used the trust monies in carrying on his trade, with compound interest (*b*); but Sir John Leach charged an executor with compound interest under similar circumstances (*c*), and in other later decisions Sir John Romilly, M.R., in accordance with the rule laid down by him (as before stated), directed an account with rests (*d*). But in a later case still, the Court of Appeal refused to direct compound interest (*e*). [In a still later case where an administratrix had allowed her solicitor to receive and retain the dividends on securities, which had been set apart for an infant next-of-kin, she was decreed to account for the dividends with interest at 3 per cent. with half-yearly rests, on the ground that the administratrix ought to have had the dividends invested from time to time in consols, and the proceeds would have formed a common fund with the existing securities, and the dividends would thus have been invested at compound interest (*f*).]

Trustee neglecting a direction to accumulate, will be charged with compound interest.

17. If a testator *expressly directs an accumulation* to be made, and the executor having the money in his hands disregards the injunction it seems *compound* interest will be decreed (*g*). "Where there is an express trust," said Lord Eldon, "to make improvement of the money, if he will not honestly endeavour to improve it, there is nothing wrong in considering him, as to the principal, to have lent the money to himself, upon the same terms upon which he could have lent it to others, and as often as he ought to have lent it if it be principal, and as often as he ought to have received it, and lent it to others, if the demand be interest, and interest upon interest" (*h*). [If the accumulation be directed only during the minority of the *cestui que trust* with a direction to hand the fund over to him on his attaining 21, and the trustee after the determination of the minority, in lieu of paying over the trust funds, retains them uninvested or

(*a*) 1 Russ. 107.

(*b*) *Attorney-General* v. *Solly*, 2 Sim. 518.

(*c*) *Heighington* v. *Grant*, 5 M. & Cr. 258; 2 Ph. 600.

(*d*) *Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, Id. 561; and see *Walrond* v. *Walrond*, 29 Beav. 586.

(*e*) *Burdick* v. *Garrick*, 5 L. R. Ch. App. 233.

[(*f*) *Gilroy* v. *Stephens*, 51 L. J. N.S. Ch. 834; 30 W. R. 755.]

(*g*) *Raphael* v. *Boehm*, 11 Ves. 92; 13 Ves. 407, 590; *Dornford* v. *Dornford*, 12 Ves. 127; *Brown* v. *Sansome*, 1 M'Clel. & Younge, 427; *Knott* v. *Cottee*, 16 Beav. 77; *Pride* v. *Fooks*, 2 Beav. 430; *Wilson* v. *Peake*, 3 Jur. N. S. 155.

(*h*) *Raphael* v. *Boehm*, 11 Ves. 107; and see *S. C.* 13 Ves. 411.

improperly invested, the trustee will be charged with compound interest (*a*).]

Executor not charged with interest during first year from testator's death.

18. An *executor* will not in general be charged with interest but from the *end of a year* from the time of the testator's decease. "It frequently," said Lord Thurlow, "may be necessary for an executor to keep large sums in his hands, especially in the course of the *first year* after the decease of the testator, in which case such necessity is so fully acknowledged, that, according to the constant course of the Court, the fund until that time is not considered distributable. *After that,* if the Court observes that an executor keeps money in his hands without any apparent reason, but merely for the purpose of using it, then it becomes negligence and a breach of trust, the consequence of which is that the Court will charge the executor with interest" (*b*).

No interest on money lost that never came to hand.

19. It will be observed that, in the preceding cases, trustees and executors have been decreed to pay interest in respect only of monies actually come to hand, and improperly retained; for when a fund has *never been received,* but has been inexcusably left outstanding and lost, it seems the Court contents itself with holding the trustees liable for the *principal,* without enforcing against them the equity, that as the fund, if got in, would have become productive, the trustees ought further to be charged with interest (*c*).

Mistake.

20. Where an executor, under a mistaken impression of the law, but acting *bonâ fide,* retained one third of the residue himself, and paid two-thirds to his co-executors, he was held accountable to the person entitled for the whole, but with interest only upon the one-third retained by himself (*d*). [But this case has been questioned on the ground that the executor ought to have been dealt with as if he had improperly retained the money in his own hands, on the principle that where a trustee has made an improper payment he is still regarded in equity as having the money in his own hands, and that accordingly he should have been held accountable for interest on the whole fund (*e*).]

[(*a*) *Re Emmet's Estate*, 17 Ch. D. 142.]

(*b*) *Forbes* v. *Ross*, 2 Cox, 115; and see the observations of Sir A. Hart, in *Flanagan* v. *Nolan*, 1 Moll. 85; and see *Moyle* v. *Moyle*, 2 R. & M. 710; *Johnson* v. *Newton*, 11 Hare, 160; *Hughes* v. *Empson*, 28 Beav. 181; *Johnson* v. *Prendergast*, 22 Beav. 480.

(*c*) *Tebbs* v. *Carpenter*, 1 Mad. 290; and see *Lowson* v. *Copeland*, 2 B. C. C. 156.

(*d*) *Saltmarsh* v. *Barrett*, (No. 2), 31 Beav. 349; but see *Attorney-General* v. *Köhler*, 8 Jur. N.S. 467; 9 H. L. C. 655; *Shaw* v. *Turbett*, 14 Ir. Ch. Rep. 476.

[(*e*) *Re Hulkes*, 33 Ch. D. 552; *At-*

SECTION VI.

OF THE DISTRIBUTION OF THE TRUST FUND.

Mistake as to rights is at the expense of the trustee.

1. It is incumbent upon the trustee to satisfy himself beyond doubt, before he parts with the possession of the property, *who* are the parties legally and equitably entitled to it. He must therefore attend to all claims of which he has notice; and he may compel all persons who claim to be *cestuis que trust* to set forth their title (*a*).

Quasi trustees.

2. The necessity of seeing that the trust-money reaches the proper hand is obligatory, not only on trustees regularly invested with the character, but on all persons having notice of the equities, as if A. lend a sum to B., and B. afterwards discovers that it is *trust money*, he cannot pay it back to A. unless A., as trustee, had a power of signing a receipt for it (*b*).

Derivative equities.

3. As to persons claiming *directly* under the instrument creating the trust, or their real or personal representatives, the trustee has express notice of the rights of parties, and must regulate his conduct accordingly. But other interests may grow out of and be *grafted upon* the original trust, as by appointment under a power or by assignment, and these the trustee cannot know except by express or implied notice subsequent to the creation of the trust. Thus, a fund is settled upon trust for A. for life, with remainder to such one or more of his children as A. shall appoint, and in default of appointment for his children equally. Here A. may exercise the power by appointing to some one child exclusively, or a child may assign his share to a stranger. In such cases the trustee must use his best endeavours to ascertain who are the persons equitably entitled, as he is always in danger of being affected by *constructive* notice. But if a trustee has no express notice and cannot be affected by constructive notice, and he pays at the proper time to the person *primâ facie* entitled under the original instrument, he cannot afterwards be made to account over again to the person claiming under the *derivative* title (*c*), and therefore a trustee under such

torney-General v. *Köhler*, 9 H. L. C. 654; and see *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 351.]

(*a*) *Hurst* v. *Hurst*, 9 L. R. Ch. App. 762; and see *post*, p. 387, note (*b*).

(*b*) *Sheridan* v. *Joyce*, 7 Ir. Eq. Rep. 115. As to powers of trustees to sign receipts, see *ante*, pp. 312, 313.

(*c*) *Cothay* v. *Sydenham*, 2 B. C. C. 391; *Phipps* v. *Lovegrove*, 16 L. R.

circumstances is not justified in paying the fund into Court under the Trustee Relief Act (*a*).

[Improvident *cestui que trust*.]

[4. If the *cestui que trust* is *sui juris* and absolutely entitled to the trust fund, the trustees are not justified in withholding payment on the ground that the beneficiary intends to deal improvidently with the fund, and if they do so they will be liable for the costs of an action to enforce payment (*b*).]

Assignment.

5. After notice of an assignment the trustee cannot safely pay either principal or *interest* to the assignor (*c*) though the assignment be by way of mortgage only, for though a mortgagor in possession of real estate is not accountable for the *rents* until notice of the mortgagee's intention to enter, it cannot be assumed that the like rule will apply to personal estate in the hands of a trustee, as to which it has been said that the act of giving notice to the trustee is equivalent to taking possession (*d*). [And it has been held that where a first mortgagee of a leasehold house had notice of a second charge, and the property was subsequently sold by the mortgagor and the first mortgagee concurred in the sale, and allowed the balance of the purchase-money after satisfying his mortgage to be paid to the mortgagor, he was liable to the second mortgagee (*e*).]

Impeachable deeds.

6. An assignment is sometimes, though not void *per se*, yet of an *impeachable* character, as where there is a suspicion of the undue exercise of parental influence. In these cases it is conceived that while the deed remains unimpeached, the trustee may safely act on the assumption of its validity (*f*).

Assignment with receipt clause.

7. If the assignment confer on the assignee a power of signing receipts, the production of the deed with a receipt entitles the assignee to call for payment without tendering a release (*g*).

Death of *cestui que trust*.

8. If the *cestui que trust* be dead the trustee must pay to his personal representative, and if he mix himself up with questions arising out of the *cestui que trust's* will, and so refuse to pay to the personal representative, he will be saddled with the costs of a suit for recovery of the fund (*h*).

Eq. 80; *Williams* v. *Williams*, 17 Ch. D. 437, 443; *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91. In the latter case the effect of the marriage by the operation of a *foreign law*, may be regarded as equivalent to an assignment of which the trustee had not notice.

(*a*) *In re Cull's Trusts*, 20 L. R. Eq. 561.

[(*b*) *De Burgh* v. *M'Clintock*, 11 L. R. Ir. 220.]

(*c*) *Cresswell* v. *Dewell*, 4 Giff. 460.

(*d*) See *Loveridge* v. *Cooper*, 3 Russ. 58.

[(*e*) *West London Commercial Bank* v. *Reliance Permanent Building Society*, 27 Ch. D. 187; 29 Ch. Div. 954; but see *Noyes* v. *Pollock*, 32 Ch. Div. 53.]

(*f*) See *Beddoes* v. *Pugh*, 26 Beav. 407; and *post*, Chap. xxvi. s. 1.

(*g*) *Foligno's Mortgage*, 32 Beav. 131.

(*h*) *Smith* v. *Bolden*, 33 Beav. 262.

9. If the *cestui que trust* be a *feme* formerly married, but whose marriage has been dissolved (*a*), or there has been a judicial separation (*b*), [or a protection order (*c*),] the *chose en action*, though it accrued in right before the dissolution of marriage or the separation, [or protection order] is payable to the wife just as if the husband had previously died. In every case of judicial separation the wife, from the date of the decree and whilst the separation continues, is to be considered as a *feme sole* with respect to property "which she may acquire or which may come to or devolve upon her," and such property may be disposed of by her as a *feme sole* (*d*), but this enactment does not apply to property to which the wife was entitled in possession at the date of the decree, so that a restraint on anticipation by her affecting any such property will continue notwithstanding the separation (*e*); and where a protection order is made *in case of desertion*, the like consequences follow as from the date of the desertion (*f*). In both of these cases property of or to which the wife is possessed or entitled in remainder or reversion at the date of the desertion or decree (as the case may be) is to be included in the protection given by the order or decree (*g*); but in the case of a protection order *on the ground of assault* the order is to have the same effect in all respects as a decree for separation on the ground of cruelty, and the protection will only commence as at the date of the order. On the resumption of cohabitation, which puts an end to all the effects of a separation (*h*), the property belongs to the *feme* for her separate estate (*i*). And property acquired by a *feme* after a decree for judicial separation and while the decree continues in force, is not bound by a covenant to settle after acquired property to accrue during the coverture (*j*.)]

Divorce of *cestui que trust*.

[Protection order.]

The life-interest of a husband in property of his wife is not necessarily forfeited by a dissolution of the marriage on the

(*a*) *Wells* v. *Malbon*, 31 Beav. 48; *Wilkinson* v. *Gibson*, 4 L. R. Eq. 162; and see *Fitzgerald* v. *Chapman*, 1 Ch. D. 563.

(*b*) *Johnson* v. *Lander*, 7 L. R. Eq. 228.

[(*c*) 20 & 21 Vict. c. 85, ss. 21, 25; 21 & 22 Vict. c. 108, s. 8; 41 Vict. c. 19, s. 4; *Cooke* v. *Fuller*, 26 Beav. 99; *Re Coward and Adam's Purchase*, 20 L. R. Eq. 179; *Nicholson* v. *Drury Buildings Estate Company*, 7 Ch. D. 48; *Norton* v. *Molloy*, 7 L. R. Ir. 287, under the corresponding Act relating to Ireland, 28 Vict. c. 43.]

[(*d*) 20 & 21 Vict. c. 85, s. 25.]

[(*e*) *Waite* v. *Morland*, 38 Ch. Div. 135.]

[(*f*) 20 & 21 Vict. c. 85, s. 21.]

[(*g*) 21 & 22 Vict. c. 108, s. 8.]

[(*h*) *Nicol* v. *Nicol*, 31 Ch. Div. 524, 526; and see *Haddon* v. *Haddon*, 18 Q. B. D. 778, 782.]

[(*i*) *Re Emery's Trusts*, 50 L. T. N.S. 197; 32 W. R. 357; 20 & 21 Vict. c. 85, s. 25.]

[(*j*) *Dames* v. *Creyke*, 30 Ch. D. 500.]

ground of his misconduct (*a*), but where a life interest was given to the testator's son, with remainder to any wife of the son for her life, and he married a woman who was divorced from him on his petition, and died without marrying again, the woman was held not entitled to a life interest (*b*).

Right of surviving trustee to have another trustee appointed.

10. If a *surviving* trustee be placed in an *embarrassing* situation as regards the distribution or management of the fund, it is *said* that he has a right to ask for the appointment of a new trustee to assist him by his counsel (*c*).

Advice of counsel.

11. If through any misapprehension on the part of the trustee, or the ill advice of his counsel, the trust money finds its way into a channel not authorised by the terms of the trust, the trustee will be held personally responsible for the misapplication to the parties who can establish a better claim. "I have no doubt," said Lord Redesdale, upon one occasion, "the executors *meant* to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If under the best advice he could procure he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer" (*d*).

In one case where a testator had executed a promissory note in Switzerland for 600*l.*, but by a counter-note executed shortly after it was declared that 400*l.* only was due upon valuable consideration, but a Swiss Court, upon proceedings taken there, had awarded the payment of the whole 600*l.*, and the executor in England (though by our law but 400*l.* was demandable) had discharged the whole amount, Lord Alvanley observed, "*If the executor had taken advice, and been advised by any gentleman of the law in this country that he was bound to make this payment, I would not have held him liable, for I will not permit a testestor to lay a trap for his executor, by doing a foolish act which may mislead him*" (*e*). But these remarks were addressed

[(*a*) *Fitzgerald* v. *Chapman*, 1 Ch. D. 563; *Burton* v. *Sturgeon*, 2 Ch. D. 318.]

[(*b*) *Re Morrieson*, 40 Ch. D. 306, *per* Kay, J., dissenting from *Bullmore* v. *Wynter*, 22 Ch. D. 619.]

(*c*) *Livesay* v. *O'Hara*, 14 Ir. Ch. Rep. 12.

(*d*) *Doyle* v. *Blake*, 2 Sch. & Lef. 243; and see *Re Knight's Trusts*, 27 Beav. 49; *Urch* v. *Walker*, 3 M. & Cr. 705, 706; *Turner* v. *Maule*, 3 De G. & Sm. 497; *Peers* v. *Ceeley*, 15 Beav. 209; *Ex parte Norris*, 4 L. R. Ch. App. 280. [*Re Jackson*, 44 L. T. N.S. 467.] In *Boulton* v. *Beard*, 3 De G. M. & G. 608, the fact that the trustees had acted upon the advice of counsel, though stated at the bar, was not in evidence, which may account for the silence of the L. JJ. upon this point in their judgments.

(*e*) *Vez* v. *Emery*, 5 Ves. 141. As to the effect in reference to costs, of acting under advice of counsel, see *Angier* v. *Stannard*, 3 M. & K. 566; *Devey* v. *Thornton*, 9 Hare, 232; *Field* v. *Donoughmore*, 1 Dru. & War. 234.

to the special circumstances of the case, and must not be taken as impugning the general rule.

Foreign law.

12. Every executor is taken to know the law of his country, but otherwise as to foreign laws. Thus, where a legacy was given to a married woman domiciled in Scotland, and before payment of the legacy the husband died, and the executors of the testator paid the legacy to the wife, and the executors of the husband afterwards sued the executors of the testator for the same legacy on the ground that, by the law of Scotland where the wife was domiciled, the *chose en action* did not survive as by the law of England to the wife, but passed to the representatives of the husband, it was held that the executors were not bound to know the law of Scotland, and that as they had acted according to the *primâ facie* line of their duty and the ordinary practice, and express notice to them of the law of Scotland had not been proved, they were not answerable (*a*).

Foreign domicile.

13. As personal property is regulated by the law of the domicile, the trustee, if a *cestui que trust* be *domiciled abroad*, should be careful how he deals with the interest of that *cestui que trust*. By the law of some countries a male does not attain majority till twenty-two, but a female at seventeen (*b*); and in other countries, as in Scotland, infants above the age of puberty (fourteen in males, and twelve in females) can with their curators give valid receipts for debts and legacies (*c*). In some countries the wife has an equity to a settlement, and in others (as in Denmark) she has not (*d*). [In the State of New York, the wife is entitled to a legacy or distributive share, as if she were *sole* (*e*).] In Australia, the Court pays the money of *a married woman* to the husband, without examination of the wife (*f*). If the trustee has no notice of the difference between the two laws, he might not be liable, but the safer course would be to make inquiry.

Presumption of death.

14. It often happens that a *cestui que trust* has gone abroad and has *not been heard of for seven years*, and in that case the law presumes for certain purposes that the person was dead at the expiration of the seven years, but not that he died at any particular moment of that period (*g*). But as the fact of death is presumed

(*a*) *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91.

(*b*) *Re Hellman's Will*, 2 L. R. Eq. 363; and see *Re Blithman*, 2 L. R. Eq. 23; [*Donohoe* v. *Donohoe*, 19 L. R. Ir. 349.]

(*c*) *Re Chrichton's Trusts*, 24 L. T. 267.

(*d*) *Dues* v. *Smith*, Jac. 544.

[(*e*) *Re Lett's Trusts*, 7 L. R. Ir. 132.]

(*f*) *Re Swift's Trusts*, W. N. 1872, p. 195.

(*g*) *Dunn* v. *Snowden*, 2 Dr. & Sm. 201; *Lamb* v. *Orton*, 6 Jur. N.S. 61; *Doe* v. *Nepean*, 5 B. & Ad. 86; [*Reg.* v. *Tolson*, 23 Q. B. D. 168, 183;] and see

only, the conclusion of law may be rebutted by explanatory circumstances (*a*); [and the *onus* of proving at what particular time the death took place lies with the person asserting a right depending on the death having occurred at that time (*b*).] Should the person afterwards re-appear in fact, he may assert his right (*c*); and accordingly, where the Court pays out money on presumption of death, it requires the recipient to give security to refund it if necessary (*d*). It is evident therefore that a trustee *in pais*—that is, out of Court—cannot safely pay at the expiration of the seven years, but must accumulate the fund until he is satisfied of the actual death, or a sufficient indemnity is offered, or the sanction of the Court has been obtained (*e*).

Mistake.

15. [In one case it was held by Sir J. Romilly, M.R, that] if an executor or trustee has made a wrong payment, and is afterwards obliged to pay over again to the person rightfully entitled, he is not chargeable with interest, provided the erroneous payment was a *bonâ fide* mistake (*f*), [but this decision has not been acquiesced in, and seems not to be reconcilable with principle or the weight of authority (*g*), but] of course a wrongful payment of interest will not create in the payee a right to the principal, for no wrong can create a right (*h*). The trustee of a creditors' deed made a mistake in payment arising out of a misapprehension of the law, which at that time was not clear, and the Court held that as he had acted *bonâ fide* and was not a mere trustee, but filled a *quasi* judicial position, he could not be made accountable to the creditors, who were left to recover the amount from the person wrongfully paid (*i*).

[Income tax.]

[16. If an executor or trustee pay the income of a trust fund to

Sillick v. *Booth*, 1 Y. & C. C. C. 117; *Re Phene's Trust*, 5 L. R. Ch. App. 139; [*Re Rhodes*, 36 Ch. D. 586; and see *Re Walker*, 7 Ch. 120.]

(*a*) *Bowden* v. *Henderson*, 2 Sm. & G. 360; [and see *Prudential Assurance Company* v. *Edmonds*, 2 App. Cas. 487.]

[(*b*) *Re Phene's Trusts*, 5 L. R. Ch. App. 139; *Re Lewes' Trusts*, 6 L. R. Ch. App. 356; *Re Corbishley's Trusts*, 14 Ch. D. 846.]

(*c*) *Woodhouselee* v. *Dalrymple*, 9 W. R. 475, 564; and see *Monckton* v. *Braddell*, 7 Ir. R. Eq. 30; 6 Ir. R. Eq. 352.

(*d*) *Dowley* v. *Winfield*, 14 Sim. 277; *Cuthbert* v. *Purrier*, 2 Ph. 199; and see *Davies* v. *Otty*, 35 Beav. 208.

(*e*) See *Re Phene's Trust*, 5 L. R. Ch. App. 139; *Hickman* v. *Upsall*, 20 L. R. Eq. 136. [As to the circumstances under which the Court will order payment on the presumption that a woman is past child-bearing, see Dan. Ch. Pr. 6th ed. 1778, note (*m*); Taylor on Evidence, p. 129; and *Re Warren's Settlement*, 52 L. J. Ch. 928.]

(*f*) *Saltmarsh* v. *Barrett* (No. 2), 31 Beav. 349.

[(*g*) *Re Hulkes*, 33 Ch. D. 552; *Attorney-General* v. *Köhler*, 9 H. L. C. 654.]

(*h*) *Remnant* v. *Hood*, 2 De G. F. & J. 404.

(*i*) *Ex parte Oyle*, 8 L. R. Ch. App. 711.

the *cestui que trust* for several years without deducting the income tax, he will not be allowed afterwards to deduct the amount of such income tax on the past payments from future accretions of income (*a*).]

Claim by another.

17. As a trustee cannot be expected to part with the fund unless the right of the *cestui que trust* be undisputed, if a third person claim improperly, or refuse to say whether he claims or not in a case where the trustee has a right to ask the question, such third person will make himself amenable to costs (*b*).

Bond of indemnity.

18. In cases where there exists a mere shadow of doubt as to the rights of the parties interested, and it is highly improbable that any adverse claim will, in fact, be ever advanced, the protection of the trustee may be provided for by a substantial bond of indemnity. In general, however, a bond of indemnity is a very unsatisfactory safeguard, for when the danger arises, the obligors are often found insolvent, or their assets have been distributed. And if the bond be to indemnify against a breach of trust, the Court is not disposed to show mercy towards a trustee who admits himself to have *wilfully* erred by having endeavoured to arm himself against the consequences (*c*).

[Option to purchase testator's business.]

[19. It often happens that a testator engaged in trade gives an option to a son to purchase his business, and empowers his trustees to accept the bond of the son as security for payment of the purchase money by instalments. Where such an option is exercised, it may be proper for the trustees, on transferring the business and chattels, to reserve a lien for the unpaid purchase money. In a recent case it was held that a clause in an agreement conferring such a lien operated as a bill of sale within secs. 4 and 8 of the Bills of Sale Act, 1878, and, not having been registered, was void as against the trustee in the subsequent bankruptcy of the son (*d*).]

Suit.

20. A trustee cannot be expected to incur the least risk, and therefore if the equities be not perfectly clear, he should decline to act without the sanction of the Court, and he will be allowed

[(*a*) *Currie* v. *Goold*, 2 Mad. 163.]

(*b*) See *Re Primrose*, 23 Beav. 590; *Lonergan* v. *Stourton*, 11 W. R. 984.

(*c*) A *verbal* promise of *indemnity* has been held not to be within the Statute of Frauds, *Wildes* v. *Dudlow*, 19 L. R. Eq. 198. [If the trustee is also a beneficiary, and the bond is intended to operate in his favour as such beneficiary, express words will be necessary, as *primâ facie* such a bond extends only to indemnity from demands against the trustee as such; *Evans* v. *Benyon*, 37 Ch. Div. 329.]

[(*d*) *Coburn* v. *Collins*, 35 Ch. D. 373. Where property which was to be offered to the testator's son at a price named, was sold in a creditor's action, the son was held entitled to receive the excess of the purchase-money above such price; *Re Kerry*, W. N. 1889, p. 3.]

all costs and expenses incurred by him in an application for that purpose (*a*). But as a trustee is indemnified by the decree of the Court, he will *appeal* from any decision to the Court above at *his own risk* (*b*). If the rights be perfectly clear, and the trustee appeals to the Court without reason, he will be answerable in costs, though he do not act either fraudulently or maliciously (*c*).

Trustee Relief Act.

21. If there be no dispute as to the *amount* of the fund, but only as to *who* is entitled to it, and the trustee, instead of transferring the fund into Court under the provisions of the Trustee Relief Act (*d*), needlessly commences an action, he will be allowed only the costs that would have been incurred had he taken advantage of the Trustee Relief Act (*e*).

[Originating summons.]

[22. Under the Rules of Court of 1883, an inexpensive process has been introduced which enables either trustees, executors, or administrators, or their *cestuis que trust*, by means of an originating summons, to procure the determination *without an administration by the Court of the estate or trust*, of various questions and matters arising out of or affecting the trusts or the persons interested thereunder, or to obtain an order for the administration of the estate or trust without the delay and formalities of an action (*f*); but this form of proceeding is not applicable for the determination of questions involving charges of breach of trust (*g*), nor unless the question raised is one which would have arisen in the administration of an estate or the execution of a trust (*h*). Thus it is not applicable to cases where questions arise between the estate of a testator, or devisees and legatees under a will, or beneficiaries under an instrument, and persons claiming adversely (*i*); nor where the question is whether

(*a*) *Re Wylly's Trust*, 28 Beav. 458; *Talbot* v. *Earl of Radnor*, 3 M. & K. 252; *Goodson* v. *Ellison*, 3 Russ. 583; *Curteis* v. *Candler*, 6 Mad. 123; *Knight* v. *Martin*, 1 R. & M. 70; *S. C.* Taml. 237; *Taylor* v. *Glanville*, 3 Mad. 176; *Angier* v. *Stannard*, 3 M. & K. 566. And see *Campbell* v. *Home*, 1 Y. & C. C. C. 664; *Gardiner* v. *Downes*, 22 Beav. 397; *Merlin* v. *Blagrave*, 25 Beav. 137; *Cook* v. *Harvey*, W. N. 1874, p. 69.

(*b*) *Rowland* v. *Morgan*, 13 Jur. 23; *Tucker* v. *Horneman*, 4 De G. M. & G. 395; and see *Wellesley* v. *Mornington*, W. N. 1870, p. 192.

(*c*) *Re Knight's Trust*, 27 Beav. 45; *Lowson* v. *Copeland*, 2 B. C. C. 156.

(*d*) See *post*, Appendix No. 1.

(*e*) *Wells* v. *Malbon*, 31 Beav. 48.

[(*f*) Order 55, Rules 3 and 4, *et seq.* As to the parties to be reserved, see Rule 5.]

[(*g*) *Re Weall*, 42 Ch. D. 674; *Dowse* v. *Gorton*, (1891) A. C. 202, *per* Lord Macnaghten; but see *Re Neil*, 62 L. T. N.S. 649.]

[(*h*) *Re Davies*, 38 Ch. D. 210; *Re Royle*, 43 Ch. Div. 18.]

[(*i*) *Re Budge*, 56 L. J. Ch. 779; 56 L. T. N.S. 726; 35 W. R. 663; *Re Carlyon*, 56 L. J. Ch. 219; 56 L. T. N.S. 151; 35 W. R. 154; *Re Gladstone*, W. N. 1888, p. 185.]

or not the defendant became trustee (*a*); nor to a case where an executor has distributed the fund, and administration is sought on the ground that he has by mistake overlooked in the distribution some of the *cestuis que trust* (*b*), and, in general, the procedure is only intended for the decision of simple questions (*c*).

Under this rule, the question of the validity of a release given by legatees, without (as they alleged) having had independent advice, has been decided (*d*); but in this case no objection was taken to the jurisdiction, and L. J. Cotton intimated that it was not to be taken as a precedent (*e*); and in a subsequent case Kay, J., declined to entertain a similar application (*f*).

[Present practice.]

23. Under the present practice it is in many cases less expensive to determine the point in dispute in an action, or by originating summons, than by the aid of the Trustee Relief Act, and in such cases a trustee ought not to adopt the more expensive process (*g*), and if he do so without sufficient justification, he will be made to pay the additional costs necessitated by his conduct (*h*).

[Order for general administration not usually made.]

24. Under the new Rules of Court (*i*), it is not obligatory on the Court to make an order for the administration of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without administration, and the Court usually refuses to make an order for general administration, unless satisfied that it is *necessary* for the protection of the trustees or executors (*j*). An order for accounts and inquiries will be made under Order 15, if the circumstances of the case require it (*k*); but the Court will not direct the ordinary accounts under Order 15, where charges of breach of trust are made which may necessitate accounts being directed at the hearing on a different footing (*l*).

Where there is an application for administration or execution of trusts by a creditor, or beneficiary, and no accounts or in-

[(*a*) *Elworthy* v. *Harvey*, 37 W. R. 164; 60 L. T. N.S. 30.]

[(*b*) *Re Warren*, W. N. 1884, p. 112.]

[(*c*) *Re Giles*, 43 Ch. Div. 391; *Re Hargreaves*, 43 Ch. Div. 401.]

[(*d*) *Re Garnett*, 50 L. T. N.S. 172; 32 W. R. 474.]

[(*e*) *Re Garnett*, 31 Ch. Div. 1, 12.]

[(*f*) *Re Ellis*; *Kelson* v. *Ellis*, 59 L. T. N.S. 924; 37 W. R. 91.]

[(*g*) See observations of the late M. R. in *Re Birkett*, 9 Ch. D. 581.]

[(*h*) See *Re Giles*, 55 L. J. N.S. Ch. 695.]

[(*i*) Ord. 55, R. 10; as to the principles upon which the Court acts in the exercise of its discretion under this order, see *Re Wilson*, 28 Ch. D. 457; *Re Blake*, 29 Ch. Div. 913; and as to the jurisdiction to give costs see *Re Medland*, 41 Ch. Div. 476.]

[(*j*) *Re Llewellyn*, 25 Ch. D. 66; *Re Dickinson*, W. N. 1884, p. 199.]

[(*k*) *Borthwick* v. *Ransford*, 28 Ch. D. 79.]

[(*l*) *Re Gyhon*, 29 Ch. Div. 834.]

sufficient accounts have been rendered, the Court may order the application to stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render a proper account, with an intimation that if this is not done they may be made to pay the costs of the proceedings (*a*); and when necessary to prevent proceedings by other creditors, may make the usual judgment or order for administration, with a proviso that no proceedings are to be taken under such judgment or order without leave of the judge in person.

In considering whether an administration order ought to be made, the Court will have regard to a direction by the testator that his executors shall take proceedings to have his estate administered by the Court (*b*).

Frame of the action.

25. If an action be necessary it] may be instituted either by the trustee or by the *cestui que trust;* but in most cases an action is sustained rather than originated by the trustee. Whether the trustee be plaintiff or defendant, he should take care before an order is made, that all proper parties are before the Court, for if the trustee fail in his duty to point out the proper parties, it might be held that the order of the Court under such circumstances did not indemnify him.

[If the trustee is plaintiff, and his accounts are directed to be taken, the conduct of the proceedings will be given to the defendants (*c*).]

Plaintiff held to have no interest.

26. Where the suit is commenced by a *cestui que trust,* and it is found at the hearing that upon the true construction of the instrument he has no interest in the fund, yet if the point was so doubtful that the fund could not have been distributed without the opinion of the Court, and *either* the fund is administered by the Court under the suit of the plaintiff, *or* the Court makes a declaration of the rights of the parties in the suit, the plaintiff will as a general rule have his costs (*d.*) But where a plaintiff, instituting proceedings as claiming a contingent interest, obtains an order for taking the accounts in an administration suit, and pending the reference his interest ceases, and the parties interested instead of adopting repudiate the proceedings, the plaintiff cannot have his costs (*e*).

[(*a*) Ord. 55, R. 10 A.]

[(*b*) *Re Stocken*, 38 Ch. Div. 319.]

(*c*) *Allen* v. *Norris*, W. N. 1884, p. 118; *S. C.* 27 Ch. D. 333.]

(*d*) *Westcott* v. *Culliford*, 3 Hare, 274, and cases there cited; *Turner* v. *Frampton*, 2 Coll. 336; *Boreham* v. *Bignall*, 8 Hare, 134; *Lee* v. *Delane*, 1 De G. & Sm. 1; *Merlin* v. *Blagrave*, 25 Beav. 134; *Wedgwood* v. *Adams*, 8 Beav. 103.

(*e*) *Hay* v. *Bowen*, 5 Beav. 610.

Alterations in practice.

27. The Court, according to the old practice, could not have made a mere *declaratory order* without consequential directions (*a*), and could not have administered the trust in the presence of *some only* of the parties interested, or as to a *part only* of the trust estate, or as to the rights of persons entitled under a will without taking preliminary *accounts;* but [under the present practice] the Court is authorised to make declaratory orders merely, as also to adjudicate on questions in the presence of some only of the persons interested, and as to part only of the trust estate, and without ascertaining the particulars or accounts of the property touching which the question has arisen (*b*).

Special case.

28. The opinion of the Court may also be obtained upon a special case [in the manner provided by] Sir George Turner's Act, 13 & 14 Vict. c. 35 (*c*); but where the parties are numerous, it is found in practice that much time is consumed, and expense incurred, in settling the case so as to meet the different views of the parties, and [it will generally be found a shorter and simpler course to issue a writ of summons, and then state the question in the form of a special case under Order 34 of the Rules of the Supreme Court, 1883.]

St. Leonards' Act.

29. By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 30, any trustee, executor, or administrator may, without suit by *petition or by summons upon a written statement at Chambers*, apply to the Court for its opinion, advice, or direction upon any question respecting the management or administration of the trust property, or assets of the testator or intestate. By the Amendment Act, 23 & 24 Vict. c. 38, s. 9, the application is required to be signed by counsel (*d*), and the Judge, where necessary, may require the attendance of counsel (*e*).

(*a*) See *Daniel* v. *Warren*, 2 Y. & C. C. C. 292; *Shewell* v. *Shewell*, 2 Hare, 154; *Gaskell* v. *Holmes*, 3 Hare, 438; *Say* v. *Creed*, 3 Hare, 455.

[(*b*) See Rules of the Supreme Court, 1883, Ord. 25, R. 5; Ord. 16, R. 9, 11, 32; Ord. 34, R. 2; Ord. 55, R. 3. And see 15 & 16 Vict. c. 86, ss. 50 and 51, which have, however, been repealed by 46 & 47 Vict. c. 49.]

[(*c*) This Act is repealed by 46 & 47 Vict. c. 49, but by Ord. 34, R. 8, of the Rules of the Supreme Court, 1883, any special case may be stated for the same purposes, and in the same manner, as provided by the Act, and the effect of this order is to keep alive the provisions of the Act, so that trustees who act upon a declaration made by the Court upon a special case stated under it are still protected by s. 15 of the Act; *per* Pearson, J.; *Re Benzon*, W. W. 1886, p. 19; *S. C. nom. Forster* v. *Schlesinger*, 54 L. T. N.S. 51.]

[(*d*) Notwithstanding the Judicature Act, 1873, and Ord. 19, R. 4, of the Rules of the Supreme Court, 1883, signature by counsel is still necessary. *Re Boulton's Trusts*, 51 L. J. N.S. Ch. 493.]

(*e*) See *post*, Chap. xxii. s. 2, div. 4.

Authority from the *cestui que trust* to receive the money.

30. When the trustee is satisfied as to the parties rightfully entitled, he may pay the money either to the parties themselves, or to an agent empowered by them to receive it; and the authority need not be by *power of attorney*, or by *deed*, or even in *writing*. The trustee is safe if he can prove the authority however communicated. But a trustee would not be acting *prudently* if he parted with the fund to an agent without some document producible at any moment by which he could establish the fact of the agency.

Genuineness of the authority.

31. The trustee must look well to the *genuineness* of the authority, for if he pay to a wrong party it will be at his own peril. Thus, where A., possessed of 1000*l.* Million Bank stock, employed B., a broker, to receive the dividends for her, and B. *forged* a letter of attorney authorising him to sell the stock, and a sale was effected accordingly, it was decreed by Lord Northington that the company must bear the loss: for "a trustee," he said, "whether a private person or body corporate, must see to the reality of the authority empowering him to dispose of the trust money; and if the transfer be made without the authority of the owner, the act is a nullity, and in consideration of law and equity the rights remain as before" (*a*).

Mortgage forged by trustee's solicitor.

32. Where a trustee [handed over money to his solicitor for investment, and subsequently took] a supposed mortgage, but which, in fact, had been *forged* by the trustee's own solicitor, and the trustee did not take all the precautions that he might have done (viz., by calling for a receipt under the hands of the mortgagor for the money), it was held that the loss must fall on the trustee, and was not to be borne by the trust estate so as to fall upon the *cestui que trust* (*b*).

Cestui que trust abroad.

33. A *cestui que trust* is often abroad, and then the trustee cannot be sure that at the time of payment under the power of attorney the *cestui que trust* is alive, and if he were dead the power of attorney would be at an end (*c*). If, however, the *cestui*

(*a*) *Ashby* v. *Blackwell*, 2 Eden, 299; *Sloman* v. *Bank of England*, 14 Sim. 475; *Eaves* v. *Hickson*, 30 Beav. 136; *Sutton* v. *Wilders*, 12 L. R. Eq. 373; and see *Harrison* v. *Pryse*, Barn. 324; *Ex parte Joliffe*, 8 Beav. 168; [*Barton* v. *North Staffordshire Rail. Co.*, 38 Ch. Div. 458].

(*b*) *Bostock* v. *Floyer*, 1 L. R. Eq. 26; 35 Beav. 603. ["The *ratio decidendi* of the case was this, that it was not the ordinary course of business to place money in the hands of a solicitor to invest. It was not a specific investment, it was handed to the solicitor, and in that point of view the case is intelligible enough upon the ground that it was not right for the trustee to hand over the money to the solicitor for the purpose of investment," *per* L. J. Lindley, *Re Speight*, 22 Ch. Div. 727, 761;] and see *Hopgood* v. *Parkin*, 11 L. R. Eq. 75; *Sutton* v. *Wilders*, 12 L. R. Eq. 373.

[(*c*) Now by the Conveyancing Act,

que trust give to the trustee a written direction by deed or otherwise to pay money to a particular person, any payment made under such written direction, until it is revoked, and the revocation comes to the knowledge of the trustee, would be binding on the *cestui que trust's* executors (*a*). A convenient course in cases of this kind is to transmit the money to a Bank abroad, making it payable to the *order* of the *cestui que trust;* but where the *cestui que trust* is unable to receive his money in person, his direction had better be asked as to the particular mode of remittance to be adopted. By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 26, a trustee paying under a power of attorney is expressly exempted from liability, notwithstanding the death of [or avoidance of the power by] the person who gave the power of attorney, provided the trustee did not know of such death [or avoidance] at the time of payment (*b*); [and this has been extended by the Conveyancing and Law of Property Act, 1881, to cases of payments or acts made or done by any person in good faith since the 31st December, 1881, and applies whether "the donor of the power has died or become lunatic, of unsound mind or bankrupt, or has revoked the power," if the fact was not known to the donee of the power at the time of exercising it (*c*).]

Letters of administration.

34. If a legacy to a wife be a small sum, as under 50*l.*, and the husband survives her, the Court orders payment to him without taking out letters of administration to the wife (*d*) ; and, on the other hand, where the wife has survived, the Court has ordered a small sum, as a legacy of 13*l.*, to which the husband was entitled, to be paid to the widow, without taking out administration to the husband (*e*). But the Court refused to order payment to the husband, without letters of administration to the wife, of a sum

1882 (45 & 46 Vict. c. 39), s. 8, a power of attorney given for valuable consideration since the 31st December, 1882, and expressed to be irrevocable is not, *in favour of a purchaser*, revoked by anything done by the donor of the power without the concurrence of the donee, or by the death, marriage, lunacy, unsoundness of mind or bankruptcy of the donor; and by s. 9 a power of attorney whether for valuable consideration or not given since the 31st December, 1882, and expressed to be irrevocable for a fixed time not exceeding one year from the date of the instrument, is not, *in favour of a purchaser*, during the fixed time, revoked by any similar act or occurrence.]

(*a*) See *Vance* v. *Vance*, 1 Beav. 605; *Harrison* v. *Asher*, 2 De G. & Sm. 436; *Kiddill* v. *Farnell*, 8 Sm. & G. 428.

(*b*) But where the title of the person giving the power determines with his life, as in the case of a husband claiming in right of his wife, the difficulty seems insurmountable. See *Re Jones*, 3 Drew. 679.

[(*c*) 44 & 45 Vict. c. 41, s. 47.]

(*d*) *Re Jones' Trusts*, 1866, W. N. p. 65; *Hinings* v. *Hinings*, 2 H. & M. 32; *King* v. *Isaacson*, 9 W. R. 369.

(*e*) *Callendar* v. *Teasdale*, 3 W. R. 289.

of 80*l.*, and remarked that the husband was not liable after the wife's death for her debts contracted before marriage, and that the fund would get into a wrong channel (*a*). Where a married woman was entitled to a small sum under 50*l.*, representing *real* estate, the Court ordered it to be paid to her without a deed of acknowledgment (*b*). It is presumed that a trustee, acting in a similar manner under similar circumstances, would be protected by the Court.

Payment to an infant.

35. A testamentary guardian has, by Act of Parliament (12 Car. 2. c. 24), the "custody, tuition and management of the infant's goods, chattels, and personal estate" [and this has generally been considered as not] authorising a trustee to pay to the guardian a *capital* sum to which the infant is entitled. [But under the corresponding Irish Act, 14 & 15 Car. 2. c. 19 (*Ir.*) it has been held that the receipt of the testamentary guardian for a legacy of the infant is a good discharge (*c*); and in a recent case in England, Fry, J., while refusing payment to the testamentary guardian of a legacy which had been paid into Court under the Legacy Duty Act (*d*), on the special ground that the testamentary guardian was not a "person entitled" within the meaning of that Act, intimated that he had no intention of interfering with the decision in the Irish case (*e*); and] where an infant *cestui que trust* represented himself to be of age, and induced the trustee to pay him, it was held that as the infant was old enough to commit a fraud, the trustee was not liable to him over again when he came of age (*f*).

Lunatic.

36. The mere appointment by the Court of the *committee of the estate* of a lunatic, would not justify a trustee in paying trust-money, to which the lunatic is entitled, to the committee of his estate, in the absence of any special power to receive conferred upon him by the Court.

Payment to a partner.

37. Where a debt is owing to a firm jointly the amount may be paid to the surviving partners without the concurrence of the representatives of the deceased partners (*g*).

Payment to a single trustee.

38. The Court will not, in the exercise of its discretion, except

(*a*) *Re Cabel*, 3 W. R. 280, reversing *S. C.* 3 W. R. 84.

(*b*) *Knapping* v. *Tomlinson*, W. N. 1870, p. 107; *Re Clarke's Estate*, 13 W. R. 401; [*Frith* v. *Lewis*, W. N. 1881, p. 145.]

[(*c*) *M'Creight* v. *M'Creight*, 13 Ir. Eq. R. 314.]

[(*d*) 36 Geo. 3. c. 52, s. 32.]

[(*e*) *Re Cresswell*, 45 L. T. N.S. 468; 30 W. R. 244.]

(*f*) *Overton* v. *Banister*, 3 Hare, 503; and see *Wright* v. *Snowe*, 3 De G. & Sm. 321; *Nelson* v. *Stocker*, 4 De G. & J. 458.

(*g*) *Philips* v. *Philips*, 3 Hare, 289.

under special circumstances (*a*), pay out money to a single trustee who has survived his co-trustees (*b*); and a *trustee* out of Court would do well to throw all the protection he can about a trust fund; but it must not be inferred that he would not be *safe* in paying to a single surviving trustee, for payment to a surviving trustee for sale is of constant occurrence. [In cases of sales under the Settled Land Act, 1882, it must be borne in mind that sect. 39 expressly provides that capital money arising under that Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorises the receipt by one trustee (*c*).]

Overpayment.

39. If a trustee or executor has made an overpayment in error to a *cestui que trust* or legatee, he has a right to recoup himself out of any other interest in the trust fund of that *cestui que trust* or legatee (*d*).

Repayment to executor.

The Court will not generally, in favour of an executor, make an order on a legatee to refund *personally* (*e*); and it certainly will not make an order to refund to an executor who voluntarily and in spite of expression of doubts on the part of a legatee has made overpayments to the latter (*f*); and the Court will not, it seems, at the instance of an executor who is liable to a *creditor*, compel a *purchaser* from a legatee to refund (*g*). But an executor who has been made to pay a creditor, and has under his control a legacy appropriated by him as such, but not actually paid over, has been allowed to throw the debt upon the legacy (*h*), but is disentitled to his costs of obtaining relief (*i*). And an executor who has distributed assets amongst residuary legatees, with notice, not of an existing debt, but [merely of a liability which may become a debt, as for example a liability to possible future calls on shares], may, if called upon to pay such debt, recover back from the residuary legatees the amount paid to them, but without interest (*j*).

[Payment by mistake to officer of Court.]

[Notwithstanding the general rule of law that money volun-

(*a*) *Re Courts of Justice Concentration (Site) Act*, 1865, W. N. 1867, p. 148. In *Clark* v. *Fenwick* or *Fennick*, W. N. 1873, p. 38, 21 W. R. 320, the Court ordered a sum of cash, the accumulation of income, to be paid to three out of four trustees, the fourth trustee being abroad.

(*b*) *Re Dickinson's Trust*, 1 Jur. N.S. 724; *Re Roberts*, 9 W. R. 758; and see *Baillie* v. *M'Kewan*, 35 Beav. 183; *Re Dickson's Estate*, 3 Ir. R. Eq. 344; and note to s. 32 of Trustee Act, 1850, *post*, Appendix No. 2.

[(*c*) See *Garnett, Orme and Hargreaves' Contract*, 25 Ch. D. 595.]

(*d*) *Livesey* v. *Livesey*, 3 Russ. 287; *Dibbs* v. *Goren*, 11 Beav. 483.

(*e*) *Downes* v. *Bullock*, 25 Beav. 54.

(*f*) *Bate* v. *Hooper*, 5 De G. M. & G. 338.

(*g*) *Noble* v. *Brett*, 24 Beav. 499.

(*h*) *S. C.*

(*i*) *S. C.* (No. 2), 26 Beav. 233.

(*j*) *Jervis* v. *Wolferstan*, 18 L. R. Eq. 18; [*Whitaker* v. *Kershaw*, 45 Ch. Div. 320.]

tarily paid under a mistake of law cannot be recovered, if money be paid to a trustee in bankruptcy under a mistake of law the Court will order it to be refunded, for "the Court of Bankruptcy ought to be as honest as other people," and to "act in the way in which any highminded man would act" (*a*), and the same principle extends to a liquidator or other officer of the Court (*b*).]

Rights of creditors.

40. A *creditor* who is not barred by the Statute of Limitations, or to whose debt the statute is not pleaded, may recover assets from a legatee to whom they have been erroneously paid by the executor (*c*), but not from purchasers for value, as from persons claiming under a marriage settlement (*d*); [and where the residuary estate had been assigned by the surviving executor to the residuary legatees, it was held by the Court of Appeal that a creditor might proceed against the residuary legatees without making the executor a party to the action (*e*). But, as the right of the creditors "is a right only in equity, equitable considerations, if sufficiently weighty, will make it the duty of the Court not to grant that equitable relief to which under ordinary circumstances creditors are entitled" (*f*), and accordingly the relief was refused to mortgagees of real estate whose security was insufficient, but who had assented to the distribution of the personalty among the residuary legatees (*g*). A claim against the executor *personally* for a *devastavit* in distributing the assets without providing for a simple contract debt is barred after six years from the time of the *devastavit* (*h*); though he may be made liable after the expiration of that period, on the ground of breach of trust in an action to administer his testator's estate (*i*). And an executor cannot, when called upon to account, set up his own *devastavit*

[(*a*) *Ex parte James*, 9 L. R. Ch. App. 609, 614; *Ex parte Simmonds*, 16 Q. B. Div. 308; *Re Brown*, 32 Ch. D. 597.]

[(*b*) *In re the Opera, Limited* (1891), 2 Ch. 154.]

(*c*) *Fordham* v. *Wallis*, 10 Hare, 217.

(*d*) *Dilkes* v. *Broadmead*, 2 Giff. 113; 2 De G. F. & J. 566; [and it would seem that, as the right of a creditor to recall a legacy which has been paid when assets are insufficient depends on his right to follow the assets, there can be no such right in respect of a legacy which has been in fact paid by the executor *de bonis propriis*; *Re Brogden*, 38 Ch. Div. 546, 569, 573.]

[(*e*) *Hunter* v. *Young*, 4 Ex. Div. 256; and see *Re Frewen*, 60 L. T. N.S. 952.]

[(*f*) *Per* L. J. Cotton, *Blake* v. *Gale*, 32 Ch. Div. 571, 578, affirming *S. C.* 31 Ch. D. 196; *Ridgway* v. *Newstead*, 3 De G. F. & J. 474.]

[(*g*) *Blake* v. *Gale*, *sup.*]

[(*h*) *Thorne* v. *Kerr*, 2 K. & J. 54; *Re Gale*, 22 Ch. D. 820; *Re Hyatt*, 38 Ch. D. 609.]

[(*i*) *Re Marsden*, 26 Ch. D. 783; *Re Baker*, 20 Ch. Div. 230; *Re Birch*, 27 Ch. D. 622; *Re Hyatt*, *ubi sup.*; unless the provisions of the Trustee Act, 1888 (51 & 51 Vict. c. 59), s. 8, be available in his favour, as to which see *post*, Chap. xxx., sec. 1.]

as a defence, and then claim the benefit of the Statute of Limitations (*a*).]

Rights of *cestuis que trust.*

41. A *cestui que trust* may, notwithstanding the Statute of Limitations, if there has been no improper *laches*, recover from another *cestui que trust* an overpayment erroneously made to him by the trustee (*b*); and *residuary legatees*, plaintiffs in a suit, have been ordered to refund to unpaid particular *legatees* (*c*).

Overpayment through misconduct of a *cestui que trust.*

42. Where a trustee had paid to wrong parties upon the evidence of certificates which had been forged by one of the *cestuis que trust*, the Court not only compelled repayment by the wrong parties of what each had received, but also ordered the *cestui que trust* who had forged the certificates, to make up to the parties rightfully entitled, to the relief of the trustee, what should not be repaid (*d*); and in suits against trustees for breaches of trust, the Court has ordered a tenant for life who was *overpaid* by the breach of trust, to pay back to the trustees without the institution of *another suit* for the purpose (*e*). [But where trust money had been invested incautiously by trustees on a 5 per cent. mortgage, and on the failure of the security the trustees were ordered to replace the fund with interest at 4 per cent., it was held that the tenant for life could not be called upon to return to the trustees the additional 1 per cent. which he had received (*f*).]

Settlement with one residuary legatee.

43. If one of several residuary legatees receives only what is his fair share at the time, the subsequent wasting of the assets will not entitle the other residuary legatees to call upon him to refund; for if the executor renders his accounts to a residuary legatee and pays him his share, what right or business has such residuary legatee to interfere further in the matter of the administration of the estate? He cannot take proceedings for the administration of it; and, were he to do so, he would probably have to pay the costs. If so, why is he to suffer for the *laches* and neglect of the other residuary legatees, who have

[(*a*) *Re Hyatt*, 38 Ch. D. 609.]

(*b*) *Harris* v. *Harris* (No. 2), 29 Beav. 110.

(*c*) *Prowse* v. *Spurgin*, 5 L. R. Eq. 99.

(*d*) *Eaves* v. *Hickson*, 30 Beav. 136.

(*e*) *Hood* v. *Clapham*, 19 Beav. 90; and see *Baynard* v. *Woolley*, 20 Beav. 583; *Davies* v. *Hodgson*, 25 Beav. 177; *Griffiths* v. *Porter*, 25 Beav. 236. As to overpayment to a *feme covert*, whose anticipation is restrained, see *Moore* v. *Moore*, 1 Coll. 54. As to a wrong payment to one *cestui que trust* by arrangement with another *cestui que trust*, see *Rogers* v. *Ingham*, 3 Ch. Div. 351; [and as to the power of the Court to relieve against mistakes of law, see *S. C.* and *Stone* v. *Godfrey*, 5 D. M. & G. 76, 90.]

[(*f*) *Re Whiteley*, 33 Ch. Div. 347, affirmed in D. P. *nom. Learoyd* v. *Whiteley*, 12 App. Cas. 727; but see *Fry* v. *Tapson*, 28 Ch. D. 268.]

not required the executor to account to them or to pay over the balance in his hands or due from him (*a*)? [The principle has been applied to a case where a beneficiary, who in the result proved to have been overpaid, was one of the trustees of the will, and an order on further consideration in an administration action had been made, and there was nothing to show that the deficiency had not arisen from subsequent wasting of the estate (*b*). And where payments were rightly made to certain appointees, and afterwards an unavoidable loss occurred by which the trust funds were rendered insufficient to pay all in full, there being no hotchpot clause, the payments so made were final and not to be brought into account (*c*).

However, if any question of construction of the will is likely to arise as to any share, which will involve costs which are properly payable out of the general estate, the trustee should retain a sufficient sum to protect himself against such costs (*d*).]

Release.

44. On the final adjustment of the trust accounts it is usual for the trustee, on handing over the balance to the parties entitled, to require from them an acknowledgment that all claims and demands have been settled (*e*). It is reasonable, that when the trustee parts with the whole fund, and so denudes himself of the means of defence, he should be placed by the party receiving the benefit in the utmost security against future litigation. But a receipt in full of all claims extends only to all claims that are then known (*f*).

In practice it is usual to require a release under seal, for although an acquittance of this kind *may* be opened by the *cestui que trust* on showing fraud, concealment, or mistake, it is *primâ facie* a solemn, simple, and valid defence, and throws on the relessor the heavy *onus* of displacing it (*g*). In strict right, however, a trustee in the absence of special circumstances cannot insist upon a release under seal (*h*). But it has been held that an *executor*, though he cannot insist on a release from a pecuniary

(*a*) *Peterson* v. *Peterson*, 3 L. R. Eq. 111; see 114; [and see *Re Bacon's Will*, 42 Ch. D. 559.]

[(*b*) *Re Winslow*, 43 Ch. D. 249, citing *Fenwick* v. *Clarke*, 4 D. F. & J. 240.]

[(*c*) *Re Bacon's Settlement*, 42 Ch. D. 559.]

[(*d*) *Re Potts*, W. N. 1884, p. 106.]

(*e*) See —— v. *Osborne*, 6 Ves. 455; but *query* if the *release* spoken of was not a *conveyance*.

(*f*) *Eaves* v. *Hickson*, 30 Beav. 142.

(*g*) See *Fowler* v. *Wyatt*, 24 Beav. 232.

(*h*) *Chadwick* v. *Heatley*, 2 Coll. 137; *Fulton* v. *Gilmour*, Hill on Trustees, 604; *Re Wright's Trust*, 3 K. & J. 421; *Warter* v. *Anderson*, 11 Hare, 303; *Re Cater's Trust*, 25 Beav. 366; *Foligno's Mortgage*, 32 Beav. 131.

legatee (*a*), yet on the estate being wound up, has a right to a release from the residuary legatee (*b*).

In one case (*c*), where the trust was by parol for A. for life, and on her death for B. and C., and the costs of the suit depended on the question whether the trustee ought, as required, to have transferred the sums on the joint receipt of A., B. and C., or whether he was right in refusing, unless they executed a release under seal, Vice Chancellor Kindersley decided that the trustee was entitled to a release on the grounds, first, that the trust was by parol, and secondly, that the time of payment, according to the tenor of the deed, was anticipated, as the tenant for life was still living. These reasons are not satisfactory. The circumstance that the trust was by parol, and therefore obscure, might have been an excuse for not paying at all, or ground for demanding an indemnity; but seems to afford no reason for requiring a release under seal, as distinguished from a simple receipt or acquittance in writing. Neither does the anticipation of the time appear to be material, for A., B. and C. were admitted to be the only *cestuis que trust*, and their concurrence in the receipt was equivalent to a reduction into possession (*d*). King *v.* Mullins.

In another case, V. C. Wood observed, that every trustee had a right to have some sort of a discharge, perhaps not a *release*, unless the trust was created by an instrument *under seal* (*e*). But no such distinction has ever yet been made, and V. C. Kindersley, as we have seen, required a release because the trust was by *parol*.

[45. A release of the executors and the estate of the testator given by a pecuniary legatee on payment of part of his legacy, on the footing of the estate being insufficient for payment of the legacies in full, will not enure for the benefit of the residuary legatee, if, by reason of additional funds falling in, the estate subsequently becomes sufficient to make a further payment to the legatees (*f*).] [Property falling in after release.]

46. The trust fund is not unfrequently transferred from the trustees of an old settlement to the trustees of a new settlement, and the trustees of the old settlement insist on a general release before they will part with the fund, while, on the other hand, Release from trustees to trustees.

(*a*) *Re Fortune's Trust*, 4 Ir. R. Eq. 251.

(*b*) *King* v. *Mullins*, 1 Drew. 311.

(*c*) *King* v. *Mullins*, Vice Chancellor Kindersley, 21st Dec. 1852, MS.; 1 Drew. 308.

[(*d*) See *Anson* v. *Potter*, 13 Ch. D. 141.]

(*e*) *Re Wright's Trust*, 3 K. & J. 421; and see *Re Cater's Trusts*, 25 Beav. 366.

[(*f*) *Re Ghost's Trusts*, 49 L. T. N.S. 588.]

the trustees of the new settlement feel a reluctance to give more than a simple receipt. The requisition of the trustees of the old settlement has usually been complied with, but perhaps it could not be enforced (*a*). Of course, the trustees of the new settlement cannot be called upon to enter into any covenant of indemnity.

Expense of the release.

47. As the party to benefit by the deed is, in general, the one to prepare it, the release will be drawn by the solicitor of the trustee. Another reason would be that the trustee has the necessary documents in his possession. The expense must be paid out of the trust fund.

Order of the Court.

48. When a trustee pays money under the direction of the Court, he is indemnified by the order itself, and is not entitled to any release from the parties (*b*). It would be impossible to hold a trustee answerable for an act not done by himself, but by the Court. It is the duty, however, of the trustee to fully inform the Court of all the material facts within his knowledge, and if he improperly withheld them, he would be made responsible for the results of his suppression of facts.

[Abortive settlement.]

[49. Where a settlement is executed in contemplation of an intended marriage, which is never solemnized, or of a marriage which is annulled on the ground of impotency, the trustees of the settlement will be ordered to reconvey the trust property to the settlor discharged from the trusts (*c*).]

36 Geo. 3. c. 52.

50. By 36 G. 3. c. 52, s. 32, *executors and administrators*, where legatees or next of kin are *infants*, or *beyond seas*, may pay the legacies or shares into Court (*d*), and by 45 G. 3. c. 28, s. 7, the provisions of the former Act are extended to trustees and owners of *real estate* charged with *legacies*.

10 & 11 Vict. c. 96.

51. By 10 and 11 Vict. c. 96, entitled "An Act for better

(*a*) *Re Cater's Trusts*, 25 Beav. 366.

(*b*) See *Waller* v. *Barrett*, 24 Beav. 413; *Gillespie* v. *Alexander*, 3 Russ. 137; *Underwood* v. *Hatton*, 5 Beav. 39; *Farrell* v. *Smith*, 2 B. & B. 337; *Fletcher* v. *Stevenson*, 3 Hare, 370; *Knatchbull* v. *Fearnhead*, 3 M. & Cr. 126; *David* v. *Frowd*, 1 M. & K. 209; *Sawyer* v. *Birchmore*, 1 Keen, 401; *Smith* v. *Smith*, 1 Dr. & Sm. 384; *Bennett* v. *Lytton*, 2 J. & H. 155; *Williams* v. *Headland*, 4 Giff. 495; *England* v. *Lord Tredegar*, 35 Beav. 256; *Lowndes* v. *Williams*, 24 L. T. N.S. 465.

[(*c*) *Essery* v. *Cowlard*, 26 Ch. D. 191; *Addington* v. *Mellor*, 33 W. R. 232.]

[(*d*) It has been held that under this Act it is the duty of executors to pay an infant's legacy into Court, and that they are not justified in investing the legacy in Consols and accumulating it at compound interest, *Rimell* v. *Simpson*, 18 L. J. N.S. Ch. 55; but it may well be doubted whether this decision would now be followed, as a trustee may properly deal with a fund out of Court in the same manner as the Court would have dealt with it if under its control.]

securing trust funds and for the relief of trustees," it is enacted:

I. That all *trustees, executors, administrators, or other persons having in their hands any moneys belonging to any trust whatever*, or the major part of them, shall be *at liberty, on filing an affidavit* (*a*) *shortly describing the instrument creating the trust*, to pay the same into the Bank of England, to the account of the *particular trust*, subject to the order of the Court of Chancery, and that all trustees or other persons having any *annuities or stocks* of the Bank of England, of the East India Company, or South Sea Company, or any Government or Parliamentary securities standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trust, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the Accountant-General (*b*), with his privity, in the matter of the particular trust subject to the orders of the said Court, and in every such case the receipt of one of the cashiers of the said Bank for the money so paid, or the certificate of the proper officer of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited.

II. That *such orders as shall seem fit* shall from time to time be made by the Court of Chancery in respect of the trust moneys, stocks, funds or securities so paid in, transferred and deposited as aforesaid, and for the investment and payment of any such moneys, or of any dividends or interest on any such stocks or securities, and for the transfer or delivery out of any such stocks and securities, and for the administration of any such trusts generally *upon a petition* (*c*) to be presented in a summary way; and service of such a petition shall be made on such persons as the Court shall direct; and every order made upon any such petition shall have the same effect as if the same had been made in a suit regularly instituted; and if it shall appear that any such trust funds cannot safely be distributed without the institution of one or more suit or suits, the Court may direct any such suit or suits to be instituted.

[(*a*) As to the form of affidavit under the Supreme Court Fund Rules, 1886, r. 41, see *post*, Appendix No. 1.]

[(*b*) Now the Paymaster General; see 35 & 36 Vict. c. 44, ss. 4, 6.]

[(*c*) As to when application may be by summons under the new Rules of Court, *vide post*, Appendix No. 1.]

12 & 13 Vict. c. 74.

52. This Act did not enable the *major part* of trustees to pay in or transfer a fund where the other trustees had a *legal control over the fund and would not concur*. But by 12 & 13 Vict. c. 74, it was enacted, that where moneys, annuities, stocks, or securities were vested in persons as trustees, executors, administrators, or otherwise, and the *major part of them* were desirous of transferring the funds into Court under the Trustee Relief Act, the Court, on a *petition* presented under the said Act for that purpose, might direct the transfer by the major part, without the concurrence of the rest, and might make an order on the necessary parties to permit such a transfer.

The decisions upon these Acts, and the General Orders relating to them, will be found separately considered in the Appendix.

Payment to official trustees of charities.

53. By 18 & 19 Vict. c. 124, s. 22, any trustee or other person having stock or money in his hands for a *charity* may, by an order of the Board of Charity Commissioners, transfer the stock or pay the money to the *Official trustees* of charitable funds, and such payment or transfer will be an indemnity to the person paying or transferring.

Payment into County Court.

54. By [50 & 51 Vict. c. 43, s. 70,] trust funds vested in trustees upon trusts within the meaning of the Trustee Relief Acts, and not exceeding 500*l.* in amount or value may, if *money*, be paid into the *Post Office Savings Bank* of any county court town, in the name of the registrar of such Court, or, if *stock or securities*, be transferred into the joint names of the *treasurer and registrar* of such Court.

Protection against creditors, &c.

55. Trustees who are also *executors* may be embarrassed as to the distribution of the trust fund, not merely by the difficulty in ascertaining who are their *cestuis que trust*, but by reason of the possible existence of paramount claims on the part of creditors or others. To meet this difficulty provision was made by Sir George Turner's Act (*a*) for directing a reference, upon *motion* or *petition* of course, to inquire whether there were any outstanding debts or liabilities affecting the estate of any deceased person, and for enabling the personal representative to distribute the estate subject to the result of the inquiry, without the cost of a *general administration* under the direction of the Court; and by a more recent enactment, the benefit of these provisions might be obtained by summons at chambers (*b*).

Turner's Act.

(*a*) 13 & 14 Vict. c. 35, ss. 19–25. (*b*) 23 & 24 Vict. c. 38, s. 14.

Lord St. Leonards' Act.

56. By Lord St. Leonards' Act (*a*), even the necessity of an application to the Court under that of Sir George Turner was in most cases rendered unnecessary, it being by Lord St. Leonards' Act in substance enacted that *executors* and *administrators*, after giving such notices for creditors and others (*b*) to send in their claims as would have been given by the Court of Chancery, may at the expiration of the time named in the notices proceed to distribute the estate, without being liable for any claim of which they *shall not have had notice* at the time of distribution (*c*). [And the above provisions in Sir George Turner's Act, and the amending Act, have since been repealed (*d*).]

Jurisdiction of County Courts.

57. [By 51 & 52 Vict. c. 43, s. 67 (County Courts Act, 1888), the County Courts have and can exercise all the powers and authority of the High Court in actions or matters relating to administration, the execution of trusts, under the Trustee Relief Acts, or the Trustee Acts, where the trust estate or fund to which the action or matter relates does not exceed in amount or value the sum of 500*l*. By section 69, where any action or matter is pending in the Chancery Division of the High Court which might have been commenced in a County Court, any of the parties may apply at chambers to the judge to whom it is attached for a transfer of the action or matter to the County Court in which the same might have been commenced, and the judge may, upon such application, or without any application, order the transfer.]

(*a*) 22 & 23 Vict. c. 35, s. 29.

(*b*) This includes the claims of next of kin under an intestacy, *Newton* v. *Sherry*, 1 C. P. D. 246.

(*c*) Sums appropriated by executors and retained by them as trustees are monies distributed and cease to be assets, *Clegg* v. *Rowland*, 3 L. R. Eq. 368 [and a plaintiff claiming as unpaid legatee must bring the beneficiaries before the Court, *Re Frewen*, 60 L. T. N.S. 953.] Executors, to entitle themselves to the protection of the Act, must insert advertisements in the *London Gazette*, [but not necessarily in another London paper, *Re Bracken*, 43 Ch. Div. 1], as well as in local papers, *Wood* v. *Weightman*, 13 L. R. Eq. 434; and executors after distribution are bound to give all proper information to unpaid creditors, or they will be deprived of their costs in suits by such creditors, *In re Lindsay*, 8 Ir. R. Eq. 61. [In determining as to the sufficiency of the notices, the Court will have regard to all the circumstances, especially the place of residence of the testator or intestate and his position in life; *Re Bracken*, 43 Ch. Div. 1. The sending in of a claim by a creditor is not equivalent to bringing an action so as to keep his debt alive under the Statutes of Limitation; *Re Stephens*, 43 Ch. D. 39.]

[(*d*) 46 & 47 Vict. c. 49.]

CHAPTER XV.

THE DUTIES OF TRUSTEES OF RENEWABLE LEASEHOLDS.

Upon this head we propose—I. To examine the preliminary question, in what cases the obligation to renew is imposed by the settlement. II. To inquire in what manner the trustees are to levy the fines payable upon the renewals.

I. In what cases the obligation to renew is imposed by the settlement.

Settlement of leaseholds does not *per se* imply a direction to renew.

1. It might naturally be supposed, that, from the very circumstance of the leaseholds being of a renewable character, a settlement of them to several persons in succession would *per se* imply a right in the remainderman to call upon the tenant for life to contribute to the fine (*a*); and indeed Lord Thurlow, in the instance of a lease which had not previously been treated as renewable, observed, "The cases in which the *nature of the estate* or the will of the testator compels a renewal, appear not to apply to the present: where there is *no such custom*, or direction, it is in the discretion of the tenant for life to renew or not" (*b*). However, it seems to be now established generally, that, in a devise of renewable leaseholds *without the interposition of a trustee*, the remainderman cannot oblige the tenant for life to contribute to the fine (*c*); and so it was determined even where the devise was expressly made, "subject to the payment of all *fines*, and as they became due yearly and for every year" (*d*). However, as the interest given is in its nature capable of renewal, the Court says, "If the tenant for life do renew, he shall not by converting the new acquisition to his own use derive an unconscientious benefit out of the estate" (*e*); but on the remainderman's contributing to the fine, shall be regarded as

(*a*) See *White* v. *White*, 4 Ves. 32.

(*b*) *Nightingale* v. *Lawson*, 1 B. C. C. 443.

(*c*) *White* v. *White*, 4 Ves. 32, *per* Lord Alvanley; *S. C.* 9 Ves. 561, *per* Lord Eldon; *Stone* v. *Theed*, 2 B. C. C. 248, *per* Lord Thurlow.

(*d*) *Capel* v. *Wood*, 4 Russ. 500.

(*e*) *Stone* v. *Theed*, 2 B. C. C. 248, *per* Lord Thurlow.

a trustee, and shall hold the renewed interest upon the trusts of the settlement (*a*).

Whether a direction to renew will be implied by the interposition of a trustee.

2. Will the *interposition of a trustee* sufficiently indicate an intention of obliging the tenant for life to renew? "In a *devise to trustees*," says Lord Hardwicke, "if *cestui que trust* for life be one of the lives, I should doubt whether such *cestui que trust* could be compellable to contribute; but here all these lives were strangers; *the intent of the testator certainly was, that the lease should continue, and be kept on foot, and something must be done for a renewal though nothing is mentioned*" (*b*). Lord Alvanley on one occasion alluded to the point, but said he was not called upon to decide it (*c*). In *Hulkes* v. *Barrow* (*d*), where the devise was to trustees upon trust to permit one to receive the rents for life, with remainders over, "subject to the payments of the rents and performance of the covenants reserved and contained, *or to be reserved and contained*, in the present or *future* leases, whereby such premises were or *should be* held, and also all taxes, *fines* and expenses attending the premises," it was held that the obligation of renewing the lease was imposed by the will. And in *Lock* v. *Lock* (*e*), where a testator had devised a college lease of twenty-one years to his wife for life, remainder to her son, she paying 10*l.* per annum to her son *during her life;* it was ruled, that, as the testator contemplated the continuance of the lease during the life of the wife, she was bound to renew. These, however, were cases accompanied with special circumstances. It has since been decided by Lord Plunket, in Ireland, that a settlement with the *mere interposition of a trustee* does *not* impose an obligation to renew (*f*).

Whether implied in a marriage settlement.

3. Where leaseholds of this kind are made the *subject of a marriage settlement*, it may be argued, that as the parents and issue who have any interest given them are *purchasers for value*, the enjoyment of the tenant for life should be consistent with that of the other subsequent takers. But in *Lawrence* v. *Maggs* (*g*),

(*a*) *Nightingale* v. *Lawson*, 1 B. C. C. 440; *Stone* v. *Theed*, 2 B. C. C. 248, *per* Lord Thurlow; *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Fitzroy* v. *Howard*, 3 Russ. 225.

(*b*) *Verney* v. *Verney*, 1 Ves. 429.

(*c*) *White* v. *White*, 4 Ves. 33.

(*d*) Taml. 264.

(*e*) 2 Vern. 666.

(*f*) *O'Ferrall* v. *O'Ferrall*, Ll. & G. Rep. *temp.* Plunket, 79. In *Trench* v. *St. George*, 1 Dru. & Walsh, 417, before the same Judge, it is not clear whether his Lordship did or not consider the will as creating an obligation to renew, but it would rather appear that he did. The remainderman was held not liable to contribute towards the renewal fines in favour of the tenant for life, except as respected certain fines paid subsequently to 1819, as to which the remainderman submitted to contribute. See Ib. p. 454 *et seq.*

(*g*) 1 Eden, 453. Search has been

the case of a marriage settlement with trustees interposed, but without any mention of renewals, Lord Northington was apparently of opinion that the tenant for life was *not* bound to renew.

Implied in articles for a settlement.

4. If renewable leaseholds upon marriage be *articled to be settled*, the Court will, in executing the settlement, insert the proper direction for renewals. This, it seems, was directly determined in *Graham* v. *Lord Londonderry* (*a*): and the case of *Lawrence* v. *Maggs*, before Lord Northington, was cited before Lord Thurlow in *Pickering* v. *Vowles* (*b*), as establishing the same doctrine; but it appears by the report taken from Lord Northington's own MS. that the Bar were mistaken in this (*c*). However, Lord Thurlow himself seems to have entertained that opinion, for in the same case of *Pickering* v. *Vowles*, where the property was articled to be settled, but there was no direction for renewals, his Lordship said, "It was *intended* the lease should be fully estated, and that the husband and wife should have life estates, and that so fully estated it should go to the children."

Of discretionary renewals.

5. A direction for renewals where successive estates are limited is sometimes in the form of a *discretionary* power. The instrument *may*, indeed, be so specially worded, that the power should be perfectly arbitrary; but if the proviso be simply that "it shall be lawful for the trustees to renew, from time to time, as occasion may require, and as they may think proper," the clause will be construed, not as conferring an option upon the trustees of renewing or not, but as a safeguard against any unreasonable demands on the part of the lessor (*d*).

23 & 24 Vict. c. 145, ss. 8, 9.

[6. By an Act passed 28*th August*, 1860, provisions were made for the renewal of leases by trustees under instruments executed since the date of the Act. These provisions were repealed by the Settled Land Act, 1882 (*e*), but have been in substance re-enacted, and extended to all trusts, whatever the date of their creation, by the Trustee Act, 1888 (*f*), by which it is enacted as follows:—

[Trustee Act, 1888.]

"Sect. 10. It shall be lawful for any trustee (*g*) of any lease-

made for this case in R. L. through several years, but the decree has not been found. See *Lord Montfort* v. *Cadogan*, 17 Ves. 488; *S. C.* 19 Ves. 638; *Trench* v. *St. George*, 1 Dru. & Walsh, 417.

(*a*) Cited *Stone* v. *Theed*, 2 B. C. C. 246.

(*b*) 1 B. C. C. 197. The cause does not appear in R. L.

(*c*) 1 Eden, 453.

(*d*) *Milsington* v. *Mulgrave*, 3 Mad. 491; 5 Mad. 472; *Mortimer* v. *Watts*, 14 Beav. 416; and see *Verney* v. *Verney*, 1 Ves. 430; *Harvey* v. *Harvey*, 5 Beav. 134; *Luther* v. *Bianconi*, 10 Ir. Ch. Rep. 203.

[(*e*) 45 & 46 Vict. c. 38, s. 64.]

[(*f*) 51 & 52 Vict. c. 59.]

[(*g*) Which expression includes an

holds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if he in his discretion think fit, and it shall be the duty of such trustee if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustee from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where, by the terms of the settlement or will, the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same; unless the consent in writing of such person is obtained to such renewal on the part of the trustee (*a*)."

"Sect. 11. In case any money shall be required for the purpose of paying for the renewal of any lease as aforesaid, it shall be lawful for the trustee effecting such renewal to pay the same out of any money which may then be in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewal lease, and if he shall not have in his hands as aforesaid sufficient money for the purpose it shall be lawful for the trustee to raise the money required by mortgage of the hereditaments to be contained in the renewed lease, or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments comprised in the renewed lease shall be subject; and no mortgagee advancing money upon such mortgage, purporting to be made under this power, shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purpose aforesaid."]

7. By another Act, passed 28*th August*, 1860, where any estate or interest under any lease or grant from an *ecclesiastical corporation*, is vested in a person as trustee, whether expressly or by implication of law, with a power to raise money for procuring a renewal, or where such power is vested in any person, it is made lawful for such person to raise money for the purpose 23 & 24 Vict. c. 124.

executor or administrator; see sec. 1, sub-s. 3. The provisions of the Act apply to several joint trustees as well as to a sole trustee; sec. 1, sub-s. 4.]

[(*a*) The concluding words were not contained in 23 & 24 Vict. c. 145, s. 8.]

of purchasing the reversion or otherwise enfranchising the property (*a*); and it has been held that this enactment confers a power not only to raise the money, but also to effect the purchase or enfranchisement (*b*). But this will not authorise the trustees to make any arrangement with the reversioners which will disturb the relative rights of the tenant for life and the remaindermen under the settlement; and where it was proposed to surrender part of the leaseholds in consideration of a release of the reversion of the rest of the leaseholds, and the interests of the tenant for life would suffer by the arrangement, the Court had no power, without the consent of the tenant for life, to give effect to the proposal, though beneficial on the whole (*c*).

How fines on renewals to be levied.

II. We next proceed to inquire in what manner the fines for renewals are to be levied by the trustees.

Upon this subject we shall advert, *First*, to the case where the settlor himself has specifically marked out the fund from which the fines are to be raised, and *Secondly*, to the rules adopted by the Court, where the settlor himself has omitted to declare any intention.

First. Where the fund for the fines is pointed out.

How to be levied out of "rents, issues, and profits," where the leases are for years.

1. If there be an express trust to provide the fines for renewals out of the "*rents, issues, and profits*," and the leaseholds are *terms of years not determinable on lives*, so that the times of renewal can be certainly ascertained, it will be the duty of the trustees to lay by every year such a proportion of the annual income as against the period of renewal will constitute a fund sufficient for the purpose (*d*).

Fines to be levied out of rents and profits, or by mortgage.

2. If the trust be to levy the fines for renewal out of the "*rents, issues, and profits*, or *by mortgage*," it was held in a case before Sir J. Leach that the annual rents only would in the first instance be applicable, for he considered the authority to mortgage not as making it optional with the trustees whether they should or not affect the interests of the remainderman, by throwing the charge of the renewal upon the *corpus* of the property, but as given for the protection of the *cestuis que trust* in case

(*a*) 23 & 24 Vict. c. 124, s. 20.

(*b*) *Hayward* v. *Pile*, 5 L. R. Ch. App. 218, *per* Lord Hatherley.

(*c*) *Hayward* v. *Pile*, 5 L. R. Ch. App. 214. But in another special case where there was an absolute trust for renewal, overriding the interest of the tenant for life, the Court made the order, *Hollier* v. *Burne*, 16 L. R. Eq. 163; [See *Maddy* v. *Hale*, 3 Ch. Div. 327; *Re Lord Ranelagh's Will*, 26 Ch. D. 591.]

(*d*) *Lord Montfort* v. *Lord Cadogan*, 17 Ves. 485; *S. C.* 19 Ves. 635; see *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 121; *Blake* v. *Peters*, 1 De G. J. & S. 345.

the amount of the fine should not be otherwise forthcoming (*a*), and intimated that should the trustees be under the necessity of mortgaging, the Court would call back from the party in possession the amount of the incumbrance thus temporarily incurred (*b*). However, in the later case of *Jones* v. *Jones* (*c*), where the trustees were empowered to levy the fines "*by and out of the rents, issues, and profits,* or *by mortgage,* or by such other ways and means as should be advisable," the Court, after observing that to levy the fines from the rents would throw them on the tenant for life, while a mortgage would be oppressive to the remainderman, declined to give any opinion whether the trustees might not, had they exercised their discretion, have determined upon whom the burthen should fall; but as the trustees had not exercised their discretion, it was held that the Court could adjust the *onus* amongst the parties according to the equitable rule, viz. in proportion to their actual enjoyment, as soon as it could be ascertained (*d*). And in *Greenwood* v. *Evans* (*e*), *Reeves* v. *Creswick* (*f*), *Ainslie* v. *Harcourt* (*g*), where the fines were to be raised out of the *rents, issues, and profits,* or *by mortgage,* the Court in like manner adopted the principle of throwing the *onus* on the successive tenants of the estate, in proportion to their enjoyment (*h*). In the first two cases the *leaseholds were for lives,* and in the last the leaseholds were partly for *lives* and partly for years, but no distinction was taken on that account. The present leaning of the Courts would appear, therefore, to be, to consider the language of the instrument as directing only the temporary mode of raising the fines, without prejudice to the ultimate equitable adjustment according to the principles now acted upon in equity in ordinary cases. But if the trusts be to pay the renewal fines by and out of "the *annual* rents, issues, and profits," with a *power,* if the money wanted for renewal be not produced, to raise it by mortgage, the *onus* will fall upon the tenant for life (*i*).

How to be levied when the leases are for lives.

3. If the leaseholds be either for *lives* or *for years determinable on lives,* and the trust is to raise the fines for renewal out of the "*rents, issues, and profits,*" the expenses of renewal must still be

(*a*) *Milsintown* v. *Earl of Portmore,* 5 Mad. 471; and see *Milles* v. *Milles,* 6 Ves. 761.

(*b*) 5 Mad. 472; and see *Earl of Shaftesbury* v. *Duke of Marlborough,* 2 M. & K. 121, 123.

(*c*) 5 Hare, 440.

(*d*) *Jones* v. *Jones,* 5 Hare, 440.

(*e*) 4 Beav. 44.

(*f*) 3 Y. & C. 715, as corrected from Reg. Lib; see note (*j*), p. 410.

(*g*) 28 Beav. 313.

[(*h*) See *Isaac* v. *Wall,* 6 Ch. D. 706; *Re Marquess of Bute,* 27 Ch. D. 196.]

(*i*) *Solley* v. *Wood,* 29 Beav. 482.

cast upon the *annual* rents, if it *clearly appear* that such were meant, though from the *uncertainty of the time*, the trustees cannot be sure they shall have accumulated an adequate fund.

Whether rents and profits mean annual rents.

4. But the expression "rents, issues, and profits," often stands by itself, without any sufficient indication *aliunde* that *annual* rents are intended, and then the question arises, and is attended with great difficulty, whether the fines shall be raised out of the annual rents or the *corpus*.

Stone *v.* Theed.

In *Stone* v. *Theed* (*a*), Lord Thurlow held that the *annual* rents only were applicable. In *Allan* v. *Backhouse* (*b*) Sir T. Plumer considered that the trustees might sell or mortgage, and that the tenant for life and remainderman must contribute in the usual proportions, and this decision was affirmed on appeal by Lord Eldon (*c*). In *Shaftesbury* v. *Marlborough* (*d*) Sir J. Leach observed upon the conflict between the preceding cases, and followed the authority of Lord Thurlow. [In *Re Barber's Settled Estates* (*e*), the authority of *Allan* v. *Backhouse* was conceded without argument.]

The decisions in *Playters* v. *Abbott* (*f*) and *Townley* v. *Bond* (*g*), must be viewed as resting only upon the special wording of the instruments which were under consideration.

Greenwood *v.* Evans, &c.

In *Greenwood* v. *Evans* (*h*), *Jones* v. *Jones* (*i*), *Reeves* v. *Creswick* (*j*), and *Ainslie* v. *Harcourt* (*k*), the trustees were empowered to levy the fines from the *rents, issues,* and *profits*, or by *mortgage*, and the Court, as we have seen, apportioned

(*a*) 2 B. C. C. 243; see the case stated from Reg. Lib. with some remarks, in *Jones* v. *Jones*, 5 Hare, 451, note (*a*); and see *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591; [*Re Green*, 40 Ch. D. 610.]

(*b*) 2 V. & B. 65.

(*c*) Jac. 631. [A full copy of Lord Eldon's judgment will be found in the Law Magazine, vol. 26, p. 112.]

(*d*) 2 M. & K. 111, 121.

[(*e*) 18 Ch. D. 624.]

(*f*) 2 M. & K. 97.

(*g*) 2 Conn. & Laws. 393.

(*h*) 4 Beav. 44.

(*i*) 5 Hare, 440.

(*j*) 3 Y. & C. 715. It is stated in the report that "there were no funds provided for the purpose of renewal by the testator's will;" from which it might be supposed that the will was altogether silent upon the subject, but Mr. Shapter, Q.C., who had occasion to consult the Reg. Lib. obligingly furnished the author with the following extract from the will: "It shall be lawful for my said trustees, and the survivor of them, and the heirs, executors, administrators and assigns respectively of such survivor to renew, or use their or his endeavours to renew, the leases for the time being of such part of my said estates as shall be accustomably renewable from time to time and as often as occasion shall require, and for that purpose to make such surrenders of the then leases, or any renewed leases, as shall be requisite and necessary in that behalf, and *by and out of the rents, issues, and profits*, of the premises, the leases whereof may be so renewed, or by *mortgage thereof*, to raise so much monies as shall be sufficient for paying the several renewal fines and other necessary charges for such renewals."

(*k*) 28 Beav. 313.

the burthen amongst the successive tenants, according to their enjoyment.

The result appears to be that where the direction is to raise the fines out of "the rents, issues, and profits," simply, the Court may be compelled, by the express language of the instrument, to throw the fines upon the *annual* rents, but will lean strongly against such a construction, and where the trustees are empowered to raise the fines out of "the rents, issues, and profits, *or* by mortgage," it will hold the discretion to apply only to the temporary means of raising the fund, and will apportion the burthen according to the general rule (*a*). Result of the cases.

5. On a reference to the Master in Chancery by Sir J. Leach, how a fund for payment of fines on the renewal of leaseholds for *lives*, where the fines were to be paid from the *annual* rents, could best be secured, the Master proposed in his report, that each of the lives, upon which the leases were held, should be insured *against the life of the tenant for life* in a sum sufficient to cover the amount of the fine, and that the premiums upon the policies should be paid out of the annual rents and profits (*b*). Upon this arrangement we must remark that the lives of the *cestuis que vie* ought to have been insured *unconditionally*, and not against the life of the tenant for life, for the estate was continually deteriorating as the lives wore out, and the remainderman was entitled to have good lives or equivalent insurances. In leaseholds for years, the remainderman has a right to a proportional accumulation towards the payment of the next fine, and why is not the same principle to prevail in the case of leaseholds for lives? Subject to this observation, a more convenient mode of raising the fines could not perhaps be suggested, and a trustee under similar circumstances would scarcely incur a risk in acting upon it at his own discretion. Of raising the fines by way of insurance.

6. Where freeholds and leaseholds for lives are limited to the same uses, it is usual, from the difficulty of mortgaging leaseholds vested in trustees (who will not covenant beyond their own acts), to insert a power to charge the *freeholds* for raising the fines; and it would be well to provide that the freeholds and leaseholds might be joined together in the security, and that the loan should precede other charges created by the settlement, and that the *corpus* of the property should be subject to the mortgage, so as Power to charge freeholds for raising fines.

[(*a*) See *Re Marquess of Bute*, 27 Ch. D. 196.]

(*b*) *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 124; and see *Greenwood* v. *Evans*, 4 Beav. 44.

to shut out the question of apportionment between the tenant for life and the remainderman.

Who shall have the accumulations where renewal cannot be had.

7. [Where there is an absolute trust for renewal of leaseholds out of the rents and profits overriding the interest of the tenant for life, but from the unwillingness or incapacity of the lessor no renewal can be obtained, it is the duty of the trustees to make the best arrangement which is practicable for rendering the property permanent for the benefit of the persons successively entitled, either by purchasing the reversion where this can be done on advantageous terms, and with a due regard to the interests of the successive *cestuis que trust*, or by converting the leaseholds and investing the proceeds, allowing the tenant for life only the income of the investments during his life (*a*); but where no absolute trust for renewal exists, although] a portion of the annual rents and profits may have been destined by the settlor to defray the expenses of renewals, if no renewal can be obtained, the sums which would have been raised will be regarded as a charge which fails of taking effect, and will merge for the benefit of the tenant for life (*b*).

Who must compensate the remainderman where no renewal has been made.

8. If a trustee (*c*), or tenant for life in the situation of a trustee (*d*), fail in his duty to apply the given fund, the remainderman may call for a compensation from such trustee, or tenant for life, or their assets. But when, by the permission of the trustee, the tenant for life has been in the full enjoyment of the rents and profits without deduction for renewals, though the trustee is primarily answerable to the remainderman, yet the tenant for life, who has had the actual pernancy, must to that extent make it good to the trustee (*e*).

Of fines on underleases.

9. And where the leaseholds were annually renewable for twenty-one years, and the custom had been for the lessee annually to grant under-leases for twenty years, the tenant for life, as bound to pay the fines to the lessor out of the annual rents and

[(*a*) *Maddy* v. *Hale*, 3 Ch. Div. 327; *In re Wood's Estate*, 10 L. R. Eq. 572; *Hollier* v. *Burne*, 16 L. R. Eq. 163; *Re Barber's Settled Estates*, 18 Ch. D. 624; *Re Lord Ranelagh's Will*, 26 Ch. D. 590.]

(*b*) *Morres* v. *Hodges*, 27 Beav. 625; *Richardson* v. *Moore* and *Tardiff* v. *Robinson*, cited *Colegrave* v. *Manby*, 6 Mad. 82, 83, and reported 27 Beav. 629; *In re Money's Trusts*, 2 Dr. & Sm. 94. See *Colegrave* v. *Manby*, 6 Mad. 86, 87, 2 Russ. 252; *Bennett* v. *Colley*, 5 Sim. 181, 2 M. & K. 231; *Browne* v. *Browne*, 2 Giff. 304.

(*c*) *Lord Montfort* v. *Lord Cadogan*, 17 Ves. 485; *S. C.* 19 Ves. 635; and see *Wadley* v. *Wadley*, 2 Coll. 11.

(*d*) *Colegrave* v. *Manby*, 6 Mad. 72; *S. C.* 2 Russ. 238.

(*e*) *Lord Montford* v. *Lord Cadogan*, *ubi supra*; *Townley* v. *Bond*, 2 Conn. & Laws. 403, 406, *per* Sir E. Sugden; and see *Wadley* v. *Wadley*, 2 Coll. 11; *Marsh* v. *Wells*, 2 S. & St. 87; [*Brigstocke* v. *Brigstocke*, 8 Ch. Div. 357.]

profits, was declared entitled to the fines paid annually by the under-lessees (*a*).

How fines to be levied where no direction by the settlor.

Secondly. It often happens that renewable leaseholds are devised to trustees with a direction, either expressed or implied, to keep the leases continually renewed, but *without any declaration of intention* out of what fund the settlor meant the expenses to be levied.

Where paid by tenant for life or remainderman.

1. Where this is the case, the tenant for life and remainderman may possibly agree to contribute towards the fine out of their own pockets, at the time of the renewal; or if the tenant for life and remainderman cannot agree to *join* in raising the fine, one of them may be willing to advance the whole amount *pro tempore* out of his own pocket, and then an apportionment on the principles adopted by the Court may be compelled between the tenant for life's estate and the remainderman at the tenant for life's decease, and either party advancing the fine will have a *lien* on the renewed lease for the amount expended beyond his proportional part. If the tenant for life and remainderman will neither jointly, nor will either of them singly advance the fine, then it is said the trustees must raise the expenses out of the estate by way of mortgage (*b*); and at the tenant for life's decease the apportionment must be made in like manner. However, a mortgage, where neither the tenant for life nor remainderman will make the advance, is more easily to be suggested than to be carried into effect, for few persons would be disposed to lend their money on such a security, in the absence of any express power to mortgage. In such a case, therefore, it seems necessary to have recourse to the Court, except where the difficulty is met by the provisions of the Act before referred to (*c*).

Mortgage by trustees.

Old rule of contribution.

2. The old rule of contribution was, that the tenant for life should advance one-third, and the remainderman two-thirds (*d*); but the question was put by Lord Thurlow, "Is a tenant for life at the age of ninety-nine, whose title accrued in possession when he was ninety-eight, to pay one-third—a great deal more than any

(*a*) *Milles* v. *Milles*, 6 Ves. 761; and see *Earl Cowley* v. *Wellesley*, 1 L. R. Eq. 656; *S. C.* 35 Beav. 640.

(*b*) See *Buckeridge* v. *Ingram*, 2 Ves. jun. 666; *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 121; *Allan* v. *Backhouse*, 2 V. & B. 72.

[(*c*) 51 & 52 Vict. c. 59, s. 11, *ante*, pp. 406, 407.]

(*d*) *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 118, *per* Sir J. Leach; *Lock* v. *Lock*, 2 Vern. 666, R. L. 1710, B. fol. 120; *Verney* v. *Verney*, 1 Ves. 428; *Limbroso* v. *Francia*, cited Ib.; *Graham* v. *Lord Londonderry*, cited *Stone* v. *Theed*, 2 B. C. C. 246; and see *Rowel* v. *Walley*, 1 Ch. Rep. 218; *Ballet* v. *Sprainger*, Pr. Ch. 62; *Cornish* v. *Mew*, 1 Ch. Ca. 271.

possible enjoyment? According to that rule, a man of the age of ninety-nine, who has the enjoyment only of ten days, pays as much as a man of twenty-five" (*a*).

Rule of keeping down the interest on the fine.

3. Lord Alvanley adopted the rule (*b*), (and from the case of *Lawrence* v. *Maggs*, it would seem that Lord Northington had before acted upon the same principle (*c*),) that the tenant for life should merely *keep down the interest* of the fine. But Lord Eldon said, "he could not agree to that: in the case of tenant for life and remainderman in *tail* or in *fee*, the *inheritance* being charged with the mortgage, it was fair the tenant for life should only keep down the interest, for the natural division was, that he who had the *corpus* should take the burthen, and he who had only the fruit should pay to the extent of the fruit of the debt: but leases, whether for lives or years, were in their nature temporary, and therefore the position that the tenant for life was bound to pay the interest was to be understood with this qualification, that he was further bound to contribute a due proportion of the principal according to the benefit he derived from the renewed interest" (*d*).

Court will not act on speculative calculations.

4. It might be thought reasonable that the proportion of the expense to fall upon the tenant for life should be regulated by his actual age and *probable* duration of life; but it has been said that accident might render such a course unjust to the one party or the other, according as the tenant for life happened to live a longer or shorter period than was allowed by the calculation (*e*).

Present rule of contribution.

5. The rule now in operation was first clearly laid down by Lord Thurlow in *Nightingale* v. *Lawson* (*f*), a case, said Lord Eldon (who was one of the counsel in it) to which, from the intricacy of the subject, the reports have failed to do justice (*g*).

Nightingale v. Lawson.

The circumstances may be briefly stated as follows: A widow, tenant for life of a term which had twelve years to run, renewed for a further term of twenty-eight years, to commence from the expiration of the twelve years, and afterwards renewed for the additional term of fourteen years to commence from the expiration of the twenty-eight years. The widow lived through the original term of twelve years, and through nine of the renewed term of twenty-eight years. The question was raised after the death of

(*a*) See *White* v. *White*, 9 Ves. 555.
(*b*) *Buckeridge* v. *Ingram*, 2 Ves. jun. 652, see 666; *White* v. *White*, 4 Ves. 24, see 33.
(*c*) 1 Eden, 453, see 455.
(*d*) *White* v. *White*, 9 Ves. 560.
(*e*) *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 119, *per* Sir J. Leach; and see *Bennett* v. *Colley*, 2 M. & K. 234.
(*f*) 1 B. C. C. 440.
(*g*) *White* v. *White*, 9 Ves. 556.

the widow, in what proportions the tenant for life and the remainderman should contribute to the fines. The following points were resolved by Lord Thurlow, after very anxious, frequent, and grave consideration of the subject (*a*), and have ever since been acquiesced in by the Courts.

Proportions to be paid by the tenant for life and remainderman.

(A) "That, as the widow had lived nine years after the expiration of the twelve, leaving nineteen years to run of the twenty-eight, the Master ought to take the sum paid by her for the renewal of the lease as the value of the term purchased, that is, of the term of twenty-eight years, to commence at the expiration of the twelve years; he should then consider the value of the term of nine years after the existing term, and what the term of nineteen years after the existing term and the nine years was worth, and the latter was the proportion to be paid by the remainderman" (*b*). (Upon which resolution Lord Eldon thus comments: "It was first considered," he said, "what the interest of the tenant for life was in that term which had to run out at the time of the renewal, and then what benefit the tenant for life had received by the enjoyment of the renewed term from the period when the old term would have expired; and Lord Thurlow determined that the remainderman took that interest in the renewed term which was *ultra* so much of the renewed term as expired in the lifetime of the person who renewed, and the value of that interest he made the remainderman pay" (*c*).)

Kind of interest.

(B) "That as to the *kind of interest* to be allowed, *simple* interest would not be a satisfaction, as the widow had laid out her money totally, and the value of the lease was calculated upon the ground of compound interest: compound interest was therefore to be computed upon the proportional value of the nineteen years' term to the whole expense of renewal" (*d*).

Rate of interest.

(C) "That as to the *rate of interest*, in computing compound interest, you go upon the idea that the interest is paid upon the exact day and immediately laid out; but as this was impossible, it would be sufficient to compute interest at 4 per cent." (*e*).

Rate after the death of the tenant for life.

(D) "That such interest was only to be paid till the widow's death, for after that her executors had the demand upon the re-

(*a*) See *White* v. *White*, 9 Ves. 560.

(*b*) See *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Barnard* v. *Heaton*, cited *White* v. *White*, 4 Ves. 29; *Playters* v. *Abbott*, 2 M. & K. 108; *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 118; *Lanauze* v. *Malone*, 3 Ir. Ch. Rep. 354.

(*c*) *White* v. *White*, 9 Ves. 558.

(*d*) See *White* v. *White*, 4 Ves. 35, 36; *S. C.* 9 Ves. 557, 558; *Bradford* v. *Brownjohn*, 3 L. R. Ch. App. 711.

(*e*) See *Giddings* v. *Giddings*, 3 Russ. 260.

mainderman, and it became a common debt, and must carry simple interest only" (*a*).

Case of tenant for life having had no enjoyment.

(E) "With respect to the second renewal, as the widow had not lived to enjoy any part of that term, her executors were entitled to the whole of the expenses, with interest to be computed on the same principle as before" (*b*).

Risk of losing the contribution.

6. In this case, it will be observed, the *tenant for life* had disbursed the fine and, the payment being a charge upon the property, the widow was in no danger of eventually losing her demand. But where the tenant for life has not the means of renewing, but the remainderman comes forward with the money, if the contribution is to be suspended till the death of the tenant for life, it may happen, that, when the proportions can at last be ascertained, the estate of the tenant for life may be insolvent, and so the contribution be lost. "I admit," says Lord Eldon, "there is this difficulty in the case; but perhaps from the nature of the thing it cannot be helped: the utmost extent you can go to is to make the tenant for life give security for the sum which may eventually be due" (*c*).

How the rule to be applied to leaseholds for lives.

7. There occurs, also, this further difficulty, viz. how to apply the principle to the case of leaseholds for *lives*. The new *cestui que vie* may die in the lifetime of the original *cestui que vie*, and then no actual benefit accrues either to the tenant for life or to the remainderman. If the tenant for life paid the fine, is the remainderman to contribute nothing, because he took no benefit? If the remainderman paid the fine, is the tenant for life to contribute nothing, because he can excuse himself under the same plea?

8. From the nature of leaseholds for *lives* it seems difficult to discover any other principle of adjustment than one of the following:—

First, That the tenant for life and the remainderman should contribute according to their *chance of benefit at the time of the renewal*, in which case the proportions would be settled thus:—The chance of benefit to the tenant for life is the value of the new life commencing from the death of the last surviving original *cestui que vie*, and determining on the death of the tenant for life. The chance of benefit to the remainderman is the value of the new life commencing on the death of the original *cestuis que vie* after

(*a*) See *Giddings* v. *Giddings*, 3 Russ. 260; *Bradford* v. *Brownjohn*, 3 L. R. Ch. App. 711.

(*b*) *Coppin* v. *Fernyhough*, 2 B. C. C. 291.

(*c*) See *White* v. *White*, 9 Ves. 558, 559; *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 122.

the death of the tenant for life. In the proportion of these two values would be the respective contributions.

Secondly, That the *remainderman's* proportion should be regulated by the *actual benefit* derived. Thus, if the new *cestui que vie* die in the lifetime of any of the original *cestuis que vie*, or of the tenant for life, the remainderman takes no benefit and has nothing to pay. In this case the tenant for life is the *loser*. Should the new *cestui que vie* survive the original *cestuis que vie* and also the tenant for life, the value of the new life should be taken at the tenant for life's death, and that interest be paid for by the remainderman. It might happen that the original *cestuis que vie* and the tenant for life might die soon after the renewal, and then the estimated value of the new life would be greater than the whole fine; and in such a case the tenant for life would be a *gainer*. Thus the tenant for life might sometimes be a gainer, sometimes a loser: the remainderman would never either gain or lose, but would pay the exact value of the interest which he actually took (*a*).

Thirdly, That, *vice versâ*, the *tenant for life's* proportion should be regulated by the actual benefit derived, and that the contingent loss or gain, as the case might be, should fall upon the *corpus* of the property, that is, upon the remainderman.

9. In *Reeves* v. *Creswick* (*b*), where leaseholds for *lives* were devised to trustees upon trust for A. for life, with remainder to her children, and a bill was filed by the trustees for the purpose of having the expenses of renewal raised, the following scheme, which had been approved by the Master, was directed to be carried into effect. The period of enjoyment of the property by the tenant for life under each of the old leases being the joint duration of her own life and that of the then surviving *cestui que vie* named in such lease, and the period of her enjoyment of the property under each corresponding renewed lease being in like manner the joint duration of her life, and those of the new *cestuis que vie*, or the longest liver of them, the difference between the values of the estates for these two periods gave the benefit derived by the tenant for life from the renewals in question, and the residue of the increased value of the property expressed the benefit derived from the renewals by the remainderman. Calculations were accordingly made by the actuary of an insurance

Reeves *v.* Creswick.

(*a*) See Lord Eldon's remarks in *White* v. *White*, 9 Ves. 559, which, however, are very obscurely worded.

(*b*) 3 Y. & C. 715. See as to this case, p. 410, note (*j*), *supra*.

office, upon the above principles, of the benefit derived by the respective parties from the renewal of each lease, and the fines and expenses of renewal being divided in the proportions so ascertained, the total amount, which thereupon appeared to fall to the share of the tenant for life, was directed to be insured upon her own life for the purpose of providing, upon her decease, for the payment of a corresponding part of the principal of the mortgage debt to be raised upon the property. The policy of insurance was ordered to be assigned to the mortgagee, and directions were given for paying the premiums on the policy, and for keeping down the interest on the entire mortgage debt out of the annual rents and profits of the estates. The only observation that occurs upon the propriety of this arrangement is, whether the tenant for life ought to have been directed to keep down the interest of the *entire* mortgage debt out of the annual rents as between her and the remainderman, or only of that part of the principal which fell to the share of the tenant for life. It will be seen also from this statement, that the Court made an apportionment according to the *speculative* benefit, a course which the Court has in other cases disclaimed, except for the purpose of raising the fine *in præsenti* without prejudice to the ultimate apportionment on the death of the tenant for life, when the relative benefits derived can be ascertained. It was perhaps understood, though it does not so appear from the report, that the decree was to be without prejudice to an ultimate adjustment.

Jones *v.* Jones.

In *Jones* v. *Jones* (*a*), before Vice-Chancellor Wigram, involving leaseholds for *lives* as well as leaseholds for *years*, and where the fines were to be raised out of the rents or by mortgage, or by such other means as should be advisable, the mode of raising and ultimately apportioning the fines was fully considered, and the importance of the subject may justify a somewhat lengthened extract from the judgment. "The rule," said the Vice-Chancellor, "is, that the parties are to pay in proportion to their enjoyment, by which I understand their *actual* enjoyment to be meant, and not an extent of enjoyment to be determined by mere *speculation*, or by a calculation of *probabilities*, and the question is, how that apportionment is to be effected. If the *tenant for life* is willing to take upon himself to renew, he will enjoy the estate during his own life, and when the actual period of his enjoyment is ascertained, his estate will have a lien upon the residue of the

(*a*) 5 Hare, 440.

term for any overpayment which may have been made. The case is one of much greater difficulty where the renewal is made by the *remainderman*, or (which as to this difficulty is the same thing) where the trustee is to raise the money and charge it on the *corpus*. In that case, unless some course be taken to protect the interest of the remainderman, the tenant for life may enjoy the estate during his whole life without bearing any greater charge than the interest on the debt created by the renewal, and he may leave no assets to pay his proportion of the principal money. That inconvenience may perhaps be avoided by requiring the tenant for life to give security, but there is a practical difficulty in determining for what sum the tenant for life is to give security. If he gives security for the whole amount of the fine, because by possibility he may enjoy the whole benefit resulting from the renewal, the difficulty is got over; but the tenant for life may not be able to give security for the whole although he might for a part, and how is the Court in such a case to deal with the interests of the parties? I do not, however, think that the difficulty to which I have adverted is insuperable. The tenant for life may in the *first instance* be required to give security for an amount calculated upon the assumption that his life will last during a portion of the renewed lease. If he should die within the time during which it was assumed that his life would last, the security would of course be more than sufficient to satisfy his proportion of the fine, and it would be void for the excess. If he outlived that time he might, if necessary, be called upon to give a further security to cover the additional proportion then to be attributed to him. It appears to me proper to declare that *each party* is to bear the burthen of the renewal in the proportion of *his actual enjoyment* of the estate. There will be a direction for the tenant for life to keep down the interest, and a reference to ascertain what proportion of the fine was properly payable by him. This inquiry is necessarily by anticipation. There will then be a reference to approve of a security, and these directions must be followed by a declaration that the reference and security are to be without prejudice to the question whether the tenant for life may or may not be liable to pay less or more than the sum for which the security is given." The doctrines enunciated in this case have been since approved as sound, and the tenant for life, where the fine has been paid out of the trust fund, has been ordered to give security for his contribution to

the fine in proportion to the benefit which he should ultimately derive from the new life (*a*).

It must be observed, however, that *Jones* v. *Jones* leaves untouched the case which creates the greatest difficulty, viz., where by the death of the new *cestui que vie* in the lifetime of the tenant for life no benefit from the renewal accrues either to the tenant for life or to the remainderman. Nor does it appear to have been distinctly perceived by the Court that the renewal of leaseholds for lives being essentially matter of *speculation*, it is impossible to regulate the contribution of either tenant for life or remainderman according to the *value* of his actual enjoyment, without *e converso* making the remainderman or the tenant for life take upon himself the risk of the renewal proving profitable or unprofitable in its ultimate results; and further, that in order to make each party bear the burden of the renewal in the *proportion* of his actual enjoyment, it would be necessary to await the death not merely of the tenant for life but also of the *cestuis que vie*, a course which would be extremely inconvenient, and, it is conceived, contrary to the general practice of the Court.

In *Harris* v. *Harris* (*b*), copyholds held for three *lives* were settled on A. for life with remainders over, and two of the *cestuis que vie* having died, A. put in two new lives at his own expense. A. died in the lifetime of the original *cestui que vie*, so that A. in event had no benefit from the renewal, and the whole fine was ordered to be repaid to A.'s personal representative. But it might happen that the two new lives would also die in the lifetime of the original *cestuis que vie*, and then the remaindermen also would have no benefit from the renewal. It would seem, therefore, that the Court must have assumed that the speculative gain or loss was to fall on the remainderman.

Tenant for life regarded as a trustee.

10. Where the legal estate of renewable leaseholds is devised without the interposition of a trustee, but the testator at the same time directs, either expressly or by implication, that the leases shall be renewed, the tenant for life is then himself a trustee (*c*), and as such is compellable to apply for renewals (*d*), but ought before applying for a renewal to consult the remainderman (*e*).

(*a*) *Hudleston* v. *Whelpdale*, 9 Hare, 775.

(*b*) *Harris* v. *Harris* (No. 3), 32 Beav. 333.

(*c*) *White* v. *White*, 5 Ves. 555.

(*d*) *Lock* v. *Lock*, 2 Vern. 666; and see *White* v. *White*, 4 Ves. 24.

(*e*) *White* v. *White*, 5 Ves. 555. [The tenant for life on renewal ought not to put in his own life; *Hudleston* v. *Whelpdale*, 9 Ha. 775, 788, distinguishing *White* v. *White*, 9 Ves. 554, 561, as having been decided upon the special terms of the will.]

Tenant for life refusing to renew.

11. It has been said, that if from the threats or acts of the tenant for life there appears the intention of suffering the lease to expire, the Court would appoint a receiver of the estate to provide a fund for the renewal (*a*); and that if the tenant for life has already allowed the period for renewal to pass, the rents and profits may be impounded for either procuring a renewal (*b*), or finding the remainderman a compensation (*c*). But no suit *for damages* can be effectually prosecuted before the tenant for life's decease; for so long as it remains uncertain how much of the renewed term will survive to the remainderman, the amount of the injury done to him cannot be ascertained (*d*). It follows that the mere forbearance of the remainderman to bring a suit during the continuance of the life estate cannot be construed into *laches* or acquiescence (*e*).

Admission fines in respect of copyholds.

12. The fines, fees and expenses of the *admission* of new trustees to *copyholds* must be borne by the tenant for life and remaindermen in proportion to their respective interests, according to the principles which regulate the renewal of leaseholds. Thus a testator devises copyholds to A. and his heirs upon trust for B. for life, with remainder to C. in fee. A. pays a fine on his admission and dies. His heir is admitted and pays a fine and dies, and his heir again is admitted and pays a fine. Thus the fine for the admission of the trustee is a kind of purchase-money for an estate for life of that trustee. The burthen must be borne by the *cestuis que trust* of the estate, and they contribute to the fines in proportion to their actual enjoyment, as in the case of leaseholds (*f*). These observations are on the assumption that the will or settlement contains no express directions how the fines are to be raised.

(*a*) See *Bennett* v. *Colley*, 2 M. & K. 233.

(*b*) See *S. C.* 5 Sim. 192.

(*c*) *S. C.* 5 Sim. 181; 2 M. & K. 225; and see *Lord Montfort* v. *Lord Cadogan*, 17 Ves. 490.

(*d*) *Bennett* v. *Colley*, 5 Sim. 181; *S. C.* 2 M. & K. 225; *Harris* v. *Harris* (No. 3), 32 Beav. 333.

(*e*) *Bennett* v. *Colley*, 5 Sim. 181; 2 M. & K. 225.

(*f*) *Carter* v. *Sebright*, 26 Beav. 374; and see *Playters* v. *Abbott*, 2 M. & K. 108; *Bull* v. *Birkbeck*, 2 Y. & C. C. C. 447; *Jones* v. *Jones*, 5 Hare, 461.

CHAPTER XVI.

DUTIES OF TRUSTEES TO PRESERVE CONTINGENT REMAINDERS.

1. TRUSTS of this description are at present of much less frequent occurrence than they were formerly, and the reason is easily explained.

Object of the settlement under the old law, liable to be defeated.

2. As the law stood before the recent Acts, which will be noticed presently, the objects of a strict settlement (where there was no limitation to trustees to preserve contingent remainders), were liable to be defeated in the two following ways:—

In the first place, as a contingent remainder was formerly extinguishable by the *surrender* or *merger* of the particular estate in the inheritance (*a*), if lands were limited to A. for life with remainder to his unborn children, with remainder to B.; A. might surrender his life estate to B., or B. might release to A., or A. and B. might join in a conveyance of the fee simple to C., and in each case the contingent remainder was squeezed out, and if issue were afterwards born, they had no remedy at law or in equity.

Again, the intention of the settlor was that the estate should remain in the family as long as the law permitted, and that on the death of the tenant for life it should devolve on the person who happened at the time to stand next in the series of limitations, but in fact when the eldest son attained twenty-one he was enabled, with the concurrence of his father in making a tenant to the *præcipe*, to bar all the subsequent remainders; and thus, on the majority of the eldest son, the estate became the absolute property of the father and son, and the interests of those in remainder were sacrificed, except so far as the father and son might choose to give them effect.

3. To obviate these results settlements were usually penned in one of the two following modes: either, *First*, The legal estate

(*a*) Also by forfeiture of the particular estate. But see now 8 & 9 Vict. c. 106, s. 8.

was limited to the use of the parent for 99 years if he should so long live, with remainder to the use of trustees and their heirs during the life of the parent upon trust to preserve the contingent limitations, and on his death to other uses in remainder; or to the use of trustees and their heirs during the life of the parent in trust for him, and on his death to other uses in remainder; or, *Secondly*, The settlement was to the use of the parent for life, with remainder to trustees and their heirs during the life of the parent upon trust to preserve the contingent remainders, and on his death to other uses in remainder.

Case of the legal estate for life in the trustee.

4. In the *first* form of settlement the object in view, by vesting the freehold in the trustees, was to preserve the contingent limitations from being destroyed by the surrender or merger of the particular estate, which would have been practicable had the freehold been limited to the parent himself, and also to prevent the barring of the entail and the alienation of the estate for purposes not authorised by the spirit of settlement.

Case of the legal estate in the tenant for life.

5. In the *second* form it was the duty of the trustees as before to preserve the contingent limitations, but as the freehold in possession was vested in the parent the trustees had no power to prevent a recovery by the father and son as soon as the latter came of age, but if the tenant for life committed a forfeiture (as by feoffment in fee in order to defeat the contingent remainders), it was then the duty of the trustees to enter and so vest the freehold in possession in themselves, and it was then their further duty, as in the first form, though the settlor himself might not have contemplated such a purpose, not to concur in putting an end to the settlement, except where such interference was prudent and proper (*a*).

Effect of the Fines and Recoveries Act upon trusts to preserve contingent remainders.

6. The law upon the duties of trustees to preserve contingent remainders has in later times undergone great alteration.

By the 15th section of the Fines and Recoveries Act (*b*) it is declared, that every tenant in tail, whether *in possession, remainder, contingency,* or *otherwise,* shall have power to dispose of the lands entailed for an estate in fee simple absolute; but by the 40th and two following sections, the disposition must be by *deed inrolled,* and must be made with the *consent of the protector of the settlement.*

Operation of the old law.

7. Under the old law the key of the settlement was in the

(*a*) The duties of trustees to preserve contingent remainders with reference to the old law have been omitted in this edition, but will be found in the early editions.

(*b*) 3 & 4 Will. 4. c. 74.

hands of the person who was the owner of the freehold in possession; but now, by the 32nd section of the Act, any settlor entailing lands may *appoint* one or more persons *in esse*, not exceeding three and not being *aliens*, to be protector or protectors of the settlement during the period therein specified, and may perpetuate the protectorship by means of a power of appointment of new protectors (*a*). If the settlor has not taken advantage of this permission, then, by the 22nd section, if there be subsisting under the settlement any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate tail, the owner of such prior estate, or of the first of such prior estates if more than one, or *the person who would have been owner had he not disposed of his interest*, is constituted the protector of the settlement. But, by the 27th section, no dowress, *bare trustee*, heir, executor, or administrator shall be protector. However, by the 31st section, it is enacted, that, "where, *under a settlement made before the passing of the Act*, the person who under the old law should have made the tenant to the *præcipe*, shall be a *bare trustee*, such trustee during the continuance of the estate conferring the right to make the tenant to the *præcipe* shall be the protector;" but, by the 36th section, the protector of a settlement shall not be deemed to be a *trustee* in respect of his power of consent, and a Court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving his consent as a breach of trust.

Operation of the new law.

8. Under the provisions, therefore, of this Act, as regards settlements made *since* the passing of the Act, a *bare trustee* cannot be protector in any case (*b*). As regards settlements made *before* the passing of the Act, though the trustee may become protector by the operation of the 31st section, he is not accountable in a Court of equity for the exercise of his discretion. But a bare trustee who is protector under that section can insist on retaining the legal estate only so long as the purposes of the trusts exist, that is, so long as according to the rules of a Court of equity he is required to be a trustee. Therefore, where there

[(*a*) Where a testatrix appointed three persons protectors, and made provisions for the appointment of other persons to be protectors in case they should die, and the protectors all died but no new protectors were appointed in their place, it was held by V. C. Malins that the tenant for life was the protector. *Clarke* v. *Chamberlin*, 16 Ch. D. 176.]

[(*b*) See *Re Dudson's Contract*, 8 Ch. Div. 628; *Re Ainslie*, 51 L. T. N.S. 780.]

was a devise of lands to trustees upon trust for testator's daughter during her life, for her separate use, without power of anticipation, with remainder to the use of her children as tenants in common in tail with remainders over, it was held that the testator's daughter, having become *discoverte* and being *sui juris*, could compel a conveyance by the trustees of the legal estate vested in them during her life (*a*).

7 & 8 Vict. c. 76.

9. By 7 & 8 Vict. c. 76, s. 8, it was declared that no estate should be created by way of *contingent remainder;* but that every estate which before that time would have taken effect as a contingent remainder, should take effect as an executory devise, or if in a deed, as an estate having the same properties as an executory devise, and that *contingent remainders* already created should not be defeated by the destruction or merger of the preceding estate.

8 & 9 Vict. c. 106.

10. But this sweeping provision was repealed by 8 & 9 Vict. c. 106, s. 1; and in lieu thereof it was enacted (by s. 8), that a *contingent remainder* should be deemed capable of taking effect, notwithstanding the determination by *forfeiture, surrender*, or *merger* of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

Remarks upon the limitation to preserve contingent remainders.

11. In consequence of this enactment it is now unnecessary to make use of any machinery for preserving contingent remainders from destruction by the *forfeiture, surrender*, or *merger* of the preceding estate; and therefore, if an estate be limited to the use of A. for life, with remainder to his unborn children, the contingent limitations cannot be defeated. But limitations to trustees, during the lives of the tenants for life, are still frequently introduced in settlements for the purpose of creating a check upon the tenants for life, as, in cases of waste by the tenants for life, it would be the duty of the trustees to interfere as protectors of the remaindermen's interest (*b*).

Contingent remainders may still be defeated by determination of life estate in due course.

12. Contingent remainders however created before the recent Act (*c*) still remain liable to be defeated, should the preceding life estate determine, *in due course*, before they become vested, and the limitation of an estate *pur autre vie* adequate to support the contingent remainders is accordingly in many cases a matter of considerable importance. Thus if an estate be limited to A. for life, with remainder to the unborn children of B., or to the

(*a*) *Buttanshaw* v. *Martin*, Johns. 89, 93.

(*b*) *Perrot* v. *Perrot*, 3 Atk. 94, *per* Lord Hardwicke; *Garth* v. *Cotton*, 1 Ves. sen. 555, *per eundem*.

[(*c*) 40 & 41 Vict. c. 33.]

children of B. who should attain 21, here the contingent remainders, if B. survives A., would require support by a limitation of the estate to trustees after the death of A. until the children of B. should come into existence, in the one case, or until a child should attain 21 in the other.

40 & 41 Vict. c. 33.

[But now by the recent Act (*a*) every contingent remainder created by any instrument executed after the passing of the Act (2 August, 1877), or by any will or codicil revived or republished by any will or codicil executed after that date, which would have been valid as a springing or shifting use or executory devise, or other limitation, had it not had a sufficient estate to support it as a contingent remainder, is, in the event of the particular estate determining before the contingent remainder vests, to take effect as if it were a springing or shifting use, or executory devise or other executory limitation.

The effect of this enactment is to render contingent remainders independent of the determination of the particular estate in all cases in which the limitation would have been valid had it been a springing or shifting use, or an executory devise or other limitation; but where the limitation would have been void, as for instance for remoteness, had it been a springing or shifting use or an executory devise or other limitation, the remainder will still be liable to be defeated by the determination of the particular estate before it has become vested.

Legal limitations not construed as equitable in order to protect contingent remainders.

13. If an estate be devised to trustees and their heirs to certain uses, showing a clear intention on the part of the testator to create a succession of *legal* limitations, the Court will not hold the legal estate to be in the trustees merely because a different construction would leave the contingent remainders created by the devise unprotected by any particular estate (*b*).]

[(*a*) 40 & 41 Vict. c. 33.]

[(*b*) *Cunliffe* v. *Brancker*, 3 Ch. Div. 393; *Festing* v. *Allen*, 12 M. & W. 279; 5 Hare, 573; see *Marshall* v. *Gingell*, 21 Ch. D. 790; but an equitable limitation created by a will or settlement, will not be deprived of protection by reason of its being converted into a legal limitation upon a reconveyance by a mortgagee to the uses of the will or settlement, *Re Freme*, W. N. 1891, p. 113.]

CHAPTER XVII.

DUTIES OF TRUSTEES FOR RAISING PORTIONS.

THE subject of portions is of so extensive a character, that to exhaust it would require a treatise by itself. All that can be attempted in a single chapter is a brief summary of the law upon the points of most usual occurrence in practice.

Who are portionists.

We propose in the *first* section to inform trustees *who* are their *cestuis que trust,* or in other words who are to be regarded as portionists—a question that appears simple enough in itself, and yet involves a multitude of cases which can only be reconciled by the most refined distinctions. The principal struggle has been where and under what circumstances an *eldest* son is to be included amongst or excluded from the designated class. But further, the question *who* are portionists, involves the inquiry when or at what time portions, which are regulated by peculiar principles, are vested; and again, even if portions may have become vested, it remains to be asked whether they may not have become divested on the doctrines of ademption and satisfaction—doctrines which open a wide field of controversy, and are to some extent left still in an unsatisfactory state.

Amount to be raised.

In the *second* section we shall explain (and this may be compressed within much narrower bounds) what is the *amount* to be raised, both as regards the principal sum and interest, and also as to costs; [and in what cases maintenance will be allowed, even though the corpus be not vested.]

When to be raised.

In the *third* section we shall have to consider at *what time* the portions ought to be raised, and more particularly when portions are charged on *reversionary* interests, for then either the estate must suffer by raising the portions at a sacrifice in *præsenti* out of an interest to take effect in future, or else the portionists must be left destitute until the reversion falls into possession.

Mode of raising.

Lastly, in the *fourth* section we shall offer some practical remarks as to the best *mode* of raising the portions, as whether by sale or mortgage, or a fall of timber, or out of mines, or in what other manner.

SECTION I.

WHO ARE TO BE REGARDED AS PORTIONISTS.

UNDER this head we shall inquire: *First. Who* are meant by younger children where the estate charged is settled on an "*eldest*" child. *Secondly. Who* are meant by younger children where the estate charged is *not* settled on an "*eldest*" child. *Thirdly.* At *what time* the portions vest. *Fourthly.* Of *ademption* and *satisfaction.*

Settlement on eldest son.

First. Who are meant by younger children where the estate charged is settled on an "eldest" child.

1. "The Court in the case of portions," observed Sir G. Turner, "seems to have regarded rather the *purpose* than the *words* of the instrument. In some of the cases, indeed, the Court seems almost to have carried into effect the purpose of the instrument in opposition to the words, and although in the late cases more weight has been given to the terms of the instrument, there can be no doubt that in cases of this nature, very great attention must be given to the purpose of the instrument" (*a*).

General rule

2. In the first place, then, let us see in what cases an eldest child actually will be regarded as a younger child constructively, or (which is the same thing), in what cases a younger child will be deemed the eldest child.

"Every child," said Lord Hardwicke, "except the *heir*," (*i.e.* except the one who takes the estate) "is considered in equity as a younger, and eldership, not carrying the estate along with it, is considered not such an eldership as shall exclude," viz. from sharing in the portions provided for younger children. "It would be hard, that the right of eldership should be taken away, and yet not have the benefit of a younger child" (*b*).

Time of distribution.

3. If, therefore, before the period fixed for *distribution of the portions,* the estate shifts either by the original limitations, or

(*a*) *Remnant* v. *Hood*, 2 De G. F. & J. 413; approved by V. C. Wood, *Davies* v. *Huguenin*, 1 H. & M. 743.

(*b*) *Duke* v. *Doidge*, 2 Ves. sen. 203, note.

by appointment under a power contained in the settlement, from the eldest child to a younger child, the younger child so taking the estate is treated as the eldest (*a*), and the eldest child losing the estate is deemed a younger child (*b*).

Chadwick *v.* Doleman.

Thus, in the leading case of *Chadwick* v. *Doleman* (*c*), a father on his marriage settled an estate to the use of himself for life, with remainder (subject to a jointure) to the use of trustees upon trust, within six months after his decease, to raise 4000*l.* for younger children's portions as the father should appoint, or in default of appointment to be divided amongst the younger children, with remainder to the use of the first and other sons in tail. There were several children of the marriage, viz. *Humphrey* the eldest, and *Thomas*, *John*, *Lewis*, *Ann*, and *Dorothy*. By a deed, dated in 1686, the father appointed the 4,000*l.*, giving 2,600*l.* part thereof to Thomas the *second* son on the occasion of his marriage, and after this Humphrey the eldest son died in his father's lifetime without issue, and thereupon the father appointed the 2,600*l.* amongst his younger children other than Thomas. On the death of the father the estate devolved on the second son Thomas, and then the question arose whether the first or the second appointment was good, or in other words whether Thomas was entitled to the 2,600*l.* as well as the estate. The Lord Keeper said he admitted that Thomas at the time of the appointment was a person capable of taking, and was a younger child within the power, but that this was a defeasible appointment, not from any power of revoking, or upon the words of the appointment, but from the capacity of the person. He was capable of taking at the time of the appointment made, but that was *sub modo* and upon a tacit or implied condition, that he should not afterwards happen to become the eldest son and heir, so that he had as it were only a defeasible capacity. And

(*a*) *Davies* v. *Huguenin*, 1 H. & M. 730; *Re Bayley's Settlement*, 9 L. R. Eq. 491; *Teynham* v. *Webb*, 2 Ves. sen. 198; *Stanhope* v. *Collingwood*, 4 L. R. Eq. 286; *S. C.* nom. *Collingwood* v. *Stanhope*, 4 L. R. H. L. 43; *Broadmead* v. *Wood*, 1 B. C. C. 77; *Savage* v. *Carroll*, 1 B. & B. 265; *Simpson* v. *Frew*, 5 Ir. Ch. Rep. 517; [*Re Flemyng*, 15 L. R. Ir. 363; (where, upon the construction of the settlement, two daughters, there being no son, were held not to fall within the description of "children other than and besides an eldest or only son"); *Reid* v. *Hoare*, 26 Ch. D. 363;] *Jermyn* v. *Fellows*, For. 93, was a case of special circumstances. In *Leake* v. *Leake*, 10 Ves. 477, the doctrine of *Chadwick* v. *Doleman*, 2 Vern. 528, would seem to have been applicable, though it was not applied. The question was not discussed.

(*b*) *Duke* v. *Doidge*, 2 Ves. sen. 203; note.

(*c*) 2 Vern. 528.

it was, therefore, adjudged that Thomas, who took the estate, was not entitled to the 2,600*l.*

Eldest son taking place of younger son.

4. In this case the second son by succeeding to the estate and so becoming the eldest was deprived of any share in the portions for younger children, and no claim appears to have been put forward on behalf of Humphrey the eldest son to stand in the place of a younger son. But it has since been settled that under such circumstances the eldest son, even though he died in his father's lifetime, and sustained up to his own decease the character of eldest son, but never eventually came into possession of the estate, is entitled to be treated as a younger son, and to share with the other portionists. Thus in *Davies* v. *Huguenin* (*a*), the estate was settled on J. Davies and his wife successively for life, remainder to the children as he should appoint, and subject as aforesaid to the use of a trustee for 500 years for raising portions for younger children; remainder to the first and other sons in tail. J. Davies had two sons, William the elder, and John Stanley the younger. William attained twenty-one and died in his father's lifetime, [and it was held that his personal representative thereupon became entitled to a portion, but subject to the exercise of the power of appointment.] Again, in *Ellison* v. *Thomas* (*b*), the eldest son of R. E. C. was not tenant in tail but tenant for life only, with remainder to his first and other sons in tail; and yet it was held that the personal representative of this eldest son who died without issue male before coming into possession of the estate, was entitled to share in the portions provided for the younger children of R. E. C.

[If the estate is sold for payment of charges, and it is insufficient for payment of all the charges, so that the eldest son gets nothing under the limitation to him, he must still be treated as an eldest child taking the estate subject to the charges, and is not entitled to share in the portions provided for the younger children (*c*).]

Eldest daughter a younger child.

5. If an estate be settled on the first and other sons with a provision for younger children, an *eldest daughter*, though the firstborn, is regarded as a *younger child* (*d*). So, if an estate be settled on the first and other *sons* of A. with remainder to B., and

(*a*) 1 H. & M. 730. See *Broadmead* v. *Wood*, 1 B. C. C. 77; but see *Re Bayley's Settlement*, 9 L. R. Eq. 491.

(*b*) 1 De G. J. & S. 18; 2 Dr. & Sm. 111; and see *Collingwood* v. *Stanhope*, 4 L. R. H. L. 55; but see *Gray* v. *Earl of Limerick*, 2 De G. & Sm. 371.

[(*c*) *Reid* v. *Hoare*, 26 Ch. D. 363.]

(*d*) *Beale* v. *Beale*, 1 P. W. 245, *per Cur.*

there is a trust for raising portions for A.'s younger children, and A. has two *daughters* only, so that the estate shifts over to B., both the daughters of A. are younger children, and entitled to share the portions between them (*a*).

Eldest son may be a younger son.

6. The rule that a younger son who at the time of distribution takes the estate and so becomes the eldest son, is excluded from sharing in the portions, must be qualified by the condition that he takes the estate under the same settlement, or under some settlement incorporated into the portions' settlement, for otherwise he retains his rights as a younger son. Thus an estate was settled to the use of A. for life, with remainder (subject to A.'s wife's annuity) to the use of his first and other sons in tail, with a trust for raising portions on the death of the wife for younger children, to be vested at twenty-one or marriage. A. had two sons, Henry the eldest, and George, and after the death of A. in 1842, but during the lifetime of A.'s widow, and therefore before the portions were raisable, Henry barred the entail and devised the estate to his brother George; and it was held that on the death of A.'s widow in 1857, when the portions became raisable, George was entitled to share in the portions, though he was then the eldest son and was the owner of the estate, because he derived his title to it, not as eldest son under the settlement, but as devisee of his brother (*b*).

Eldest son parting with the estate.

7. But if at the time of distribution the eldest son *has not* the estate, but except for his own act (as in joining with his father in defeating the entail and resettling the property) he *would have had* the estate, he is not allowed to plead the want of the estate and to claim as a portionist (*c*).

Whether the rule applies only to parents or persons *loco parentis*.

8. The doctrine of portions as laid down in *Chadwick* v. *Doleman* has been said to apply only where the settlor is the parent or stands *loco parentis;* but if this proposition were accepted literally, then if a testator devised an estate to A. a perfect stranger for life, with remainder to his first and other sons in tail, and created a term in the same estate for raising portions for the younger children of A., the second son of A., though, by

(*a*) *Beale* v. *Beale*, 1 P. W. 244; and see *Butler* v. *Duncomb*, 1 P. W. 448; *Hall* v. *Luckup*, 4 Sim. 5; *Emery* v. *England*, 3 Ves. 232.

(*b*) *Adams* v. *Beck*, 25 Beav. 648; *Sandeman* v. *Mackenzie*, 1 J. & H. 613; *Sing* v. *Leslie*, 10 Jur. N.S. 794; *Macoubrey* v. *Jones*, 2 K. & J. 685; *Spencer* v. *Spencer*, 8 Sim. 87; *Wandesford* v. *Carrick*, 5 I. R. Eq. 486; [*Domvile* v. *Winnington*, 26 Ch. D. 382;] *Peacocke* v. *Pares*, 2 Keen. 689, must be considered as overruled.

(*c*) *Stanhope* v. *Collingwood*, 4 L. R. Eq. 286; *Collingwood* v. *Stanhope*, 4 L. R. H. L. 43.

the death of his elder brother without issue in A.'s lifetime, he succeeded to the estate, would also be entitled to share in the portions. Upon examination of the several authorities it will be found that at the most there are only a few dicta in support of the proposition suggested (*a*). Lord Hardwicke on the other

(*a*) Thus, in *Hall* v. *Hewer*, Amb. 203, a testator devised his real estate to *John Hewer* for life, remainder to John's first and other sons in tail, remainder to his daughters in tail, remainder to *Humphrey*, second son of T. Hall, in fee. And the testator charged his estate with 6000*l.* in trust for the younger children of T. Hall, in case J. Hewer died without leaving issue. James, the eldest son of T. Hall, died in the lifetime of J. Hewer, so that on the death of the latter, Humphrey was the eldest son of T. Hall. It was held upon the construction of the will, that the 6000*l.* was contingent until the death of J. Hewer, and then vested in such persons as were then the younger children of T. Hall, and as Humphrey was *then* the eldest he took nothing. This was the ground of the decision, and therefore the question did not arise whether, if Humphrey had previously acquired a vested interest, he could have lost it by becoming the eldest son. Under no circumstances, however, could he have become disentitled, for there was no shifting of the estate, which had never been given to James the eldest son, but to Humphrey himself. The testator meant the estate and the portion to go together. The Court observed, "There was no case where the Court had considered a younger child as an eldest, but between parent and children, or those who stood in *loco parentis*." But this was merely a dictum.

In *Matthews* v. *Paul*, 3 Sw. 328 (and see *Adams* v. *Adams*, 25 Beav. 652; *Adams* v. *Robarts*, Ib. 658), a testatrix bequeathed her Imperial annuities and five per cent. stock in trust, upon the termination of the Imperial annuities (which event occurred in May, 1819) for the children of her daughter Mary Paul, except an eldest son. Mary Paul had at the testatrix's death five children, viz. two sons, John and Walter, and three daughters. John died before the termination of the annuities, so that on the occurrence of the latter event Walter was the eldest son, and the question was, whether he was to share in the portions, and it was ruled that he was not, for that as the time of distribution was the period for ascertaining who were to be *included* in the class, it must equally be the period for ascertaining who were to be *excluded*. Here there was no real estate in settlement at all, and therefore the principle of *Chadwick* v. *Doleman* did not come into question. The Court, however, during the argument, observed, "The cases where this rule has been adopted have arisen on gifts by *parents* or persons in *loco parentis*. In general the estate passing to the eldest son has been in the power of the persons making the provision for the younger children, and the same instrument has comprised the estate and the provision. Has the rule ever been applied to portions given by a stranger, who merely contemplated the chance of property descending to the eldest son, as representative of the family?" [And see *Re Theed's Settlement*, 3 K. & J. 375, 378, where Wood, V.C., commenting on *Matthews* v. *Paul*, said that the key to the whole of that judgment was "that, in gifts to classes the period of vesting was to be taken both for the purpose of ascertaining the class and also for the purpose of exclusion."]

In *Lincoln* v. *Pelham*, 10 Ves. 166, (and see *Bowles* v. *Bowles*, Ib. 177) the circumstances were somewhat similar. Lady Pelham gave a residuary fund in trust for Frances Pelham for life, and after her death for the younger children of the testatrix's late daughter, Catherine, Duchess of Newcastle. At the date of the will there were three children living of Catherine, viz. Lord Lincoln, Thomas, and John. Lord Lincoln died in the testatrix's lifetime, and Thomas contended that as he was a younger child at the date of the will, though not at the death of the testatrix, he was entitled to a share. Lord Eldon disallowed the claim, and considered that the general description of

hand not only applied the doctrine of *Chadwick* v. *Doleman* to the case, where a *grandmother* having a power over the settled

younger children was not equivalent to naming the younger children living at the date of the will, but meant younger children for the time being, and added, that "whatever was the principle as to *parents* or *persons in loco parentis*, it had no application here, for though the grandmother was executing a purpose, which as to this kind of doctrine might be considered *parental* (the purpose of providing for the younger branches, of other persons certainly, but in a sense her family), yet she thought that her daughters were sufficiently provided for, so as to make it unnecessary to consider them objects of her care," 10 Ves. 174. Here, again, there was no dispute as to the effect of the shifting of any estate, but it was simply a question of construction, who were the persons meant by the description of younger children.

In *Scarisbrick* v. *Lord Skelmersdale*, 4 Y. & C. 116, Justice Maule said, "It is to be observed that it is only in cases of provision made by parents or persons standing *loco parentis*, that courts of equity give this forced construction to the word 'younger.' In cases of gifts by strangers courts of equity, as well as courts of law, construe the word according to its literal import, as laid down by Lord Hardwicke in *Hall* v. *Hewer*. The distinction is founded on the consideration, that in the one case the party giving or settling is regarded as doing an act which he was under a moral, though not a legal obligation to perform, whereas in the case of a gift by a mere stranger, no such obligation exists," &c.

In *Sandeman* v. *Mackenzie*, 1 J. & H. 613, Mrs. Chisholm, a widow with three children (Alexander, the eldest —who was in possession of the Chisholm estates, subject to his mother's jointure—Duncan, and Jemima) married Sir Thomas Ramsay, and by the settlement made on the marriage, Sir T. Ramsay settled 10,000*l.* upon himself and wife successively for life, with remainder to the then present children of Mrs. Chisholm (except Alexander) equally at twenty-one; and if none of such younger children of Mrs. Chisholm should attain twenty-one, then in trust for Alexander. Sir T. Ramsay died in 1830, and Lady Ramsay in 1859; Alexander died in his mother's lifetime in 1838, and therefore Duncan came into possession of the Chisholm estates. All the three children attained twenty-one. The question was whether Duncan, though he had succeeded to the Chisholm estates, was entitled to share in the 10,000*l.* portions, and it was held that he was entitled, and Sir W. P. Wood in delivering judgment, made some important observations. "I should have been glad," he said, "if the doctrine had been confined to the class of cases in which it originated, where a settlor by marriage settlement makes provision for his family generally, limiting the estate to the eldest son in tail, giving the usual powers for jointures and portions (though, even when this is not done, the son might still make any provision he pleased on attaining his majority), and then going on to charge the settled estate in favour of younger children. In such cases it is reasonable enough to regard the limitations for younger children as intended for the benefit not merely of those who happened to be younger children at the time of vesting, but of those who might fill that character when the fund should come into possession. A settlor under such circumstances may fairly be presumed to provide for the whole of his family, and younger children would in such an instrument naturally be taken to mean those who should not otherwise be provided for. But the moment you extend the doctrine to other cases where the provision for younger children is made by some person *in loco parentis*, not by marriage settlement, but by some independent deed, you have an extremely different case to deal with. When the rule is laid down thus broadly, it includes cases where the effect of it may be to render it impossible for a second son, marrying in his father's lifetime, to make any jointure or settlement, except on a contingency. Still the cases, to whatever extent they may go, have not been carried beyond those where the donor is, if not a parent, at any rate *in loco parentis*. No authority goes so far as to apply the rule to a person, not a relative of those for whom provision is

estate, appointed portions to her younger grandchildren (*a*); but he also applied it where the settlor was an *uncle*, and this not because he considered the uncle as standing *loco parentis*, but on general principles (*b*). "Where," he said, "a provision is made by a *father* either by will or settlement for younger children, an elder unprovided for shall be deemed a younger, and the ground is that every branch of the family should be provided for, the Court not considering the words elder or younger. The question then is, whether there exists any difference where the settlement is made by a father's brother to a *collateral* relation, a nephew," &c., and he laid it down broadly that "every child except the *heir* is considered a younger, and that *eldership* which does not carry the *estate* along with it is not such an eldership as will exclude from sharing in the portions." From this judgment may be inferred the principle that where the settlor (whether a parent, or standing in *loco parentis*, or a *stranger*) settles an estate upon a particular family, and means to provide for all the family by limiting the estate to one and portions to the others, there no one of them shall under the same settlement take the estate and a portion also, but in such cases the Court will, if necessary, disregard the strictly literal meaning of the words eldest and younger, and carry out the substantial intention.

General rule.

9. This point however remains to be settled, and the only general rule to be laid down at present is that where the settlor is the parent or stands *loco parentis*, and portions are provided for younger children, and the estate upon which the portions are charged devolves (before the time for distribution of the portions) on one of the children, under the same settlement or under a settlement incorporated into it (*c*), there the words "eldest child" and "younger children" are capable of what has been called "a prodigious latitude of construction," viz., an eldest may be treated as a younger, and a younger as an eldest; but that where portions are provided for younger children, and the estate either does not

made, and not having any interest in the family estate. But here Sir Thomas Ramsay had nothing to do with the family or the estate." The substantial ground for the Court's decision in this case was that the younger child (who was declared entitled to the portions though he also took the estate) did not take the estate by any title derived from the persons who created the portions. And see *Cooper* v. *Cooper*, 8 L. R. Ch. App. 813.

(*a*) *Lord Teynham* v. *Webb*, 2 Ves. sen. 198; as to a grandfather standing *loco parentis*, see *Farrer* v. *Barker*, 9 Hare, 737; *Swallow* v. *Binns*, 1 K. & J. 147; [*Domville* v. *Winnington*, 26 Ch. D. 382, 387.]

(*b*) *Duke* v. *Doidge*, 2 Ves. sen. 203, note.

(*c*) See *Stanhope* v. *Collingwood*, 4 L. R. Eq. 286; *Collingwood* v. *Stanhope*, 4 L. R. H. L. 43; [*Domville* v. *Winnington*, 26 Ch. D. 382.]

devolve before the time for distribution of the portions on any of the children, or does not so devolve under the settlement creating the charge or a settlement incorporated in it by recital or otherwise, there the words "eldest child" and "younger children" receive their ordinary and natural interpretation.

[10. The rule, however, being only a rule of construction and not an absolute rule of law, must give way to the expressed language of the will or settlement. Thus where a testator, having devised his real estate on trusts for his wife for life, and then for his sons successively in strict settlement, gave a legacy (which was charged on the real estate, if his personalty was insufficient) equally amongst his "younger children," and then proceeded to give the names of all his children other than the eldest son, with a direction that the share of each of his "younger children" should be absolutely vested at twenty-one, whether the preceding trusts should be determined or not, it was held that a younger son, who attained twenty-one in the lifetime of the widow, and, on her death, became entitled under the settlement of the real estate, by reason of the deaths of his elder brothers without issue male, was entitled to share in the legacy (*a*).] [Exception.]

Secondly. Who are meant by younger children where the estate charged is not settled on an "eldest" son.

1. We now proceed to the cases where a settlor provides portions for younger children generally, without the ingredient that one is to take the estate and the other to have the charge. Here the ordinary rules of construction apply, and "eldest" is taken to mean the eldest actually, and "younger" to mean the younger actually (*b*), and the time for ascertaining who is eldest and who are younger is not the period of *distribution* but the period of *vesting*. Where no one is made an eldest son.

Thus in *Adams* v. *Adams* (*c*) Sir W. Curtis, the father of Emma Adams, bequeathed 6,000*l.* to trustees in trust for Emma Adams for life, and after her decease "in trust for the children born or to be born of Emma Adams, who not being an eldest or only son for the time being," should as to sons attain twenty-one, or as to daughters attain twenty-one or marry, in equal shares. Emma Adams died in 1857, and there were eight children. Henry William the eldest attained the age of twenty-one in 1826, and

[(*a*) *Re Pryterch*, 42 Ch. D. 590.]

[(*b*) *Domvile* v. *Winnington*, 26 Ch. D. 382.]

(*c*) 25 Beav. 652; *Matthews* v. *Paul*, 3 Sw. 328; *Lyddon* v. *Ellison*, 19 Beav. 565; [*Domvile* v. *Winnington*, 26 Ch. D. 382; *Longfield* v. *Bantry*, 15 L. R. Ir. 101.] But see *Re Rivers' Settlement*, 40 L. J. N.S. Ch. 87.

died in 1854, in the lifetime of his mother. George the second son attained twenty-one in 1828, and at the death of his mother was the eldest son. The question was whether the words "eldest son" meant eldest at the time of the first portion vesting, or eldest at the time of its falling into possession; that is, whether George was or not entitled to a share. The M.R. adopted the principle laid down by Sir T. Plumer, viz., that there cannot be two periods, one for ascertaining who compose the class to take, and the other for ascertaining who are to be excluded (*a*); and that as George was not the eldest son when he attained twenty-one, he took a vested interest, and that the interest being once vested there was nothing to divest it, except to a limited extent by the attainment of vested interests by the other younger children.

Exceptions.

2. To the general rule that the eldest son in these cases is to be ascertained not at the time of *distribution* but at the time of *vesting*, there may be exceptions as in *Livesey* v. *Livesey* (*b*), with reference to which the M.R. observed, "a testator *may* say, 'I do not intend any child to take a share unless at the period of distribution he shall fulfil the condition of not being an eldest son.' In *Livesey* v. *Livesey* the class was to be ascertained when the youngest child attained twenty-one, and there was a direction that the son who was or should become an eldest son should not take anything under the devise or bequest, and consequently the person who filled the character of eldest son at that period could not take. Unless the testator has said, 'I do not intend a person to take any interest who at the time of *distribution* fills the character of eldest son,' I think the character of eldest son is to be ascertained when the interest becomes vested" (*c*).

Thirdly. At what time the portions vest.

General rule as to vesting.

1. In every well-drawn settlement, whether by deed or will, the period of vesting is clearly expressed upon the face of the instrument itself, and the usual period is as to sons at twenty-one, and as to daughters at twenty-one or marriage, with a declaration that the portions are not to be payable until after the death of the tenants for life, unless with the consent of the tenants for life. It often happens, however, that the language of the instrument is contradictory or inconsistent, or in some way ambiguous, and, in order not to defeat the probable intention, a peculiar and important canon of construction has been established; and it is this—Where a parent or a person standing

(*a*) *Matthews* v. *Paul*, 3 Sw. 328.
(*b*) 13 Sim. 33; 2 H. L. Ca. 419.
(*c*) 25 Beav. 656.

loco parentis provides portions for children, the strong presumption is that he means to provide portions for all such children as may live to require it, *i.e.* for sons who attain twenty-one, and daughters who attain twenty-one or marry. If, therefore, the language of the instrument be uncertain (*a*) but is capable of the construction, that sons at twenty-one, and daughters at twenty-one or marriage, shall take a vested interest, the Court will so decide it by force of the presumption.

Thus, in *Howgrave* v. *Cartier* (*b*) a fund was vested in trustees upon trust for Peter for life, subject to 200*l.* pin-money to Elizabeth his intended wife, and if Elizabeth should die before Peter, "without *leaving* any child or children, or leaving such they should all die under twenty-one," then to pay any sum not exceeding 3,000*l.* as Elizabeth should appoint. But in case Elizabeth survived Peter then in trust for Elizabeth for life, and after the decease of the survivor in case there should happen to be any child or children of their two bodies *living*, who should attain twenty-one, then in trust for such child or children attaining twenty-one as Elizabeth should appoint, or in default as Peter should appoint, and in default among such children equally. Peter died leaving Elizabeth his widow and two children, John and Mary. Elizabeth appointed the fund between John and Mary, and then John having attained twenty-one died in the lifetime of his mother, and then Elizabeth died leaving Mary her only child. The question was whether Mary, as the only child who survived her mother, was not absolutely entitled to the whole fund, to the exclusion of John who had died in her lifetime. Sir W. Grant observed, "If the settlement clearly and unequivocally makes the right of a child to a provision depend upon its surviving both or either of the parents, a Court of Equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision, usually as to sons at the age of twenty-one, and as to daughters at that age or marriage." And

[(*a*) The "rule is only to be applied as a guide in construing an expression which is in itself ambiguous, or which the Court sees not to be framed in accordance with the intention of the settlor or testator as shewn by other parts of the instrument." *Per* Cotton, L.J., *In re Hamlet*, 39 Ch. Div. 426, 433.]

(*b*) 3 V. & B. 79.

after commenting upon the various clauses contained in the settlement he came to the conclusion that John was entitled to the share appointed to him.

So in *Swallow* v. *Binns* (*a*), Nathaniel Binns made a voluntary settlement by which a trust fund was limited to himself for life, with remainder to his son George Binns for life, and after his decease in trust "for all and every of the children of the said George Binns, *which might be living at the time of his decease*," to be equally divided, and the shares of sons to vest at twenty-one and of daughters at twenty-one or marriage. Had the settlement stopped there those children only who survived George would have taken, but then followed other inconsistent limitations, namely, If *any* child being a son died under twenty-one, or being a daughter died under twenty-one unmarried, the share of such child was to survive to the other or others; "and in case all such of the children of the said George Binns as were sons should die under twenty-one, and all such of them as were daughters under that age without having been married," then the trust fund was to be held in trust for other persons. Nathaniel died in 1822 and George in 1851, having had six children, all of whom attained twenty-one, but two of them died in his lifetime, and the question was whether such two were entitled to share with the four who survived George. Vice-Chancellor Wood observed, "The rule applies not only to settlements but also to the case of a will, so far as it provides for children towards whom the testator places himself in *loco parentis*. In this case the grandfather is providing for his children and grand-children in such a manner, as throughout to place himself, with regard to the grandchildren, in the position of one who is performing a father's part, and providing what are expressly stated to be portions in one part of the settlement, and what, without that expression, would, I apprehend, be regarded as portions for his several grandchildren. The canon of construction to which I have referred may be thus stated: That whereas in the case of ordinary instruments an express estate thereby limited cannot be enlarged, except by necessary inference, yet, upon instruments of this description, there is an implication of law arising upon the instrument itself, subject of course to any expressions to the contrary, that it is the intention of any person who places himself in *loco parentis* to provide portions for children or grand-children, as the case may be, at the period when those portions

(*a*) 1 K. & J. 417.

will be wanted, namely, upon their attaining the age of twenty-one years, or (as is usually provided in the case of daughters) upon their attaining twenty-one or marriage; and that such portions shall then vest whether the children do or do not survive their parents. It is thought to be an unnatural supposition that the circumstance of such children or grandchildren predeceasing their parents, should have been contemplated as depriving them of the whole of the portion intended for their benefit. What the Court has said is this, that you do not require a *necessary* implication to arrive at the conclusion, that all children, who being sons attain twenty-one, or being daughters attain that age or marry, were intended to take, irrespectively of the question whether they survive their parents or not, and that if you find upon the face of the settlement a clause which renders it *doubtful* whether it was intended that all such children should take, or that those only should take who might survive their parents, the Court leans strongly in favour of the previous supposition, namely, that the probable intention of a person making a settlement would be in favour of the vesting at such fixed period, independently of the question of survivorship. On the other hand the rule is not one of arbitrary construction; the Court does not go out of its way by a forced construction to raise this implication; it must find an implication upon the natural and plain construction of the words in the settlement." And the Vice-Chancellor, applying these principles to the case before him, came to the conclusion that the two children who predeceased George their father were entitled to shares. The general principles laid down in the two foregoing examples have been approved and acted upon in numerous other cases (*a*); [and the rule applies as well to portions created by will as to those created by deed (*b*).]

Presumption overcome by the language.

2. But strong as the presumption is in favour of portions vesting in children at an age when they require it, yet if the language of the instrument be clear and unambiguous, that the vesting of portions in sons who attain twenty-one or in daughters who attain twenty-one or marry is to depend on some contingency, as

(*a*) *Emperor* v. *Rolfe*, 1 Ves. sen. 208; *Powis* v. *Burdett*, 9 Ves. 428; *Remnant* v. *Hood*, 27 Beav. 74; *Perfect* v. *Curzon*, 5 Mad. 442; *Torres* v. *Franco*, 1 R. & M. 649; *Woodcock* v. *Dorset*, 3 B. C. C. 569; *Hope* v. *Lord Clifden*, 6 Ves. 499; *Bythesea* v. *Bythesea*, 23 L. J. N.S. Ch. 1004; *In Re Goddard's Trusts*, 5 Ir. R. Eq. 14; [*Rye* v. *Rye*, 1 L. R. Ir. 413; *Wakefield* v. *Richardson*, 13 L. R. Ir. 17; *Cobden* v. *Bagwell*, 19 L. R. Ir. 150.]

[(*b*) *Jackson* v. *Dover*, 2 H. & M. 209; *Re Knowles*, 21 Ch. D. 806; *Re Hamlet*, 38 Ch. D. 183; 39 Ch. Div. 426.]

the event of their surviving their parents, the Court cannot contradict the written instrument (*a*).

Where portional fund has to be created.

3. A distinction must also be made between those cases where the portional fund exists or is to be raised at all events, so that the question relates only to the distribution of the fund, and those cases where the fund itself is to be called into existence upon a contingency, so that the latter contingency leavens all the portions and makes them all contingent.

Thus in *Hotchkin* v. *Humfrey* (*b*) a term of 500 years was created in trust that "*in case* the husband should *leave* one or more younger children *that should be living* at the decease of the survivor of the husband and wife," the trustees were to *raise* portions for "*such* younger children," the same to be paid to daughters at the age of eighteen or marriage, and to sons at twenty-one; and should there be no such son or daughter then the term to cease. There were four children of the marriage who attained twenty one, but two only survived both parents. Was the portional fund to be divided between the four or given to the two who survived? Sir T. Plumer said, "If the children who died before the surviving parent are to be considered as having taken vested interests, it must follow that a vested interest was given on a contingency. Can that be? When a fund is contingent the shares to be paid out of it must be contingent. If all the children had died before the surviving parent, the fund would not have been raisable, and therefore till such parent's death it was uncertain and contingent whether it could be raised. The intention appears to me, therefore, to have been to provide only for such children as should survive the surviving parent."

Where vesting not provided for by the settlement.

4. Where the settlement is silent as to the vesting of the portions, the Court has to fall back upon general principles, and *Remnant* v. *Hood* (*c*) is an important case upon this head. A

(*a*) *Re Wollaston's Settlement*, 27 Beav. 642; *Jeffery* v. *Jeffery*, 17 Sim. 26; *Bradley* v. *Powell*, Cas. *t.* Talb. 193, but doubted by Lord Hardwicke, in *Tunstal* v. *Bracken*, 1 B. C. C. 124, note; *Fitzgerald* v. *Field*, 1 Russ. 430; *Bright* v. *Rowe*, 3 M. & K. 316; *Skipper* v. *King*, 12 Beav. 29; *Whatford* v. *Moore*, 7 Sim. 574; *Farrer* v. *Barker*, 9 Hare, 737; [*In re Willmott's Trusts*, 7 L. R. Eq. 532; *Jeyes* v. *Savage*, 10 L. R. Ch. 555;] and see *Worsley* v. *Granville*, 2 Ves. sen. 333. [*In re Leader's Estate*, 17 L. R. Ir. 279. In this case Palles, C.B., said that the rule of construction, established by *Emperor* v. *Rolfe*, 1 Ves. sen. 208; and *Woodcock* v. *Dorset*, 3 B. C. C. 569, applies to all cases of settlement irrespective of the question whether or not provision is made thereby for the children of a deceased child, and that the cases of *In re Willmott's Trusts*, and *Jeyes* v. *Savage*, *supra*, do not engraft any exception on this rule.]

(*b*) 2 Mad. 65; and see *Swallow* v. *Binns*, 1 K. & J. 426; *Fitzgerald* v. *Field*, 1 Russ. 430.

(*c*) 2 De G. F. & J. 396.

testator devised his estate to Samuel Thorold for life, with remainder to his first and other sons successively in tail, with remainder to his first and other daughters successively in tail, and enabled the tenant for life to charge 2,000*l.* for the portions of his younger children. S. Thorold accordingly upon his marriage charged 2,000*l.* to be raised within three months from his decease in favour of his younger children, but gave no directions as to the time of vesting. There were issue of the marriage a son and six daughters; the son died an infant in the father's lifetime, so that on the death of the father the eldest daughter became tenant in tail in possession. Two others of the daughters died infants in their father's lifetime, and the three remaining daughters married and attained twenty-one and two of them survived the father, but the other died in his lifetime. It was conceded by the counsel that the infants who died in the father's lifetime would take nothing, though L. J. Knight Bruce entertained a doubt (*a*). But as to the one who attained twenty-one and died in the father's lifetime, it was contended that the portion as a charge upon land had by the death of the portionist before the time for raising it sunk for the benefit of the estate. It was ruled, however, to the contrary, and the deceased child who had attained twenty-one and married was held entitled to participate. Lord Justice Turner, who applied himself to the points raised with his usual care, observed, "There are three periods at which the portions may have been intended to vest; the period of the birth of the children, the period at which they would require their portions (which, according to the ordinary habit in such cases as evidenced by the usual course of settlement, would be at twenty-one, or as to the daughters on marriage), and the period of the death of the parents. Looking both to the language and to the purpose of this instrument, I see nothing which in any way imports that the portions were not intended to vest during the lives of the parents, and to adopt the period of the death as the time of vesting would be to deprive the provision of that certainty which it must, I think, fairly be taken to have been the object of the settlement to secure. It would render the interests of the children contingent upon their surviving their parents, and deprive them of the means of making any certain provisions for their families during the whole of their parents' lives. This is a result against which the Court has struggled and successfully struggled in many cases, and I think

(*a*) See 2 De G. F. & J. 403.

therefore that we should not be justified in adopting this period as the time of vesting, in the absence of anything on the face of the instrument indicating that it was so intended. Between the other two periods it is not, as I have said, necessary for us to decide, but I think it right to state that I lean to the opinion, that in this particular case the true period of vesting was at twenty-one, or as to the daughters on marriage. The consequence of holding the portions to vest at the birth would be that the shares of children dying in early infancy would go to the parent, thus contravening the purpose of the settlement, by giving to the father what was intended for the children, and the Court in these cases seems to have regarded rather the purpose than the words of the settlement" (*a*).

General rule.

5. Upon the authority of these and other cases it may be considered as established, that unless there be something special in the instrument (*b*), the portions of the younger children, whether they survive the tenant for life or not, will not vest in sons unless they attain twenty-one, or in daughters unless they attain twenty-one or marry (*c*); and that the shares of sons who attain twenty-one and of daughters who attain twenty-one or marry, will vest absolutely, so as not to be divested by subsequent death in the lifetime of the tenant for life (*d*).

Vesting of portions.

6. Where portions are expressly made to vest in sons at twenty-one, and in daughters at twenty-one or marriage, if any son or daughter die before that period the share sinks into the estate (*e*), even though the instrument direct the interest on the portion to be applied during minority towards that child's maintenance (*f*).

Where raisable out of rents.

7. Several cases, however, seem to have made good the exception that where no time is named in the settlement for vesting, and the portions are to be raised, not out of the *corpus*, but out of the annual *rents and profits*, and the rents and profits have begun to be available for the purpose, then the portionist takes a vested

(*a*) The whole of the judgment well deserves a perusal.

(*b*) See *Earl Rivers* v. *Earl Derby*, 2 Vern. 72.

(*c*) *Bruen* v. *Bruen*, 2 Vern. 439; *S. C.* Pr. Ch. 195; *Edgeworth* v. *Edgeworth*, Beat. 328; *Warr* v. *Warr*, Pr. Ch. 213; *Hinchinbroke* v. *Seymour*, 1 B. C. C. 395; *Teynham* v. *Webb*, 2 Ves. sen. 209; *Davies* v. *Huguenin*, 1 H. & M. 730, see 743; [*Henty* v. *Wrey*, 19 Ch. D. 492;] and see *Evelyn* v. *Evelyn*, 2 P. W. 659, and the cases there cited; *Tunstal* v. *Bracken*, 1 B. C. C. 124, note; *Mayhew* v. *Middleditch*, 1 B. C. C. 162.

(*d*) *Davies* v. *Huguenin*, 1 H. & M. 730; *Macoubrey* v. *Jones*, 2 K. & J. 684.

(*e*) *Jennings* v. *Looks*, 2 P. W. 276; *Boycot* v. *Cotton*, 1 Atk. 552.

(*f*) *Hubert* v. *Parsons*, 2 Ves. sen. 261.

interest, though he dies in infancy (*a*). The portion must, as a whole, be either vested or not vested, and cannot be intermittent, and therefore as the trust to raise the portion has commenced it must go on.

[8. The question arose in the recent case of *Henty* v. *Wrey* (*b*), whether a power to appoint portions could be so exercised as to vest portions absolutely in children of tender years, and Kay, J., relying on *Lord Hinchinbroke* v. *Seymour* as reported by Brown (*c*), held that it could not, but that such an appointment would be so improper that the Court would control it by refusing to allow the portions to be raised if the children did not live to want them. But this view was overruled on appeal, when the late M.R., after careful consideration of the case of *Lord Hinchinbroke* v. *Seymour*, came to the conclusion that it was really decided on the ground of fraud on the power, and was no authority in support of the view that the power could not be exercised in favour of infants; and Lindley, L.J., stated the following propositions as the result of his examination of the authorities (*d*):— [Appointment to infant.]

"1. That powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorise appointments vesting those portions in the appointees before they want them—that is, before they attain twenty-one (or if daughters) marry.

2. That where the language of the power is clear and unambiguous, effect must be given to it.

3. That where upon the true construction of the power and the appointment the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance.

4. That where upon the true construction of both instruments the portion has vested in the appointee, the portion is raisable, even although the appointee dies under twenty-one, or (if a daughter) unmarried.

5. That appointments vesting portions charged on land in children of tender years, who die soon afterwards, are looked at with suspicion; and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so."]

(*a*) *Evelyn* v. *Evelyn*, 2 P. W. 659; *Cowper* v. *Scott*, 3 P. W. 119; *Earl of Rivers* v. *Earl of Derby*, 2 Vern. 72.

[(*b*) 19 Ch. D. 492; 21 Ch. Div. 332.]

[(*c*) 1 B. C. C. 395.]

[(*d*) 21 Ch. Div. 359.]

Fourthly. Of Ademption and Satisfaction.—The question who are portionists involves the doctrine of Ademption and Satisfaction, and we propose briefly to state the leading principles.

Ademption and satisfaction.

1. The nature of Ademption and Satisfaction may be best illustrated by instances. A father by his will bequeaths 1,000*l.* to a daughter, and after the date of the will he settles 1,000*l.* upon the same daughter upon the occasion of her marriage, and dies without having altered his will. Here the father, owing a debt of nature to his daughter (*a*), had originally intended to satisfy the obligation by a bequest in his will, but before the will takes effect the marriage occurs, and he makes the like provision for her by act *inter vivos*. In such a case the Court presumes that the father did not mean to bestow *two* portions upon the daughter at the expense perhaps of his other children, but to substitute the one portion for the other. Equity therefore holds that the subsequent (*b*) advance is an *ademption* of the legacy. "Where," said Lord Eldon, "a parent or person standing *loco parentis* gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, makes an advance in the nature of a portion to the child, that will amount to an *ademption* of the gift by the will, and this Court will presume he meant to satisfy the one by the other" (*c*). Ademption, therefore, is where the will precedes, and the settlement follows.

If, again, a father by act *inter vivos* covenant to settle 1,000*l.* on the marriage of his daughter, and afterwards either by act *inter vivos* (*d*) or by will gives 1,000*l.* to the same daughter, here the Court leaning against double portions precludes the daughter (in the absence of evidence to the contrary) from taking both the marriage portion and also the subsequent gift or legacy, and puts her to her election which one of the two she will prefer (*e*). *Satisfaction*, therefore, is where the settlement precedes and the gift or legacy follows. It might have been wise, as observed V. C. Wood, if the rule had never been applied where the settle-

(*a*) See *Watson* v. *Earl of Lincoln*, Amb. 326; *Pym* v. *Lockyer*, 5 M. & Cr. 34; *Powel* v. *Cleaver*, 2 B. C. C. 516; *Cooper* v. *Cooper*, 8 L. R. Ch. App. 813.

(*b*) A gift prior to the will is no ademption, unless it be specially contracted for, see *Taylor* v. *Cartwright*, 14 L. R. Eq. 176.

(*c*) *Trimmer* v. *Bayne*, 7 Ves. 515.

(*d*) *Jesson* v. *Jesson*, 2 Vern. 255; *Thomas* v. *Kemeys*, 2 Vern. 348; *Keays* v. *Gilmore*, 8 Ir. R. Eq. 290.

(*e*) *Copley* v. *Copley*, 1 P. W. 147; *Papillon* v. *Papillon*, 11 Sim. 642; *Warren* v. *Warren*, 1 B. C. C. 305, &c.; *Byde* v. *Byde*, 2 Eden, 19; *Sparkes* v. *Cator*, 3 Ves. 530, &c.; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; *Weall* v. *Rice*, 2 R. & M. 251; *Bruen* v. *Bruen*, 2 Vern. 439.

ment is anterior to the gift or will, as the testator or donor might well be said to know what had been previously done (*a*). But the law is established otherwise, and in general terms Satisfaction may be defined to be the donation of a thing with the intention that it is to be taken either wholly or in part, in extinguishment of some prior (legal) claim of the donee (*b*).

Persons *loco parentis.*

2. The doctrine of Ademption and Satisfaction applies only as between parents (whether father or mother) (*c*), or persons *loco parentis* on the one hand and children on the other. The doctrine does not hold as between strangers (*d*), or as between husband and wife (*e*), or as between brothers, or as between grandfather and grandchild, or as between uncle and nephew, or as between any other relatives than as above. But a brother may by his conduct place himself *loco parentis* to a brother (*f*), and a grandfather (*g*), uncle (*h*), or other relative or connection, as a stepfather (*i*), may place himself *loco parentis* to a grandchild, nephew, or other relative or connection; and this though the person *loco parentis* has children of his own (*j*), and though the actual father be living and the child be resident with him and is maintained by him (*k*). So a *putative* father is not in law the parent of the illegitimate child (*l*), but he may place himself *loco parentis* by a course of conduct. And Lord Thurlow, in speaking of a parent's provision for a child, observed generally, "as to its being considered as the payment of a debt, the law does not compel the parent to give the legacy; the Court can only mean a moral obligation, a laudable affection which may exist in *others* besides *a parent*" (*m*).

(*a*) *Dawson* v. *Dawson*, 4 L. R. Eq. 513; *per* V. C. Wood.

(*b*) *Chichester* v. *Coventry*, 2 L. R. H. L. 95, *per* Lord Romilly.

(*c*) *Finch* v. *Finch*, 1 Ves. jun. 534.

(*d*) *Powel* v. *Cleaver*, 2 B. C. C. 499. [But even as between strangers "if a legacy appears on the face of the will to be bequeathed for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a presumption is made *primâ facie* in favour of ademption," *per* Lord Selborne, L. C.; *Re Pollock*, 28 Ch. Div. 552, 556.]

(*e*) *Richardson* v. *Elphinstone*, 2 Ves. jun. 463; *Haynes* v. *Mico*, 1 B. C. C. 129; *Couch* v. *Stratton*, 4 Ves. 391.

(*f*) *Monck* v. *Monck*, 1 B. & B. 298.

(*g*) *Powys* v. *Mansfield*, 3 M. & Cr. 359; 6 Sim. 528; *Campbell* v. *Campbell*, 1 L. R. Eq. 383; *Pym* v. *Lockyer*, 5 M. & Cr. 29; and see *Roome* v. *Roome*, 3 Atk. 183.

(*h*) *Shudal* v. *Jekyll*, 2 Atk. 518.

(*i*) *Curtin* v. *Evans*, 9 Ir. R. Eq. 553.

(*j*) *Monck* v. *Monck*, 1 B. & B. 298.

(*k*) *Powys* v. *Mansfield*, 3 M. & Cr. 359 (see 368), reversing *S. C.* 6 Sim. 528; *Pym* v. *Lockyer*, 5 M. & Cr. 29; *Shudal* v. *Jekyll*, 2 Atk. 518.

(*l*) *Ex parte Pye*, 18 Ves. 140; *Grave* v. *Earl of Salisbury*, 1 B. C. C. 425; *Wetherby* v. *Dixon*, 19 Ves. 412, *per Cur.*; *Smith* v. *Strong*, 4 B. C. C. 493; *Jeacock* v. *Falkener*, 1 B. C. C. 295.

(*m*) *Powel* v. *Cleaver*, 2 B. C. C. 516.

How persons constituted *loco parentis*.

3. By what acts a person will place himself *loco parentis* is a question upon which parol evidence is admissible (*a*), and is often in practice a question of extreme difficulty (*b*). According to Sir W. Grant, "A person *loco parentis* is one who assumes the parental character or discharges parental duties" (*c*). Sir L. Shadwell said, "The legal sense of the term is that the party has so acted towards the children, as that he has thereby imposed upon himself a moral obligation to provide for them" (*d*); and Lord Eldon speaks of him as "a person *meaning* to put himself *loco parentis*, in the situation of the person described as the lawful father of the child" (*e*); and Lord Cottenham attached great force in this description to the word "meaning," as referring to the *intention* rather than *the act* of the party (*f*), and added, that the definition was to be considered as applicable not to all the parental offices and duties (for they were infinitely various) but to such offices and duties as related to the making provision for a child (*g*). If a person has contributed to the maintenance of a female relative from the time of her father's death, and has been treated as one whose consent was necessary upon her marriage, and has taken upon himself the obligation of making a provision for her upon marriage, he must under such circumstances be regarded as having placed himself *loco parentis* (*h*).

Presumption.

4. Ademption and Satisfaction are both *Presumptions* only—that is, where there is no intrinsic evidence one way or another, the Court *presumes* that double portions were not meant. But if the Court collects from the *written instrument* that double portions were intended, no presumption arises, and therefore parol evidence cannot be let in to contradict the written instrument (*i*). Where there is no *intrinsic* evidence to the contrary the presumption arises, and then this presumption, like any other, may be rebutted by *extrinsic* or *parol* evidence (*j*) and of

(*a*) *Powys* v. *Mansfield*, 6 Sim. 528; 3 M. & Cr. 359.

(*b*) See *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 350.

(*c*) *Wetherby* v. *Dixon*, 19 Ves. 412.

(*d*) *Powys* v. *Mansfield*, 6 Sim. 556.

(*e*) *Ex parte Pye*, 18 Ves. 154.

(*f*) *Powys* v. *Mansfield*, 3 M. & Cr. 367.

(*g*) Ib.

(*h*) *Booker* v. *Allen*, 2 R. & M. 270; *Pym* v. *Lockyer*, 5 M. & Cr. 29.

(*i*) *Hall* v. *Hill*, 1 Dr. & W. 94; 1 Conn. & Laws. 120, in which all the previous cases are reviewed.

(*j*) Such is the result of the numerous authorities. The principal cases are *Kirk* v. *Eddowes*, 3 Hare, 509; *Booker* v. *Allen*, 2 R. & M. 270; *Weall* v. *Rice*, 2 R. & M. 251; *Trimmer* v. *Bayne*, 7 Ves. 508; *Rosewell* v. *Bennett*, 3 Atk. 77; *Powys* v. *Mansfield*, 3 M. & Cr. 374, 378, *per* Lord Cottenham; *Hartopp* v. *Hartopp*, 17 Ves. 184; *Ellison* v. *Cookson*, 1 Ves. jun. 100; *Shudal* v. *Jekyll*, 2 Atk. 516; *Cooper* v. *Cooper*, 8 L. R. Ch. App. 819; *Curtin* v. *Evans*, 9 Ir. R. Eq. 553; [*Tussaud* v. *Tussaud*, 9 Ch. Div. 363]; and see *Lloyd* v. *Harvey*, 2 R. & M.

course counter evidence may be given to support and fortify the original presumption (*a*). There is no doubt that sometimes this presumption of law defeats the real intention, but as a general rule it effectuates the intention, and were it not for the doctrine under consideration, the provisions for families would often be most unjust, and the farthest from the settlor's actual wishes (*b*).

Subjects must be *ejusdem generis*.

5. Ademption and Satisfaction are held to apply only where the properties which are the subject of the two gifts are *ejusdem generis*. A legacy of *money* will not be adeemed by a subsequent settlement of *land;* and a covenant to settle specific lands will not be satisfied by a subsequent settlement of money (*c*). A bequest of 10,000*l.* was not adeemed by a subsequent settlement of a beneficial lease (*d*), and a legacy of 500*l.* was not adeemed by a subsequent gift of stock in trade upon the father's taking the son into partnership (*e*). But where a father covenanted upon the marriage of his son to pay 2,000*l.* by way of portion, and afterwards by his will bequeathed to his son certain powder works *and so much money* as when added to the powder works would make up the sum of 10,000*l.*, the amount in money required to make up the sum of 10,000*l.* was in fact an ordinary legacy, and was therefore applied in satisfaction of the marriage portion (*f*). [So where a father gave a bond for the payment of a sum of 10,000*l.* to his reputed son on a future day, and shortly before the day of payment took the son into partnership with him, and the articles provided that 19,000*l.* of the capital brought in by the father should belong to the son, it was held that the bond was satisfied (*g*). And a covenant by a father on the marriage of his son to pay him an annuity for his life has been deemed satisfied by a legacy subsequently given by the father's will (*h*); but where shares in a partnership business were be-

310; *Dawson* v. *Dawson*, 4 L. R. Eq. 511, *per* V. C. Wood; *Monck* v. *Lord Monck*, 1 B. & B. 298; *Robinson* v. *Whitley*, 9 Ves. 577; *Pole* v. *Lord Somers*, 6 Ves. 309; *Wallace* v. *Pomfret*, 11 Ves. 542; *Thellusson* v. *Woodford*, 4 Mad. 420; *Bell* v. *Coleman*, 5 Mad. 22; *Biggleston* v. *Grubb*, 2 Atk. 48; *Hoskins* v. *Hoskins*, Pr. Ch. 263; *Chapman* v. *Salt*, 2 Vern. 646; *Hale* v. *Acton*, 2 Ch. Rep. 35; [*Re Pollock*, 28 Ch. Div. 552; *Re Turner*, 55 L. T. N.S. 379; *Griffith* v. *Bourke*, 21 L. R. Ir. 92.]

(*a*) *Kirk* v. *Eddowes*, *ubi sup.*

(*b*) *Montefiore* v. *Guedalla*, 1 De G. F. & J. 103, *per* L. J. Turner.

(*c*) *Bellasis* v. *Uthwatt*, 1 Atk. 428, *per Cur.*; *Bengough* v. *Walker*, 15 Ves. 512, *per Cur.*; *Chichester* v. *Coventry*, 2 L. R. H. L. 96, *per Cur.*; and see *Barret* v. *Beckford*, 1 Ves. sen. 520; *Masters* v. *Masters*, 1 P. W. 423; *Cooper* v. *Cooper*, 8 L. R. Ch. App. 819; [*Lewis* v. *Lewis*, 11 I. R. Eq. 340.]

(*d*) *Grave* v. *Lord Salisbury*, 1 Bro. C. C. 425.

(*e*) *Holmes* v. *Holmes*, 1 Bro. C. C. 555; [and see *Re Lawes*, 20 Ch. Div. 81.]

(*f*) *Bengough* v. *Walker*, 15 Ves. 507.

[(*g*) *Re Lawes*, 20 Ch. Div. 81.]

[(*h*) *Montagu* v. *Earl of Sandwich*, 32 Ch. Div. 525.]

queathed to the testator's sons, and subsequently the testator assigned a share to one on his being admitted a partner, it was held that, the intention of the father being to give his son an increased payment for his services in the business, the presumption of a partial ademption was rebutted (*a*).]

Intention expressed.

6. A legacy will not be adeemed by a subsequent advance if the latter be *expressed* to be in satisfaction of some other and quite different claim, as in satisfaction of a legacy under the will of a former testator (*b*), or if the subsequent advance be for a particular purpose, as to buy furniture (*c*).

Legacies and advances.

7. Legacies to a child are always regarded as *portions* unless it be otherwise expressed (*d*), and so are all advances *inter vivos* by a parent to a child unless the instrument itself show (as sometimes happens) that the second gift was *alio intuitu* and not meant as a portion (*e*).

Advance of less amount.

8. Where the subsequent advance is of *less* amount than the previous legacy, it was for some time doubtful what would be the effect—whether the advance would adeem the *whole* legacy (*f*), or whether the doctrine of ademption would be excluded altogether, or whether it would be an ademption *pro tanto* or to the extent of the advance. It has now been settled that under such circumstances the subsequent advance will be an ademption *pro tanto*, so that the child can claim only the balance of the legacy (*g*).

Residue.

9. A *share* of a testator's *residuary estate* is regarded as a legacy to the amount of the share, and therefore if a testator bequeaths his residuary estate amongst his children and afterwards makes an advance in favour of a child, such advance, if it equal or exceed the amount of the share, will be an ademption of the whole share, and, if it be of less amount, will be an *ademption* of that child's share of the residue *pro tanto* (*h*).

[(*a*) *Re Lacon*, 39 W. R. 514; 64 L.T. N.S. 429; 60 L. J. Ch. 403, reversing Romer, J., 39 W. R. 299.]

(*b*) *Baugh* v. *Reed*, 3 B. C. C. 192.

(*c*) *Robinson* v. *Whitley*, 9 Ves. 577.

(*d*) *Ex parte Pye*, 18 Ves. 151, *per* Lord Eldon; *Shudal* v. *Jekyll*, 2 Atk. 518, *per* Lord Hardwicke; *Pym* v. *Lockyer*, 5 M. & Cr. 35; *Ellison* v. *Cookson*, 1 Ves. jun. 107, *per* Lord Thurlow; *Leighton* v. *Leighton*, 18 L. R. Eq. 458.

(*e*) *Baugh* v. *Reed*, 3 B. C. C. 192; *Monck* v. *Monck*, 1 B. & B. 298; *Leighton* v. *Leighton*, 18 L. R. Eq. 458; [*Re Lacon*, 39 W. R. 514.]

(*f*) *Hartop* v. *Whitmore*, 1 P. W. 681; *Ex parte Pye*, 18 Ves. 151; *Platt* v. *Platt*, 3 Sim. 512.

(*g*) *Pym* v. *Lockyer*, 5 M. & Cr. 29; *Kirk* v. *Eddowes*, 3 Hare, 509; *Ex parte Pye*, 18 Ves. 151, *per* Lord Eldon; *Montefiore* v. *Guedalla*, 1 De G. F. & J. 100, *per* Campbell, C.; [*Re Pollock*, 28 Ch. Div. 552. If a father stands in the position of a mere debtor to his child, advances by him of sums less than the amount of the indebtedness are not *pro tanto* a satisfaction of the debt; *Reade* v. *Reade*, 9 L. R. Ir. 409.]

(*h*) *Dawson* v. *Dawson*, 4 L. R. Eq. 504; *Montefiore* v. *Guedalla*, 1 De G.

So if a parent make a provision for a child in his lifetime and afterwards bequeaths a residue to the same child, the amount of the residue will be an absolute or partial *satisfaction* to the amount of the residue (*a*).

Codicil.

10. It has been argued that where a testator gives a legacy to a child and then makes an advance, and then by a codicil *republishes* the will, the original legacy shall be restored. But the Court has held the true construction of the codicil to be that the will is to have the effect which it would have had if the codicil had not been made, except as altered by the codicil, and that as the double provision would not have taken place had the codicil not been made, it will not be set up by the codicil (*b*).

Husband and issue.

11. As a child's portion is commonly settled upon the child for life with remainder to the *issue*, with a limitation in the case of a daughter to her *husband* for life, the Court regards the limitations to the issue, and in the case of a daughter the limitation of the life estate to the husband as parts of the provision for the child, so that not only the life estate of the child, but also the interests of the children and husband are brought into the account as parts of the advance to the child (*c*).

If a father covenant to settle on his daughter and her children and then makes a bequest to her *children*, this is a satisfaction of the covenant as regards the children of the daughter (*d*). [So where under the father's covenant the children of a daughter became entitled as tenants in common, and the father gave legacies to one of the children of the daughter, and to two children of a deceased child of the daughter, it was held that the legacies were *pro tanto* a satisfaction of the covenant as to the interests of the legatees (*e*).] But if a father upon the marriage of his son covenant to settle a fund upon him and his wife and children, and in consideration thereof the *father of the wife* makes a settlement at the same time, and then the father of the son

F. & J. 93; *Stevenson* v. *Masson*, 17 L. R. Eq. 78; and see *Smith* v. *Strong*, 4 B. C. C. 493; *Freemantle* v. *Bankes*, 5 Ves. 79; *Smyth* v. *Johnston*, 31 L. T. N.S. 876.

(*a*) *Thynne* v. *Glengall*, 2 H. L. Ca. 131; *Earl of Glengall* v. *Barnard*, 1 Keen, 769; *Montefiore* v. *Guedalla*, 1 De G. F. & J. 103, *per* L. J. Turner; *Rickman* v. *Morgan*, 2 B. C. C. 394.

(*b*) *Booker* v. *Allen*, 2 R. & M. 270, see 300; *Lloyd* v. *Harvey*, Ib. 310; *Monck* v. *Monck*, 1 B. & B. 298; and see *Roome* v. *Roome*, 3 Atk. 181.

(*c*) *Kirk* v. *Eddowes*, 3 Hare, 509. Read the important observations of V. C. p. 521; *Platt* v. *Platt*, 3 Sim. 503; and see *Campbell* v. *Campbell*, 1 L. R. Eq. 383; *Russell* v. *St. Aubyn*, 2 Ch. D. 398; *Romaine* v. *Onslow*, 24 W. R. 899.

(*d*) *Campbell* v. *Campbell*, 1 L. R. Eq. 383; [*Bennett* v. *Houldsworth*, 6 Ch. D. 671.]

[(*e*) *Bennett* v. *Houldsworth*, 6 Ch. D. 671.]

bequeaths a share of his estate to the *son*, the legacy to the son, though operating in satisfaction of the son's interest under the father's settlement, is not a satisfaction of the interest of the son's *children* (*a*).

Slight differences.

12. The Court from its leaning against double portions will not allow *slight differences* in the limitations to rebut the presumption, and by slight differences are meant such as, in the opinion of the judge, leave the two provisions substantially of the same nature (*b*). The cases upon the subject have generally arisen with reference to *ademption* (*c*), but the rule applies also to *satisfaction* (*d*). In the case of a *debt* (as distinct from a portion), said Lord Cottenham, small circumstances of difference between the debt and the legacy are held to negative the presumption of satisfaction (*e*), but in the case of *portions* small circumstances are disregarded. Thus it is, that a smaller legacy is not held to be in satisfaction of part of a larger *debt*, but it may be satisfaction *pro tanto* of a *portion* (*f*). However, the differences in the limitations may be so great as to negative the presumption of satisfaction in case even of portions (*g*). If a father covenant on the marriage of his daughter to pay a sum by way of portion, and then by his will bequeaths to her a share of his residuary estate, but by the same will gives directions for payment of his debts, the presumption of *satisfaction* is negatived by the direction for payment of debts, and then the portion is raised as a debt, while the daughter is also allowed to claim a share of the residue (*h*). But if a testator direct payment of

(*a*) *McCarogher* v. *Whieldon*, 3 L. R. Eq. 236.

(*b*) *Weall* v. *Rice*, 2 R. & M. 268, *per* Sir J. Leach; [*Tussaud* v. *Tussaud*, 9 Ch. D. 363.]

(*c*) *Earl of Durham* v. *Wharton*, 3 Cl. & Fin. 146; 3 M. & K. 472; 5 Sim. 297; *Twisden* v. *Twisden*, 9 Ves. 427, *per* Lord Eldon; *Trimmer* v. *Bayne*, 7 Ves. 515, *per* Lord Eldon; cited with approbation, *Powys* v. *Mansfield*, 6 Sim. 561; *Powys* v. *Mansfield*, 3 M. & Cr. 374, *per* Lord Cottenham; *Weall* v. *Rice*, 2 R. & M. 251; *Platt* v. *Platt*, 3 Sim. 503; *Monck* v. *Lord Monck*, 1 B. & B. 304, *per Cur.*; *Lloyd* v. *Harvey*, 2 R. & M. 310; *Sheffield* v. *Coventry*, 2 R. & M. 317; *Hartopp* v. *Hartopp*, 17 Ves. 184; *Stevenson* v. *Masson*, 17 L. R. Eq. 78; [*Edgeworth* v. *Johnston*, 11 Ir. R. Eq. 326.]

(*d*) *Clark* v. *Sewell*, 3 Atk. 98, *per* Lord Hardwicke; *Thynne* v. *Glengall*, 2 H. L. Ca. 131; *Campbell* v. *Campbell*, 1 L. R. Eq. 383; *Sparkes* v. *Cator*, 3 Ves. 530; *Russell* v. *St. Aubyn*, 2 Ch. D. 398; *Romaine* v. *Onslow*, 24 W. R. 899; [*Mayd* v. *Field*, 3 Ch. D. 587;] and see *Hartopp* v. *Hartopp*, 17 Ves. 191.

[(*e*) See also *Re Dowse*, 50 L. J. N.S. Ch. 285.]

(*f*) *Thynne* v. *Glengall*, 2 H. L. Ca. 131.

(*g*) *Coventry* v. *Chichester*, 2 De G. J. & S. 336; 2 L. R. H. L. 71; 2 H. & M. 149; [*Tussaud* v. *Tussaud*, 9 Ch. Div. 363.]

(*h*) *Chichester* v. *Coventry*, 2 L. R. H. L. 71; 2 De G. J. & S. 336; 2 H. & M. 149; *Lethbridge* v. *Thurlow*, 15 Beav. 334; *Paget* v. *Grenfell*, 6 L. R. Eq. 7; *Alleyn* v. *Alleyn*, 2 Ves. sen. 37; [and see *Re Huish*, 43 Ch. D. 260.]

his debts and gives a share of his residuary estate to a daughter and then makes an advance to her upon her marriage, the presumption of *ademption* is not negatived by the direction for payment of debts in the previous will (*a*). Where a father is a debtor, not morally, but actually to his child, as for money advanced by the child or on any other account, a bequest by the father to the child is no satisfaction, where it would not be a satisfaction as between the father and a stranger (*b*), but what would be a satisfaction as between strangers, will also be a satisfaction as between father and child (*c*).

Contingent legacy.

13. A *contingent* legacy bequeathed by a father will not be a satisfaction of a *vested* interest in the child under a previous settlement (*d*).

Strangers may be benefited.

14. A *stranger* may indirectly derive advantage from the doctrine of ademption, as where a testator gives a legacy to the child, and the residue to strangers, and then in his lifetime advances the child beyond the amount of the legacy. Here the ademption of the legacy swells the *quantum* of the residue for the benefit of the residuary legatees. This arises not from the application of the doctrine, but in spite of it, and therefore, where a testator bequeaths his residue equally between his wife or a stranger, and his child, and then advances the child in his lifetime, here the advance is not brought into account so as to augment the residue for the benefit of the wife or stranger, but the wife or stranger can claim only the moiety of the actual residue (*e*).

Ademption and satisfaction distinguished.

15. Ademption and satisfaction are often confounded, but one broad distinction between them must not be lost sight of. Where the will precedes and the settlement follows, the settlement is an actual *extinguishment* of the claim under the will. But where the settlement precedes and the will or gift follows, here as the settlement created a legal obligation or vested a legal right by act *inter vivos*, the subsequent testamentary disposition cannot annul it, but all that equity can do is to put the parties entitled under the legal obligation or legal gift, to their *election*. Thus a testator bequeaths 1000*l.* to his

(*a*) *Dawson* v. *Dawson*, 4 L. R. Eq. 504.

(*b*) *Tolson* v. *Collins*, 4 Ves. 483; *Fairer* v. *Park*, 3 Ch. D. 309.

(*c*) *Edmunds* v. *Low*, 3 K. & J. 318.

(*d*) *Bellasis* v. *Uthwatt*, 1 Atk. 426; *Hanbury* v. *Hanbury*, 2 B. C. C. 352; *Chichester* v. *Coventry*, 2 L. R. H. L. 96, *per* Lord Romilly.

(*e*) *Meinertzhagen* v. *Walters*, 7 L. R. Ch. App. 670; [and see *Stewart* v. *Stewart*, 15 Ch. D. 539.]

daughter, and afterwards on the daughter's marriage settles 1,000*l.* upon her. Here the will is considered as revoked, and the claims under the will are actually extinguished. If, on the other hand, a father covenants on the daughter's marriage to settle 1,000*l.* upon her and afterwards by will bequeaths 1,000*l.* to the daughter, here the legal obligation under the settlement remains, and the daughter if she chooses may insist on her claims under the settlement. But if she does so, the Court will not also allow her to claim under the will, or in other words the Court puts her to her election (*a*).

[Contemporaneous instruments.]

[16. Where two instruments are contemporaneous, so that both are present to the donor's mind when he is executing them, that circumstance affords a strong reason against holding a gift in the one to be a satisfaction of an obligation under the other (*b*).]

SECTION II.

WHAT AMOUNT IS RAISABLE UNDER THE HEAD OF PORTIONS.

Capital.

THIS question arises as to capital and interest, and maintenance money and costs.

1. As to the amount of *capital* to be raised, the instrument itself generally prescribes the sum with sufficient exactness, and according to the common form now adopted in settlements, the amount graduates according to the number of children, *i.e.* a certain sum if there be only one younger child who takes a vested interest, an increased sum if there be two such children, and a larger sum still if there be three or more such children.

Ambiguity.

2. Occasionally the settlement has been so ambiguously expressed with reference to the events contemplated, that recourse to the Court has become necessary. Thus, in *Hemming* v. *Griffith* (*c*), the trust was that if there should be one younger child the trustee should raise 8,000*l.*, and if two younger children 12,000*l.*, and if three or more younger children 15,000*l.*, the said portions to be paid as the husband and wife or the survivor

(*a*) *Chichester* v. *Coventry*, 2 L. R. H. L. 90, *per* Lord Romilly; *Russell* v. *St. Aubyn*, 2 Ch. D. 398; *Thomas* v. *Kemeys*, 2 Vern. 348; *Copley* v. *Copley*, 1 P. W. 147; *Byde* v. *Byde*, 2 Eden, 19. As to interest on the advance made after the date of the will, see the decree in *Beckton* v. *Barton*, 27 Beav. 106.

[(*b*) *Horlock* v. *Wiggins*, 39 Ch. Div. 142.]

(*c*) 2 Giff. 403.

should appoint, and in default of appointment the portions to vest in sons at twenty-one, and in daughters at twenty-one or marriage, and the settlement contained powers of maintenance and advancement out of the portions after the death of the parents, or in their lifetime with their consent. There were three younger children, but two of them died in infancy; and the question was whether the one who attained twenty-one was entitled to the 8,000*l.* or the 15,000*l.* Sir J. Stuart said, "It seems clear enough that if there should be three or more younger children, during the infancy of the three children the trusts for raising the 15,000*l.* were to have an operation and might be resorted to for the purposes of advancement and maintenance. If so, how can anything which has happened since the three younger children were born, reduce the trust for raising 15,000*l.* to a trust for raising 8,000*l.* only which was to be raised expressly, and in terms, in the event of there being only one younger child?" and the surviving portionist was declared entitled to the 15,000*l.*

Interest.

3. The right to interest and the rate of it, and the time from which it is to be calculated, should all be specified in the settlement, but in the absence of any express direction, a portion like any other sum of money charged on land, will carry interest with it by implication from the time when the capital ought to have been raised (*a*), and this interest will in England be at 4 per cent. (*b*); and in Ireland at 5 per cent. (*c*). But if the settlement while it is silent as to the interest on the portions, expressly and carefully and with all necessary circumstantiality provides for the interest on all the other charges, the presumption arises that interest on the portions was intentionally excluded, and the Court considers the general rule as inapplicable (*d*).

Out of rents.

4. In the rare case where the portions are to be raised not by sale or mortgage out of the corpus of the estate, but out of the annual rents and profits, the Court looking to the hardship of

(*a*) *Evelyn* v. *Evelyn*, 2 P. W. 669, *per Cur.*; *Hall* v. *Carter*, 2 Atk. 358, *per Cur.*; *Earl Pomfret* v. *Lord Windsor*, 2 Ves. sen. 487, *per Cur.*; [and where there is a trust for sale after the death of a tenant for life a legacy payable out of the proceeds of sale will carry interest at 4 per cent. from the death of the tenant for life; *Re Waters*, *Waters* v. *Boxer*, 42 Ch. D. 517.]

(*b*) *Young* v. *Waterpark*, 13 Sim. 199; affirmed 15 L. J. N.S. Ch. 63; [*Balfour* v. *Cooper*, 23 Ch. Div. 472.]

(*c*) *Purcell* v. *Purcell*, 1 Conn. & Laws. 371; [*Balfour* v. *Cooper*, 23 Ch. Div. 472;] and see *Young* v. *Waterpark*, 13 Sim. 199; *Denny* v. *Denny*, 14 L. T. N.S. 854.

(*d*) *Clayton* v. *Earl of Glengall*, 1 Dr. & W. 1; *S. C.* 1 Conn. & Laws, 311.

allowing the interest to accumulate for years against the income, raises the capital only and gives no interest (*a*).

Interest given, though portion not vested.

5. Where there is the relation of father and child, or of a person standing *loco parentis* and a child, the natural duty and therefore the presumed intention of providing for the child is so strong as to have led to the establishment of peculiar principles. Some of these have already passed under review, and another is this :

Maintenance.

A *legacy* given to a *stranger* and payable at the age of twenty-one carries no interest in the meantime, but a legacy to a child being an infant (*b*) and payable at twenty-one, if maintenance be not otherwise provided for the child (*c*), carries interest with it (*d*) from the death of the testator, and not as in ordinary legacies from the expiration of one year from the testator's death (*e*). So a *portion* charged on land in favour of a child, whether made payable at a particular age or without any direction as to payment, will carry interest with it from the death of the testator. But as the rate of interest is discretionary, the Court has not considered itself bound by the general rule of 4 per cent., but has regulated itself by the circumstances of each particular case. The application of these principles will be best understood by the following instances :—

Rate of interest.

In *Warr* v. *Warr* (*f*) a father charged the estate with portions for younger children, "to be paid at *such time* as the trustees should *appoint* for their better maintenance and preferment." There were three younger children, a son and two daughters. The son was apprenticed to a sea captain and a sum paid by the trustees for his outfit; the two daughters attained twenty-one and received their portions. The son died under age before the trustee had named any day for payment of his portion. It was ruled that the son's portion was not to be raised, as he had not lived to want it; but it was "agreed that all the children were to be maintained out of the trust estate, they having no maintenance in the meantime, and what had been employed for putting out the younger son was to come out of the trust estate."

(*a*) *Ivy* v. *Gilbert*, 2 P. W. 13; *Evelyn* v. *Evelyn*, 2 P. W. 659. But see *Ravenhill* v. *Dansey*, 2 P. W. 179.

(*b*) *Raven* v. *Waite*, 1 Sw. 553.

(*c*) *Mitchell* v. *Bower*, 3 Ves. 287; *Long* v. *Long*, Ib. 286, note; *Wynch* v. *Wynch*, 1 Cox, 433.

(*d*) See *Crickett* v. *Dolby*, 3 Ves. 16; *Raven* v. *Waite*, 1 Sw. 557; *Beckford* v. *Tobin*, 1 Ves. sen. 308; *Hill* v. *Hill*, 3 V. & B. 183; *Tyrrell* v. *Tyrrell*, 4 Ves. 1; *Chambers* v. *Goldwin*, 11 Ves. 1; *Lowndes* v. *Lowndes*, 15 Ves. 301.

(*e*) *Cary* v. *Askew*, 1 Cox, 241; *Mole* v. *Mole*, 1 Dick. 310.

(*f*) Pr. Ch. 213.

In *Staniforth* v. *Staniforth* (*a*) an estate was settled on the father and mother successively for life, with remainder in default of issue male to trustees for a term of five hundred years in trust to raise 1,000*l.* for the daughters' portions, but *no time* was appointed for payment. The father died without issue male, leaving a daughter who filed her bill, living the mother, to have the 1,000*l.* raised. The M. R. held: 1. That by the failure of issue male the term had arisen, though not to take effect in possession until the death of the mother. 2. That the portion vested in the daughter in the lifetime of the mother (the daughter it is presumed having attained twenty-one); and 3. That no time being appointed for the payment of any portion, nor any maintenance in the meantime, she was entitled to a *reasonable maintenance not exceeding the interest of the portion from the death of the father*, or at the least from such time as the portion might have been raised by sale.

Beal v. *Beal* (*b*) was this: An estate was settled on the father and mother successively for life, with remainder to the father's brother in tail, &c., and a power to charge portions was given to the father. He appointed the sum of 2,000*l.* for his two daughters, payable at eighteen or marriage, but without saying after the death of his wife, and then died. The two daughters, who were under eighteen, filed their bill in the lifetime of the mother, to have interest for their portions until raisable. Lord Harcourt decreed that they should have interest at 3 per cent. until they were twelve years old, and then 4 per cent. until the portions were raisable. Being dissatisfied with the rate of interest, they had the case re-heard before Lord Cowper, who said he thought the former decree very tender in the provision thereby made, and that it was rather a recommendation to the mother to make them that allowance than a decree to charge her jointure therewith, but that since they were not satisfied, he must now give them no more than what in strict justice they could demand, and that since the portions were not payable till eighteen or marriage, he could not charge the jointress with interest thereof in the meantime, but that as the reason for postponing the payment till eighteen was in favour of the jointress, she *ought to maintain them* out of the profits of her jointure lands.

In *Harvey* v. *Harvey* (*c*) a testator charged all his real and personal estate with 1,000*l.* a-piece to all his younger children,

(*a*) 2 Vern. 460. (*b*) Pr. Ch. 405. (*c*) 2 P. W. 21.

payable at twenty-one, but gave *no directions as to maintenance* in the meantime. The younger children during their infancy filed their bill to be allowed interest or maintenance. The M. R. said "that in this case the Court would do what in common presumption a father if living would, nay, ought to have done, which was to provide necessaries for his children, but a Court of Equity would make hard shifts for the provision of children, as where the younger children were left destitute and the eldest an infant, the Court would make such a liberal allowance to the guardian of the eldest, as that he might thereout be enabled to maintain all the children. And for the same reason the Court would likewise take a latitude in this case, and that since interest was pretty much in the breast of the Court, though the will was silent with regard to that, yet it should be presumed that the father who gave these legacies intended they should carry interest if the estate would bear it, for every one must suppose it to have been the intention of the father that his children should not want bread during their infancy, but that where the estate appeared to be small, the Court, in whose discretion it always lay to determine the quantum of interest, had ordered the lower interest."

General rule.

6. It will be collected from the preceding cases that portions provided for children have this peculiar quality, that whether made payable at a certain age or not, they are so far contingent as not to be raisable, but to sink into the land, where the children do not live to want their portions—that is, where the children being sons do not attain twenty-one, or being daughters do not attain that age or marry; but that on the other hand portions are so far considered vested as to carry with them such a rate of interest or such allowance as the Court may deem necessary for the reasonable maintenance of the children.

Costs.

7. As regards the *costs* of raising portions the general rule as to charges applies, that is, the costs must be thrown on the estate, and the portions bear no part of them (*a*), and of course under the head of costs will be included all charges and expenses properly incurred.

(*a*) *Armstrong* v. *Armstrong*, 18 L. R. Eq. 541; *Michell* v. *Michell*, 4 Beav. 549; *Trafford* v. *Ashton*, 1 P. W. 415.

SECTION III.

AT WHAT PERIOD THE PORTIONS ARE RAISABLE.

Portions out of reversions.

1. We have next to inquire at what *period* the portions are to be raised, and upon this subject the great contest has been whether they shall or not be raised while the security created for the purpose is still *reversionary*. The cases are unusually numerous and extremely conflicting, and the only result to be obtained is that the question must be decided by the "penning of the trust," or in other words, that if the instrument be unequivocal in itself as to the actual intention of the parties, the Court must carry out the intention whatever may be the consequential inconvenience. A sale or mortgage must necessarily be made at a disadvantage when the security is reversionary, but if the meaning be clear it must be done. We cannot better explain the principles by which the Court is now regulated, than by a statement of the two leading authorities.

Codrington *v.* Foley.

2. In *Codrington* v. *Foley* (*a*) a testator devised an estate to trustees for ninety-nine years from the testator's decease, remainder to Lord Foley for life, remainder to other trustees for 1,000 years, to commence from the death of Lord Foley, for raising 30,000*l.* for portions of younger children at twenty-one or marriage, remainder to the first and other sons of Lord Foley in tail. The trusts of the term of ninety-nine years were for applying the rents with the proceeds of the timber in discharge of certain incumbrances. Lord Foley died in 1793, leaving an only son, and a daughter who became Mrs. Codrington. Mr. and Mrs. Codrington filed their bill to have the 30,000*l.* raised, and it was objected that the trusts of the term of ninety-nine years were still in operation and unsatisfied, and that the 1,000 years term was consequently reversionary both at law and in equity, and while so reversionary it could not be sold or mortgaged, to the great injury of the tenant in tail. Lord Eldon came to the conclusion that the 30,000*l.* must be raised, though the term for raising it was reversionary, and after reviewing the opinions of Lord Cowper, Lord Macclesfield, Lord Hardwicke, Lord Talbot, Lord Thurlow, and Lord Alvanley upon the subject (*b*), he proceeded, "Upon this general state of the doctrine of the Court, it

(*a*) 6 Ves. 364. (*b*) The whole judgment well deserves a perusal.

appears to me that the proper rule is what Lord Talbot states—that the raising or not raising must depend upon the particular penning of the trust, and the intention of the instrument. I do not think the Court ought to be eager to lay hold of circumstances. The Court ought to hold an equal mind whilst construing the instrument, and I cannot agree with what is stated in *Stanley* v. *Stanley* (*a*) that very small grounds are sufficient. If they are sufficient to denote the intention, they are not small grounds. If they are not sufficient to denote the intention, the Court does not act according to its duty by treating them as sufficient, thereby disappointing the true intention of the instrument. The rule upon the whole depends upon this, whether it was the intention, attending to the whole of it, that the portion should or should not be raised in this manner. If there be nothing more than a limitation to the parent for life, with a (reversionary) term to raise portions at the age of twenty-one or marriage, and the interests are vested and the contingencies have happened at which the portions are to be paid, the interest *is* payable and the portions *must be raised,* in the only manner in which they can be raised, that is, by mortgage or sale of the reversionary term" (*b*).

3. In *Codrington* v. *Foley* the term for raising the portions was reversionary upon another term, the trusts of which were unsatisfied: but in the case of *Smyth* v. *Foley* (*c*) it was reversionary upon the life estate of the father, and yet the same result followed.

Smyth *v.* Foley.

Thus an estate was limited by settlement upon marriage to R. Chambers for life, remainder to M. E. his wife for life in bar of dower, remainder to trustees for 500 years, remainder to the first and other sons successively in tail, and the trusts of the term were declared to be by sale or mortgage or other means to raise 4,000*l.* for the younger children, the portions "to be paid" at their respective ages of twenty-one years, and of daughters at those ages or marriage; and upon further trust "until the same portions should become payable as aforesaid, to raise a competent yearly sum out of the rents and profits," for maintenance and education, with a power "after the decease of Richard Chambers, or in his lifetime with his consent," to raise moneys for advancement. There were six children of the marriage, three sons and three daughters, all of whom attained twenty-one. After the

(*a*) 1 Atk. 549. (*b*) 6 Ves. 379.
(*c*) 3 Y. & C. 142.

death of M. E. Chambers the wife, but in the lifetime of R. Chambers, the younger children filed their bill to have the 4,000*l.* raised. Baron Alderson in giving judgment laid down the following rules: That *First*, where a term is limited in remainder to commence in possession after the death of the father, yet if the trust is to raise a portion payable at a fixed period, the child shall not wait for the death of the father before the portion is raised, but at the fixed period may compel a sale of the term (*a*). *Secondly.* Where the period is not fixed by the original settlement, but depends on a contingency, the rule applies as soon as the contingency happens (*b*). *Thirdly.* Where not only the period but the class of children, in favour of whom the portions are to be raised, depends on a contingency (as when it is limited to take effect in case the father dies without issue male by his wife), there also on the contingency happening by the death of the wife without issue male the portions are raisable immediately, and the term is saleable in the lifetime of the father (*c*). The Judge then expressed his entire concurrence in the principles laid down by Lord Eldon (viz. that the intention must be collected from the whole settlement taken together), and finding an express direction that the portions were to be paid at twenty-one or marriage, and that the settlement contained nothing at variance with that construction, he decreed the portions to be raised by sale or mortgage of the reversionary term.

General rule and exceptions.

4. Such are the general rules by which the Courts now profess to be governed. We must, however, add the caution that when the grounds upon which the Court acted in any case are not sufficient to warrant the decision upon a fair construction of the *instrument* itself, and independently of and apart from any arguments based on the *inconvenience* of burdening the estate, such case cannot at the present day be relied upon as an authority.

And *particular* and *special* cases have occurred in which the Court has refused to raise the portions out of a reversionary term.

(*a*) *Sandys* v. *Sandys*, 1 P. W. 707; *Hellier* v. *Jones*, 1 Eq. Ca. Ab. 337; *Bacon* v. *Clerk*, Pr. Ch. 500; *Stanley* v. *Stanley*, 1 Atk. 549; *Conway* v. *Conway*, 3 B. C. C. 267; *Brome* v. *Berkley*, 2 P. W. 486, *per Cur.*; *Cotton* v. *Cotton*, 3 Y. & C. 149, note.

(*b*) As where the portions are to vest at such times as the father shall appoint and he has not yet appointed.

(*c*) *Hebblethwaite* v. *Cartwright*, For. 30; *Greaves* v. *Mattison*, 1 Eq. Ca. Ab. 336; *Ravenhill* v. *Dansey*, 2 P. W. 180; *Smith* v. *Evans*, Amb. 633; *Staniforth* v. *Staniforth*, 2 Vern. 460. In other cases the contingency did not occur. See *Worsley* v. *Granville*, 2 Ves. sen. 331; *Hall* v. *Hewer*, Amb. 203; *Corbett* v. *Maidwell*, 1 Salk. 159.

Thus, in *Corbett* v. *Maidwell* (*a*), the estate was settled upon marriage on Thomas for life, remainder to trustees for 500 years, remainder to the heirs male of the body of Thomas by his intended wife, "and if he died without issue male by his intended wife, and there should be one or more daughters which should be *unmarried or unprovided for at the time of his death*," then to raise portions for the daughter or daughters payable at eighteen or marriage with maintenance in the meantime. The wife died without issue male, but leaving a daughter who married, and she and her husband filed their bill to have the portions raised during the father's life. The Court refused the relief asked, on the ground that the portion was contingent on the daughter being unmarried and unprovided for at the father's death, a contingency which had not yet happened.

In *Butler* v. *Duncomb* (*b*), the marriage settlement limited the estate to George for life, remainder to Mary for life, remainder to the first and other sons in tail male, remainder to trustees for 500 years upon trust, that the trustees should "from and after the *commencement of the term*" raise portions for the younger children payable at twenty-one or marriage; remainder to George in fee. George died, leaving a daughter the only issue, who married, and then she and her husband filed their bill to have the portion raised in the lifetime of the mother. But the Court declined to make any such order, as the trust was to raise the portion from and after the commencement of the term, which meant the commencement *in possession*, and that this implied a negative, viz. that it was not to be raised before.

In *Brome* v. *Berkley* (*c*) the marriage settlement was to George for life, remainder to the wife for life for her jointure, remainder to the first and other sons in tail, remainder to trustees and their heirs to raise portions for daughters, payable at twenty-one or marriage with *maintenance in the meantime*, "the first payment of the maintenance money to be made at such half-yearly feast as should next happen after the *estate limited to the trustees should take effect in possession*." The husband died leaving no issue but a daughter who attained twenty-one, and filed her bill in the mother's lifetime, to have the portion raised. Lord King dismissed the bill, on the ground that the maintenance was not to be raised until the estate of the trustees came into possession, and

(*a*) 1 Salk. 159.
(*b*) 1 P. W. 448; and see *Churchman* v. *Harvey*, Amb. 335.
(*c*) 2 P. W. 484. But see *Cotton* v. *Cotton*, 3 Y. & C. 149, note.

"it was absurd to say that the portion should be raised first, and the maintenance money paid afterwards."

In *Stevens* v. *Dethick* (*a*) the estate was limited to Dethick for life, remainder to his wife for life, remainder to his first and other sons in tail, remainder to trustees for 500 years, to raise portions for daughters payable at twenty-one or marriage, with a direction that the daughters should have maintenance out of the premises comprised in the term, "and that the residue of the rents, issues, and profits above such yearly maintenance should in the meantime, *till the portions became payable*, be received by such persons as should be *entitled to the reversion* expectant upon the determination of the said term." Lord Hardwicke considered the latter clause to show an intention, that the maintenance money, and therefore also the portion itself, was not to be raised until the term fell into possession. He therefore dismissed the bill filed by the only daughter after the death of her mother, but in the lifetime of her father.

In *Massy* v. *Lloyd* (*b*) the estate was limited to trustees for 999 years upon trust for the wife for her life, and after her decease upon trust to pay an annuity to the husband, and to apply the *residue* of the rents during the husband's life, as the wife should appoint (a power which was executed), and on the death of the survivor of the husband and wife to raise 15,000*l.* for younger children's portions, and subject as above the estate was settled on the first and other sons in tail. The wife died, and it was held that the portions were not raisable during the life of the husband. The case was a very special one, but the argument that chiefly prevailed was based upon the fact that all the *rents, issues, and profits* during the lifetime of the husband had been *expressly disposed of otherwise.*

5. Hitherto we have adverted only to the question whether portions shall be raised, while the term charged with them is still *reversionary.* But there are also other circumstances affecting the portionists *personally,* which have a material bearing upon the inquiry, at what time the portions are to be raised.

Time of raising portions in special cases.

6. If a specific sum be given to A., payable at her age of twenty-one, or day of marriage, the money cannot be raised until the interest has become vested; for should the fund on which the money raised is invested prove deficient, the portionist might

(*a*) 3 Atk. 39; and see *Reynolds* v. *Meyrick*, 1 Eden, 48. But see *Cotton* v. *Cotton*, 3 Y. & C. 149, note.

(*b*) 10 H. L. Cas. 248; 11 Ir. Eq. Rep. 429; 12 Ir. Eq. Rep. 298.

still have recourse to the estate (*a*). And so where the trust of a term was to raise 3,000*l.* for younger children, payable at their respective ages of twenty-one years, or days of marriage, it was held that the trustees were not authorised, when one child had attained his age of twenty-one years, to raise the entire sum, for the infant children could not be deprived of the real security for their shares (*b*). But from the manifest convenience of raising the portions at once, it seems the Court will lean to that construction where anything appears upon the instrument to warrant such a course. Thus the trustees of a marriage settlement were directed, after the death of the husband, to levy and raise by mortgage, sale, or other disposition of the estate, if there should be more than three children, the sum of 10,000*l.* for their portions, the shares of the sons to be vested in, and payable to them at the age of twenty-one, and the shares of the daughters at twenty-one or marriage; and it was provided that *no mortgage should be made until some one of the portions should become payable.* Four of the children had attained twenty-one and three were under age; and the Vice-Chancellor said, "In this settlement there is a clause that no mortgage is to be made until some one of the portions shall become payable. The whole 10,000*l.* must therefore be raised at once. It is objected that some of the shares may become diminished in amount: the answer to that is, that the Court considers the investment in the 3 per cent. Consols as equivalent to payment. If there is any rise in the funds the children under age will have the benefit of it" (*c*).

SECTION IV.

IN WHAT MODE THE PORTIONS ARE TO BE RAISED.

WHERE an estate is settled subject to portions, the presumed intention is that the portions should impede as little as possible the devolution of the property in the main channel of the limitations. Moral duty requires that some support should be secured

(*a*) *Dickinson* v. *Dickinson*, 3 B. C. C. 19.

(*b*) *Wynter* v. *Bold*, 1 S. & S. 507.

(*c*) *Gillibrand* v. *Goold*, 5 Sim. 149. [In *Peareth* v. *Greenwood*, 28 W. R. 417, the portions of those children who had not attained twenty-one were provided for by carrying over a sum of stock sufficient at the present price to satisfy them, with a margin for depreciation.]

for the younger children, but this should be done at as little sacrifice as circumstances will allow to the family consequence as represented by the eldest son.

Modes of raising portions.

1. In raising portions, therefore, it is *primâ facie* undesirable to *sell* any part of the estate. So recourse should rather be had to levying the required amount by a side wind, as by the produce of *mines* or a fall of *timber*; or, if this cannot be done, then by *a mortgage* rather than by an absolute disposition, for though a mortgage is usually accompanied with a power of sale, so that eventually the property may pass into the hands of a stranger, yet until actual sale the owner under the settlement has the opportunity of paying off the charge from his private means. In every case, however, the language of the instrument must govern. If portions be simply *charged* on an estate, either expressly or by implication, (as where a charge is implied from a power limited to the portionist of distraining for non-payment (*a*),) the money may be raised by mortgage or sale as in the case of any other charge.

Where a sale is excluded.

2. A trust to raise the portions by *mortgage* will not authorise a *sale*, but if the trust be to levy the amount by mortgage or *otherwise* a power of sale is implied (*b*). If the trust be to raise the charge by and out of the rents or by such other ways and means *except a sale* as the trustees may think proper, not only a sale is prohibited but a mortgage also which may lead to an absolute disposition, as it enables the mortgagee by foreclosure to get possession of the estate (*c*).

Out of income or corpus.

3. If the portions be raisable by and out of the *rents and profits or* by *mortgage*, here the words are ambiguous, and are capable of the construction that the trustees have an option of levying the portions either out of the income or out of the corpus, and so of throwing the onus at their discretion either upon the tenant for life or upon the remainderman (*d*). But the Court will lean strongly against such a construction (*e*). In some cases the meaning is that the annual rents should be primarily charged, and that the deficit only should be raised out of the corpus. Thus where the trustees were to hold an estate during the minority of the devisee, and to raise portions *by and out of the rents and profits or by sale or mortgage*, and on the

(*a*) *Meynell* v. *Massey*, 2 Vern. 1.
(*b*) *Tasker* v. *Small*, 6 Sim. 625.
(*c*) *Bennett* v. *Wyndham*, 23 Beav. 521.
(*d*) See *Hall* v. *Carter*, 2 Atk. 354.
(*e*) See the cases referred to, *ante*, p. 408.

devisee attaining the age of twenty-one to pay the rents to him after payment of the portions, the Court said that as the devisee on attaining twenty-one was to take such accumulated rents and profits only, as should remain after satisfying the portions, the testator intended that the rents and profits should be first applied, and that the balance only could be raised by sale or mortgage (*a*).

[Where the portions were raisable "by mortgaging or otherwise disposing of the lands, or out of the rents and profits, or by any other ways or means," and unsuccessful efforts had been made to raise the portions by mortgage of the property, it was held that the trustees were at liberty to apply the rents and profits first in payment of the interest, and secondly in reduction of the capital of the portions (*b*).]

Out of rents.

4. A more common case is where the portions are directed to be raised out of the rents and profits simply, and nothing more is said. Here if a definite time be fixed for payment of the portions, the ordinary and *primâ facie* meaning of rents and profits is taken to be inconsistent with the direction for payment at a time certain, and recourse is therefore had to the corpus by sale or mortgage. But even if a definite time of payment be not an ingredient in the case, yet from the very nature of portions, as rents and profits without stint represent the whole estate, the Court assumes the jurisdiction of ordering a sale or mortgage (*c*); and where there is no suit pending the trustees of an estate subject to such a charge may sell or mortgage, if they can find a purchaser or mortgagee, without the intervention of the Court (*d*).

Out of annual rents only.

5. If, however, the clear intention be that *annual* rents and profits only are meant, the Court cannot break in upon the corpus; and such is the case where the portions are directed to be raised *expressly* out of the *annual* rents (*e*); or where it is

(*a*) *Warter* v. *Hutchinson*, 1 S. & S. 276; and see *Okeden* v. *Okeden*, 1 Atk. 550.

[(*b*) *Balfour* v. *Cooper*, 23 Ch. Div. 472.]

(*c*) *Warburton* v. *Warburton*, 2 Vern. 420; *Sheldon* v. *Dormer*, 2 Vern. 310; *Baines* v. *Dixon*, 1 Ves. sen. 41; *Hall* v. *Carter*, 2 Atk. 358, *per* Lord Hardwicke; *Backhouse* v. *Middleton*, 1 Ch. Ca. 173; *Green* v. *Belcher*, 1 Atk. 505; *Trafford* v. *Ashton*, 1 P. W. 415; *Countess of Shrewsbury* v. *Earl of Shrewsbury*, 1 Ves. jun. 233, *per Cur.*; *Okeden* v. *Okeden*, 1 Atk. 550; and see *Allan* v. *Backhouse*, 2 V. & B. 65; [*Re Barber's Settled Estates*, 18 Ch. D. 624;] *Bootle* v. *Blundell*, 1 Mer. 233; *Anon.* 1 Vern. 104, in which it was said that rents and profits could not receive this enlarged construction in a deed; *Garmstone* v. *Gaunt*, 1 Coll. 577; *Lingon* v. *Foley*, 2 Ch. Ca. 205; *Mills* v. *Banks*, 3 P. W. 1.

(*d*) *Backhouse* v. *Middleton*, 1 Ch. Ca. 176, *per Cur.*

(*e*) *Anon.* 1 Vern. 104; *Solley* v. *Wood*, 29 Beav. 482.

evident from the whole context that by rents and profits were intended the *annual* rents (*a*).

Out of rents or otherwise, except a sale.

6. In *Bennett* v. *Wyndham* (*b*), where the trust was to raise the charge out of the rents and profits, or by *such other ways and means* except a sale as the trustees should think proper, the Court on the one hand collected an intention that annual rents and profits were meant, and on the other hand that the tenants for life were not to be deprived of all usufructuary enjoyment, and the Court adopted a middle course by holding that part of the rents should be impounded and part be handed over to the tenants for life, and referred it to chambers to inquire what proportion of the rents ought to be impounded, and what to be paid to the tenant for life.

Mines and timber.

7. In *Offley* v. *Offley* (*c*) a term was created for raising 10,000*l.* for a daughter's portion, but the term was so short that the ordinary *profits* of the land would not raise above half the sum, There was an open coal mine in the land which the Court ordered to be wrought, with powers to the trustees to make soughs and drains as need should require, and Lord Commissioner Hutchins said that in such a case where the *usual profits* of the land would not *raise the money appointed within the time*, the Court might order *timber* to be felled off the land to make up the amount.

Out of rents by fixed annual payments.

8. If the trusts of a term be to "raise and levy *from time to time* a sum certain, by with and out of the rents and profits, by certain annual payments or sums in each year *and not otherwise*," the portional sum to be raised is a charge on the annual rents and profits generally, and the estate is not discharged at the expiration of six years, though the rents and profits during that period were sufficient to raise it (*d*).

Mortgage of undivided shares of the estate.

9. Where portions are raisable at different times as they are wanted, it is usual, as each portion is raised, not to mortgage the *entire* estate charged, but a proportional part only. Thus if the portional sum be 6,000*l.* divisible among three younger children, and secured by a term of 1,000 years, when the first 2,000*l.* is raised, the trustee of the term mortgages an *undivided third part* of the hereditaments comprised in the term, and when the second 2,000*l.* is raised, another undivided third part, and

(*a*) *Mills* v. *Banks*, 3 P. W. 1; *Wilson* v. *Halliley*, 1 R. & M. 590; *Ivy* v. *Gilbert*, 2 P. W. 13; *Evelyn* v. *Evelyn*, 2 P. W. 659, see 666; *Earl of Rivers* v. *Earl of Derby*, 2 Vern. 72; *Okeden* v. *Okeden*, 1 Atk. 550.

(*b*) 23 Beav. 521.

(*c*) Pr. Ch. 26.

(*d*) *Re Forster's Estate*, 4 Ir. R. Eq. 152.

when the remaining 2,000*l.* is raised, the other undivided third part. The result of this is, that each mortgagee takes the *legal estate* in the subject of the mortgage, whereas if the entire estate had been comprised in the first mortgage, the two other securities would have been equitable, and exposed to all the consequent risks.

Custody of title deeds.

10. Trustees of a term of years for raising portions as between them and the freeholder are not entitled to the custody of the title deeds, and cannot deliver them to a mortgagee. But they and their mortgagees have a right in equity to the production of them for all necessary purposes (*a*).

36 & 37 Vict. c. 66.

11. By 36 & 37 Vict. c. 66, s. 34, subs. 3, all causes and matters for raising portions are to be assigned to the Chancery Division of the High Court of Justice.

(*a*) *Churchill* v. *Small*, 8 Ves. 322, note (*b*); *Harper* v. *Faulder*, 4 Mad. 129, 138; *Wiseman* v. *Westland*, 1 Y. & J. 117; *Hotham* v. *Somerville*, 5 Beav. 360.

CHAPTER XVIII.

DUTIES OF TRUSTEES FOR SALE (1).

THE subject of trusts for sale may be conveniently distributed under three heads: *First*, The general duties of trustees for sale; *Secondly*, The power of trustees to sign discharges for the purchase-money; and *Thirdly*, The disability of trustees to become purchasers of the trust property.

SECTION I.

THE GENERAL DUTIES OF TRUSTEES FOR SALE.

Trustees may sell without applying to the Court.

1. IT need scarcely be observed that trustees for sale where they are not parties to a suit, are authorised to enter into contracts without the previous sanction of the Court (*a*); but where a suit has been instituted for the execution of the trust, *that* attracts the jurisdiction of the Court, and the trustees would not be justified in proceeding to a sale without the Court's sanction (*b*). Private contracts, therefore, after the institution of a suit, can only be entered into by trustees subject to the approbation of the Court, and a condition is commonly annexed that the contract shall be null and void, unless the sanction of the Court be obtained within a limited period. Cases have occurred where, from accidental circumstances, the sanction has not been obtained within the time, and then by the death of

(*a*) *Earl of Bath* v. *Earl of Bradford*, 2 Ves. 590, *per* Lord Hardwicke.
(*b*) *Walker* v. *Smalwood*, Amb. 676; and see *Raymond* v. *Webb*, Lofft, 66; *Drayson* v. *Pocock*, 4 Sim. 283; *Culpepper* v. *Aston*, 2 Ch. Ca. 116, 223; and see further, *infra*.

[(1) It should be borne in mind that under the Settled Land Acts, restrictions are placed on the powers of trustees to sell settled land. This subject is dealt with in Chap. xxiii. sect. 2, v. to which the reader is referred.]

the purchaser the contract has dropped to the ground, and the representatives of the purchaser have not felt themselves justified in renewing it. The better mode would be to give *liberty* to the purchaser at any time after the expiration of the limited period, but before any confirmation by the Court, to determine the contract (*a*).

Must consult the interest of the *cestuis que trust.*

2. A trustee for sale will remember that he is bound by his office to sell the estate under every possible advantage to his *cestuis que trust* (*b*), and in the case of several successive *cestuis que trust,* with a fair and impartial attention to the interests of all the parties concerned (*c*). Trustees, if they or those who act by their authority, fail in reasonable diligence in inviting competition (*d*), or in the management of the sale, as if they contract under circumstances of haste and improvidence, or contrive to advance the interests of one party at the expense of another, [or make a misstatement as to the condition of the property whereby a reduction of the contract price is necessitated (*e*)], will be personally responsible for the loss to the suffering party (*f*); and the Court, however correct the conduct of the purchaser, will refuse at his instance to compel the specific performance of the agreement (*g*). But if a trustee has once contracted to sell *bonâ fide,* a court of equity will not allow the contract to be invalidated because another person comes forward and is willing to give a higher price (*h*); and where there are two offers equally advantageous, one of which is preferred by a *cestui que trust,* it is not the duty of the trustees against their own opinion to accept the offer preferred by such *cestui que trust* (*i*).

Where sale is a breach of trust.

3. In no case will the Court enforce the specific performance of a contract which amounts to a *breach of trust* (*j*).

[(*a*) The form adopted in David., 4th ed., vol. ii. p. 90, and Byth., 4th ed., p. 427, is that in case the sanction of the Court is not obtained before a specified day the agreement shall be void.]

(*b*) *Downes* v. *Grazebrook,* 3 Mer. 208, *per* Lord Eldon; and see *Matthie* v. *Edwards,* 2 Coll. 480; *Orme* v. *Wright,* 3 Jur. 19; [*Edge* v. *Kavanagh,* 24 L. R. Ir. 1.]

(*c*) *Ord* v. *Noel,* 5 Mad. 440, *per* Sir J. Leach; and see *Anon. case,* 6 Mad. 11.

(*d*) *Ord* v. *Noel,* 5 Mad. 440, *per* Sir J. Leach; and see *Harper* v. *Hayes,* 2 Giff. 217.

[(*e*) *Tomlin* v. *Luce,* 41 Ch. D. 573; 43 Ch. Div. 191.]

(*f*) See *Pechel* v. *Fowler,* 2 Anst. 550.

(*g*) *Ord* v. *Noel,* 5 Mad. 440, *per* Sir J. Leach; *Turner* v. *Harvey,* Jac. 178, *per* Lord Eldon; *Bridger* v. *Rice,* 1 J. & W. 74; *Mortlock* v. *Buller,* 10 Ves. 292; and see *Hill* v. *Buckley,* 17 Ves. 394; *White* v. *Cuddon,* 8 Cl. & Fin. 766.

(*h*) *Harper* v. *Hayes,* 2 Giff. 210, reversed 2 De G. F. & J. 542.

(*i*) *Selby* v. *Bowie,* 4 Giff. 300.

(*j*) *Wood* v. *Richardson,* 4 Beav. 176, *per* Lord Langdale; *Fuller* v. *Knight,* 6 Beav. 205; *Thompson* v. *Blackstone,* 6 Beav. 470; *Sneesby v.*

Cestuis que trust may contract conditionally.

4. The usual course is said to be for the *cestuis que trust*, who are the persons most interested in the matter, and who have the strongest motives for obtaining the highest possible price, to enter into a conditional contract, and then to obtain the assent of the trustee, who, when he has satisfied himself that the sum proposed is the value of the property, sanctions a sale which is beneficial to his *cestuis que trust* (*a*).

Valuation of the property.

5. A trustee for sale must inform himself of the real value of the property, and for that purpose, will, if necessary, employ some experienced person to furnish him with an estimate (*b*). If the property be sold at a grossly inadequate value, it is a breach of trust, which affects the title in the hands of the purchaser (*c*).

Each trustee responsible for the sale.

6. A trustee who takes no active part in the business cannot excuse himself by saying he had nothing to do with the conduct of the other to whom the management was confided; for where several trustees commit the entire administration of their trust to the hands of one, they are all equally responsible for the faithful discharge of their joint duty by that one whom they have substituted (*d*).

What time allowed for disposing of the estate.

7. The trustees will be allowed a reasonable time for disposing of an estate, and though the instrument creating the trust direct them to sell "*with all convenient speed*," that is no more than is implied by law, and does not render an immediate sale imperative (*e*). On the other hand, if the trust be to sell "at such time and in such manner as the trustees shall think fit," this will not authorise the trustees as between them and their *cestuis que trust* to postpone the sale arbitrarily to an indefinite period. The trustees cannot by such postponement vary the relative rights of the tenant for life and remaindermen, and so interfere with the settlor's intention (*f*). If trustees for a length of time, as for

Thorne, 7 De G. M. & G. 399; *Mucholland* v. *Belfast*, 9 Ir. Ch. Rep. 204; *Saunders* v. *Mackeson*, W. N. 1866, p. 400; [*Oceanic Steam Navigation Company* v. *Sutherberry*, 16 Ch. Div. 236; *Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. Div. 586. As to sales on depreciatory conditions, *vide post*, p. 483.]

(*a*) *Palairet* v. *Carew*, 32 Beav. 568.

(*b*) See *Oliver* v. *Court*, 8 Price, 165; *Campbell* v. *Walker*, 5 Ves. 680; *Conolly* v. *Parsons*, 3 Ves. 628, note; Sugd. Vend. & Purch. 55, 11th edit.

(*c*) *Stevens* v. *Austen*, 7 Jur. N. S. 873; 3 E. & E. 685, 700 [referring to Sugd. V. & P. 13th ed. p. 50].

(*d*) *Oliver* v. *Court*, 8 Price, 166, *per* Lord Chief Baron Richards; *In re Chertsey Market*, 6 Price, 285, *per eundem*.

(*e*) *Buxton* v. *Buxton*, 1 M. & Cr. 80; *Garrett* v. *Noble*, 6 Sim. 504; *Fry* v. *Fry*, 27 Beav. 144; and see *Fitzgerald* v. *Jervoise*, 5 Mad. 25; *Vickers* v. *Scott*, 3 M. & K. 500; *Sculthorpe* v. *Tipper*, 13 L. R. Eq. 232; *Turner* v. *Buck*, 18 L. R. Eq. 301.

(*f*) See *Walker* v. *Shore*, 19 Ves. 391; *Hawkins* v. *Chappel*, 1 Atk. 623.

twenty years, neglect without any sufficient reason to sell, they will be answerable for any deprecation, and be decreed to account for interest instead of rents (*a*).

Trust to sell within a limited period.

8. If the trust be "with all convenient speed and *within five years*," to sell the estate and apply the funds in payment of debts, &c., the proviso as to the five years is considered as directory only, and the trustees can sell and make a good title after the lapse of that period. The Court could scarcely impute to the settlor the intention that the sale at the end of the five years should be made by the Court, which would be the case if the power in the trustees were extinguished (*b*).

[*Cestuis que trust* all *sui juris*.]

[9. A trust for sale is not put an end to by reason of all the persons beneficially interested becoming *sui juris*, for any one of the *cestuis que trust* has a right to insist on the trust being carried out, but if they all agree to take the property as realty, the trust for sale is extinguished (*c*).]

Trustees for sale may not grant leases.

10. In a case where the trustees had endeavoured for some time to sell, and not having succeeded, they agreed to execute a *lease*, the Court, on a bill filed by the trustees, to compel specific performance, refused to decree the lease, as the trust for sale did not *primâ facie* imply a power to grant leases (*d*). And so *executors* who are *quasi* trustees for sale, would, under special circumstances only, be justified in granting a lease (*e*); for such an act is not regularly within their province, and it is incumbent on the persons taking a lease from them to show that it was called for by the interests of the parties entitled to the property (*f*).

[May not give option to purchase.]

[11. And executors and administrators equally with trustees cannot bind the trust estate by a proviso in a lease that the lessee shall during the term have an option of purchasing the property at a fixed price (*g*); for it is the duty of the trustees to exercise their discretion at the time of sale as to whether the terms are in the circumstances as then existing beneficial to the

(*a*) *Fry* v. *Fry*, 27 Beav. 144; *Pattenden* v. *Hobson*, 1 Eq. Rep. 28.

(*b*) *Pearce* v. *Gardner*, 10 Hare, 287; and see *Cuff* v. *Hall*, 1 Jur. N. S. 973; *De la Salle* v. *Moorat*, 11 L. R. Eq. 8; [*Edwards* v. *Edmunds*, 34 L. T. N.S. 522.]

[(*c*) *Biggs* v. *Peacock*, 22 Ch. Div. 284; *Re Tweedie and Miles*, 27 Ch. D. 315.]

(*d*) *Evans* v. *Jackson*, 8 Sim. 217.

(*e*) *Hackett* v. *M'Namara*, Ll. & G. Rep. *t.* Plunket, 283.

(*f*) *Keating* v. *Keating*, Ll. & G. Rep. *t.* Sugden, 133; [*Oceanic Steam Navigation Company* v. *Sutherberry*, 16 Ch. Div. 236.]

[(*g*) *Oceanic Steam Navigation Company* v. *Sutherberry*, 16 Ch. Div. 236; *Clay* v. *Rufford*, 5 De G. & Sm. 768.]

cestuis que trust. And on the same principle a covenant by a trustee in a lease to renew on the payment of a fixed fine was held to be a breach of trust and not enforceable by the lessee (*a*).]

Trust for sale will not in general authorise a mortgage.

12. A trust for sale, if there be nothing to negative the settlor's intention to convert the estate absolutely, will not authorise the trustees to execute a *mortgage* (*b*). But where an estate is devised to trustees, *charged with debts,* and subject thereto, upon trust for certain parties, so that a sale, though it may be required, is not the testator's object, the trustees may, for the purpose of paying the debts, more properly mortgage than sell (*c*). [And a trustee and executor of a will containing no direct charge of debts, who is empowered to settle accounts, wind up the testator's affairs, and "make any sales or arrangements" which he judges expedient, can mortgage the real estate to raise money to meet pressing claims (*d*).] "A power of sale out and out," observed Lord St. Leonards, "for a purpose or with an object beyond the raising of a particular charge, does not authorise a mortgage: but where it is for raising a particular charge, and the estate is settled subject to that charge, then it may be proper, under the circumstances, to raise the money by mortgage, and the Court will support it as a conditional sale, as something within the power, and as a proper mode of raising the money" (*e*).

[Implied power to mortgage.]

[Trustees empowered to carry on the testator's business, and to "increase or diminish at their discretion the real or personal estate employed therein at his death," have not an implied power to create a mortgage for the discharge of business debts, paramount to an annuity, which is a first charge on the real and personal estate (*f*).]

Where the power is left to the discretion of the trustees the purchaser cannot question the exercise of the discretion.

13. A testator devised an estate to trustees upon trust to apply the rents for fifteen years in payment of incumbrances charged thereon, and if, for any reason whatever, in the *opinion of the trustees* a sale should become necessary, they were authorised to sell. The purchaser objected that the amount of the incumbrances would not justify a sale of the whole estate, but it was held that the power of sale depended on the opinion of the

[(*a*) *Bellringer* v. *Blagrave*, 1 De G. & Sm. 63.]

(*b*) *Haldenby* v. *Spofforth*, 1 Beav. 390; *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; *Page* v. *Cooper*, 16 Beav. 396; *Devaynes* v. *Robinson*, 24 Beav. 86; [*Walker* v. *Southall*, 56 L. T. N.S. 882; W. N. 1887, p. 109.]

(*c*) *Ball* v. *Harris*, 4 M. & Cr. 264.

[(*d*) *Re Jones*; *Dutton* v. *Brookfield*, 59 L. J. Ch. 31; 61 L. T. N.S. 661; 38 W. R. 90.]

(*e*) *Stroughill* v. *Anstey*, 1 De G. M. & G. 645; *Page* v. *Cooper*, 16 Beav. 400.

[(*f*) *Re Webb*; *Leedham* v. *Patchett*, 63 L. T. N.S. 545.]

trustees, and the fact that they thought it necessary would be evidenced by the conveyance (*a*).

A trust to mortgage will not authorise a sale.

14. A trust to raise money by *mortgage* will not authorise a sale, though the latter may be more beneficial to the estate; and the Court itself has no jurisdiction to substitute a sale for a mortgage (*b*).

Powers of sale.

15. It was held by V. C. Kindersley, that in the absence of any special direction a mere power to *mortgage* does not authorise a mortgage *with a power of sale*, since how can a trustee who has not in himself even any power to sell give authority to another to sell (*c*)? But according to V. C. Malins a direction to trustees to raise money "by mortgage *in such manner as they may think fit*," authorises a mortgage with a power of sale (*d*), and according to Lord Romilly, M.R., a power to raise money by *sale or mortgage* justifies a mortgage with a power of sale (*e*). There is no doubt a conflict of authority. If a mortgage *per se* does not imply a power of sale, a direction to sell or mortgage will not carry the matter further, for the trustee has no power to delegate his authority to sell, and if the broad general principle be adopted that the power of sale is an ordinary incident to the mortgage, the logical result would be that a power of mortgaging alone authorises a mortgage with a power of sale. Of course where the *Court* has jurisdiction to raise money out of an estate, as for payment of debts, it may either direct a sale, or a mortgage with a power of sale (*f*), and an executor is, for the purposes of paying debts, regarded as the absolute owner, and may therefore either sell or mortgage or give a mortgage with a power of sale (*g*). [Since the Conveyancing and Law of Property Act, 1881 (*h*), under which mortgagees, where the mortgage is made by deed, have by virtue of the Act a power of sale vested in them, the point has

(*a*) *Rendlesham* v. *Meux*, 14 Sim. 249; [and see *Binnie* v. *Broom*, 14 App. Cas. 576, 588, where Lord Watson said, "All that the law requires from a trustee who has power to sell and borrow is that he shall follow the dictates of ordinary prudence in adopting the one course or the other; and the question whether he did or did not act prudently is one of fact which must be solved according to the circumstances of each case."]

(*b*) *Drake* v. *Whitmore*, 5 De G. & Sm. 619; [and see *Re Holloway*, 60 L. T. N.S. 46; 37 W. R. 77.]

(*c*) *Clarke* v. *Royal Panopticon*, 4 Drew. 26; but see *Russell* v. *Plaice*, 18 Beav. 21; *Leigh* v. *Lloyd*, 2 De G. J. & S. 330; 35 Beav. 455; *Re Chawner's Will*, 8 L. R. Eq. 569.

(*d*) *Re Chawner's Will*, 8 L. R. Eq. 569.

(*e*) *Bridges* v. *Longman*, 24 Beav. 27; and see *Cook* v. *Dawson*, 29 Beav. 128.

(*f*) *Selby* v. *Cooling*, 23 Beav. 418.

(*g*) *Cruikshank* v. *Duffin*, 13 L. R. Eq. 555; and see *Earl Vane* v. *Rigden*, 5 L. R. Ch. App. 663.

[(*h*) 44 & 45 Vict. c. 41, ss. 19, 20.]

become practically unimportant; but it is conceived that, as by the 66th section of the Act, a power of sale in the form contained in the Act is in effect declared to be a proper power to be contained in a mortgage deed, it cannot be contended that a power to mortgage does not now authorise the insertion of a power of sale in the mortgage deed.]

Sale of equity of redemption.

16. If an equity of redemption be vested in trustees for sale with a direction to apply the proceeds in discharge of the *mortgage* and pay the balance to the settlor, the trustees, notwithstanding the direction to discharge the mortgage, may *sell subject to it* (*a*).

A power of sale will not authorise a partition.

17. A power to trustees to *sell* will not authorise a *partition*, and it was long considered doubtful whether a power to *sell and exchange* would do so (*b*), [but it has recently been decided that under the usual power of sale or exchange a partition can be effected (*c*), and this decision is not likely to be disturbed.

Effect of usual power of sale in settlements.

18. Prior to the Settled Land Act, 1882,] in *settlements* of real estate *a power of sale* was usually given to trustees, to be exercised with the consent of the tenant for life, with a direction to lay out the proceeds, with all convenient speed, in another purchase, and in the meantime to invest them upon some proper security. For determining upon what occasions the trustees would be justified in proceeding to a sale, it will be proper to notice, in the words of Lord Eldon, the intention of the settlement in so framing the power:—"The object of the sale," he said, "must be to invest the money in the purchase of another estate, to be settled to the same uses, and the trustees are not to be satisfied with probability upon that, but it ought to be with reference to an object at that time supposed practicable, or, at least, this Court would expect some strong purpose of family prudence justifying the conversion, if it is likely to continue money" (*d*). Sir W. Grant is said to have concurred in the same sentiments (*e*), so that clearly the trustees as between them and their *cestuis que trust* would not be justified in selling to

(*a*) *Manser* v. *Dix*, 8 De G. M. & G. 703.

(*b*) [*M'Queen* v. *Farquhar*, 11 Ves. 467; *Attorney-General* v. *Hamilton*, 1 Madd. 214]; *Brassey* v. *Chalmers*, 16 Beav. 223; 4 De G. M. & G. 528; *Bradshaw* v. *Fane*, 2 Jur. N.S. 247; 3 Drew. 534.

(*c*) [*In re Frith and Osborne*, 3 Ch. D. 618, and see *Doe* v. *Spencer*, 2 Exch. 752; *Abel* v. *Heathcote*, 4 Bro. C. C. 278; 2 Ves. 98.]

(*d*) *Mortlock* v. *Buller*, 10 Ves. 308, 309.

(*e*) *Lord Mahon* v. *Earl of Stanhope*, cited 2 Sug. Pow. 412.

gratify the caprice or promote the exclusive interest of the tenant for life. It might happen that particular circumstances might call for an immediate sale, as where an extremely advantageous offer is made, or there is a prospect of great deterioration by abstaining from exercising the power; but, generally speaking, the trustees ought not to convert the estate without having another purchase in view, and then not for the mere purpose of conversion, but in the honest exercise of their discretion, for the benefit of all parties claiming under the settlement (*a*). The power of investing the proceeds upon some security in the meantime was not meant to authorise the *continuance* of the property as *money*, but only to meet the exigencies of particular circumstances, as where the trustees are disappointed of the contemplated new purchase, or the state of the title to the new purchase leads to necessary delay.

Effect of the Drainage Acts.

19. It is also to be noticed where the lands have been charged by the tenant for life under the *Drainage Acts*, that as the sale can only be made subject to the charge, the exercise of the power will confer a benefit on the tenant for life, for *before* the sale he is bound by the Acts to pay not only the interest on the charge, but also part of the principal, but *after* the sale he becomes under the settlement tenant for life of the whole proceeds.

[At the request and by the direction of tenant for life.]

[20. Where the power of sale was given to the trustees "at the request and by the direction of" the tenant for life, the Court refused to restrain a sale although no immediate reinvestment was contemplated, being of opinion that the tenant for life had a right to call upon the trustees to sell, and that they had no right to refuse his request (*b*).

[Settled Land Act.]

21. Under the Settled Land Act, 1882, the power of sale is given to the tenant for life, and may be exercised by him without reference to any prospective reinvestment of the purchase-money in the purchase of another estate. In fact there is no restriction whatever in the Act on his power of sale, which, subject to the giving of certain notices (*c*), may be exercised by him, on any grounds which he thinks sufficient, without any liability on his part, to justify the grounds, and without any power in the trustees of the settlement or in the Court to interfere with his

(*a*) See *Cowgill* v. *Lord Oxmantown*, 3 Y. & C. 369; *Watts* v. *Girdlestone*, 6 Beav. 188; *Marshall* v. *Sladden*, 4 De G. & Sm. 468; [*Jaques* v. *Wilson*, W. N. 1880, p. 83.]

[(*b*) *Thomas* v. *Williams*, 24 Ch. D. 558.]

[(*c*) 45 & 46 Vict. c. 38, s. 45; 47 & 48 Vict. c. 18, s. 5.]

power of sale so long as the same is honestly and properly exercised (*a*). It must however be borne in mind that the tenant for life is under the 53rd section "in relation to the exercise of any power under the Act, to be deemed in the position and to have the duties and liabilities of a trustee for all parties entitled under the settlement," and it is conceived that the effect of this is to put the tenant for life in the position of a trustee with a power of sale exercisable in all respects at his absolute discretion, and to make the exercise of the power subject to the control of the Court in all cases in which the tenant for life is influenced by dishonest or improper motives (*b*).

[Power of sale in settlement not now necessary.]

The result of the late Act is that it is now unnecessary and unadvisable to insert a power of sale in a family settlement of real estate; but the powers arising under the Act, which are sufficient for any ordinary case, should be relied on (*c*).

[Extraordinary Tithe Redemption Act, 1886.]

22. Under the Extraordinary Tithe Redemption Act, 1886, a tenant for life of land subject to an extraordinary charge or a rent-charge under the Act may sell the land or any part thereof, or any land settled to or on the like uses or trusts, and apply the proceeds in or towards redemption of the charge (*d*).

[Sale with consent.]

23. Where trustees were empowered to sell and enfranchise with the consent of the person for the time being entitled as beneficial tenant for life, and the will contained a direction that no repurchase or reinvestment should be made while there should be any person entitled as beneficial tenant for life or tenant in tail in possession and of the age of twenty-one years, without the previous consent of such person, it was held that the trustees could during the infancy of a tenant in tail in possession make a good title under the power (*e*).]

Sale at request of a party.

Trustees for sale at the *request* and by the *direction* of another party, to be testified in writing, &c., cannot obtain a decree for specific performance without first proving that the contract was entered into at such request and by such direction, and that such request and direction have, either before or since the contract,

[(*a*) *Wheelwright* v. *Walker*, 23 Ch. D. 752.]

[(*b*) As to the control of the Court over the exercise of powers, see *post*, Chap. xxiii. s. 2. See also the observations in *Wheelwright* v. *Walker*, 23 Ch. D. 759, which seem not to give full effect to sect. 53 of the Settled Land Act, 1882.]

[(*c*) As to the powers of a tenant for life under the Act, and the effect of the Act generally, see *post*, Chap. xxii.]

[(*d*) 49 & 50 Vict. c. 54, s. 6 (3).]

[(*e*) *Re Sir T. Neave and Chapman and Wren*, 49 L. J. N.S. Ch. 642; 43 L. T. N.S. 152; 28 W. R. 976.]

been testified by the requisite writing (*a*). Nor if trustees have a power of selling or leasing at the *written request* of another, will the Court enforce a contract without such request, though it is alleged that there was part performance by the trustees and by the person whose request was necessary, and that it is therefore a case where a mere *parol* contract is sufficient (*b*).

[Deferred power of sale.]

[24. Where trustees, who had no power of sale until the death of an existing tenant for life, entered into a contract for sale, the purchaser was justified in objecting to the title, and could not be compelled to carry out the sale by entering into a new contract with the tenant for life under the powers of the Settled Land Acts (*c*). And in a similar case where, after the time for completion had expired, and the contract had been repudiated by the purchaser, the trustees offered to procure the concurrence of the beneficiaries, it was held that such offer came too late (*d*)].

[Concurrence of beneficiaries.]

Trustees for sale of a limited interest in an estate or of an aliquot part of an estate.

25. If an estate be vested in trustees upon trust for A. for life, and *on the decease of A.* to sell, the trustees have no power to sell during the life of A., however beneficial it may be to the parties interested in the trust (*e*). But if an estate be devised to A. for life, and after her decease to trustees upon trust to sell "as soon as conveniently may be after the *testator's* decease," the trustees, with the concurrence of A., can make a good title (*f*); and if the tenant for life and the trustees in remainder sell for one entire sum, it has been held that the purchaser will get a good title, and the tenant for life and the trustees may agree amongst themselves how the purchase-money is to be apportioned, or if they cannot agree it will be apportioned by the Court (*g*); [and the same principle was applied where the trustees of a reversion

(*a*) *Adams* v. *Broke*, 1 Y. & C. C. C. 627; *Sykes* v. *Sheard*, 33 Beav. 114; see the decree at the foot of the case; and see *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 459.

(*b*) *Phillips* v. *Edwards*, 33 Beav. 440.

[(*c*) *Re Bryant and Barningham's Contract*, 44 Ch. Div. 218; but see sec. 16 of the Settled Land Act, 1890.]

[(*d*) *Re Head's Trustees and Macdonald*, 45 Ch. Div. 311, where Fry, L.J., intimated that if the offer had been made "at an early stage of the proceedings, and if the trustees had been able to show that the beneficiaries did in fact consent to join, and an opportunity had been given of investigating their title, and it had been shown that they would concur in reasonable time," it was by no means clear that the vendors might not have enforced the contract.]

(*e*) *Johnston* v. *Baber*, 8 Beav. 233; *Blacklow* v. *Laws*, 2 Hare, 40; *Mosley* v. *Hide*, 17 Q. B. 91; *Want* v. *Stallibrass*, 8 L. R. Ex. 175.

(*f*) *Mills* v. *Dugmore*, 30 Beav. 104.

(*g*) *Clark* v. *Seymour*, 7 Sim. 67; [and see *Re Cooper and Allen's Contract*, 4 Ch. D. 802.]

expectant on a lease concurred with the owner of the lease in selling the fee (*a*).] And generally trustees for sale of any aliquot part of an estate may join in a sale of the whole estate for one entire sum, and the purchase-money, as amongst the respective owners, may be left to be apportioned as before (*b*); [and by sec. 35 of the Conveyancing Act, 1881 (*c*), where a trust for sale or power of sale created by an instrument coming into operation after the 31st of December, 1881, is vested in trustees, they may, in the absence of the expression of a contrary intention, concur with any other person in selling all or any part of the property.] Where a testator's estate was under administration by the Court, and a house, part of that estate, was put up for sale with another house which was comprised in the testator's marriage settlement, in one lot, and the trustees of the settlement had leave to attend, it was held that as the sale of the entirety was beneficial, a good title could be made, and that the purchase-money could be apportioned in chambers (*d*). But a purchaser cannot be compelled to accept such a title if the separate interests of the *cestuis que trust* in such a joint sale be not brought to the sale with every advantage, or if the nature of the case be such that the purchase-money will not admit of apportionment upon any intelligible principle (*e*).

Trust for sale survives.

26. Where an estate is vested in several trustees upon trust to raise a sum by sale or mortgage, and one of the trustees dies, the survivors or survivor may sell or mortgage, unless there be words in the settlement which expressly declare that the trust shall not be exercised by the *survivors or survivor*, for the execution of a trust is not regarded in the same light as that of a power; but the presumption is that, as the estate, so the discretionary part of the trust passes to the survivors or survivor (*f*). The objection is sometimes taken that where there is a power of appointment of new trustees, and one of the trustees has died and a new trustee has not been substituted, the survivor is incompetent to execute a valid conveyance. But though a proviso for appointment of new trustees may certainly be so

Though there be a power to appoint new trustees.

[(*a*) *Morris* v. *Debenham*, 2 Ch. D. 540.]

(*b*) See *M'Carogher* v. *Whieldon*, 34 Beav. 107; [and see *Re Parker and Beech's Contract*, 55 L. J. Ch. 815; 56 Ib. 358.]

[(*c*) 44 & 45 Vict. c. 41.]

(*d*) *Cavendish* v. *Cavendish*, 10 L. R. Ch. App. 319. [As to the power of trustees to grant a lease of two estates held upon different trusts, see *Tolson* v. *Sheard*, 5 Ch. Div. 19.]

(*e*) *Rede* v. *Okes*, 32 Beav. 555; 10 Jur. N.S. 1246; [4 De G. J. & S. 505. See *Re Cooper and Allen's Contract*, 4 Ch. D. 802.]

(*f*) *Lane* v. *Debenham*, 11 Hare, 188.

framed that the execution of the trust should, until a new trustee has been substituted, remain in suspense (*a*), yet the clause, as usually penned in settlements [and as framed in the Conveyancing and Law of Property Act, 1881, s. 31], is considered by the Courts to be merely of a directory character (*b*).

Power of sale in a mortgage.

27. In a *mortgage* to two persons to secure a *joint* advance with a *power of sale* to "them, their heirs and assigns," if one dies, the survivor may sell (*c*); and in a mortgage to A. in fee, with a power of sale to him, "his heirs, executors, administrators or assigns," the administrator of the assign of A., though the legal estate of the lands be not in himself, but in a trustee for him under a conveyance from the heir of the assign, is, together with such trustee, an assign within the meaning of the power, and can therefore sell (*d*). And it does not vitiate the sale, that part of the purchase-money is left on mortgage of the estate, but the mortgagee is answerable for the whole amount to the mortgagor (*e*).

23 & 24 Vict. c. 145.

28. By 23 & 24 Vict. c. 145, as to mortgages *by deed* created since 28th August, 1860, and where the security does not speak to the contrary, any mortgagee, though his security contain no power of sale, may, when the principal sum has been in arrear for twelve months, or the interest for six months, or there has been any default by the mortgagor in insuring, proceed to a sale, after six months' notice, and sign a valid receipt for the purchase-money (*f*). [But this has been repealed as to instruments executed after the 31st of December, 1881, and its place supplied as to such instruments by the Conveyancing and Law of Property Act, 1881, which gives to mortgagees of property generally, whether real or personal, where the mortgage is by deed, and no contrary intention is expressed in the instrument, power to sell the mortgaged property when the mortgage money has become due; but the power is not to be exercised unless and until—

[44 & 45 Vict. c. 41.]

(1) Notice requiring payment of the mortgage money has been given, and default made in payment for three months; or

(*a*) See *Foley* v. *Wontner*, 2 J. & W. 246.

(*b*) See *supra*, p. 279.

(*c*) *Hind* v. *Poole*, 1 K. & J. 383.

(*d*) *Saloway* v. *Strawbridge*, 1 K. & J. 371; 7 De G. M. & G. 594.

(*e*) *Davey* v. *Durrant*, 1 De G. & J. 535; [*Bettyes* v. *Maynard*, 49 L. T. N.S. 389; reversing *S. C.* 46 L. T. N.S. 766.]

(*f*) 23 & 24 Vict. c. 145, ss. 11-16; and s. 34. [An equitable mortgagee in fee, by deed made before 1882, exercising the power of sale, conferred by 23 & 24 Vict. c. 145, can, under s. 15 of that Act, convey the legal estate, if it was in the mortgagor at the date of the mortgage; *Re Solomon and Meagher*, 40 Ch. D. 508.]

(2) Some interest has been in arrear for two months after becoming due; or

(3) There has been a breach on the part of the mortgagor of some provision contained in the mortgage deed or in the Act other than and besides a covenant for payment of the mortgage money or interest thereon (*a*).]

Trustees must show a good title.

29. As a trustee, like any ordinary vendor, is bound to make the purchaser a good title (*b*), it would be prudent before proceeding to the execution of the trust, to take the opinion of counsel whether a good title can be deduced. Should the contract for sale be unconditional and the title prove bad, the purchaser in a suit for specific performance would have his costs against the trustee (*c*), though the trustee, where his conduct was excusable, might charge them upon the trust estate under the head of expenses.

Timber.

30. If trustees have a *power of sale only*, they cannot sell the estate separate from the *timber* standing upon it, though the tenant for life be without impeachment of waste, and might have cut the timber previously to the sale; and a sale so effected is absolutely void (*d*), unless it be effected subsequently to 13th August, 1859, when it may be confirmed under the provisions of a legislative enactment in that behalf (*e*).

Minerals.

31. It is conceived that no distinction exists between timber and *minerals*, for both until severed form an integral part of the property. And it was accordingly, before the late Act, decided that the surface could not be sold apart from the minerals (*f*). But now, by 25 & 26 Vict. c. 108, trustees and other persons (*g*)

25 & 26 Vict. c. 108.

[(*a*) 44 & 45 Vict. c. 41, ss. 19, 20, 71.]

(*b*) *White* v. *Foljambe*, 11 Ves. 343, 345, *per* Lord Eldon; and see *M'Donald* v. *Hanson*, 12 Ves. 277.

(*c*) *Edwards* v. *Harvey*, G. Coop. 40.

(*d*) *Cholmeley* v. *Paxton*, 3 Bing. 207; 5 Bing. 48; *S. C. nom. Cockerell* v. *Cholmeley*, 10 B. & C. 654; 3 Russ. 565; 1 R. & M. 418; 1 Cl. & Fin. 60.

(*e*) 22 & 23 Vict. c. 35, s. 13. [As to the power of a tenant for life impeachable for waste with the consent of the trustees of the settlement to cut and sell timber under the Settled Land Act, 1882, see sect. 35 of that Act, and *post*, Chap. xxii.]

(*f*) *Buckley* v. *Howell*, 29 Beav. 546; as to sales under the Settled Estates Act, see *Re Mallin*, 3 Giff. 126; [*Re Milward's Estate*, 6 L. R. Eq. 248.] In settling lands where there are minerals, it has been found convenient to enable the trustees for sale "as to any of the premises under which minerals may lie, to sell the surface apart from the minerals, or to sell the minerals together with, or apart from, the surface, and to grant or reserve such rights of way as in-stroke or out-stroke, and any other easements in, upon, over, or under any of the said premises as may be necessary or desirable for the winning, working, storing, selling, and carrying away of any such minerals." [But see now the Settled Land Act, 1882, s. 4, *post*, p. 480.]

(*g*) And "other persons" has been held to comprise mortgagees; *Re*

are authorised, with the previous *sanction of the Court of Chancery* to be obtained on petition in a summary way (*a*), to sell the *surface* separate from the *minerals*, and the *minerals* separate from the *surface*, and such sales for the time past, where they have not been the subject of litigation, either concluded or pending, are confirmed.

[Sale of land without minerals under Settled Land Act, 1882.]

[32. In the case of a sale by the tenant for life under the Settled Land Act, 1882, the sale may be made either of land with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any other land (*b*). During the minority of the tenant for life, or person having the powers of a tenant for life, this power may be exercised by the persons who are trustees of the settlement for the purposes of the Act, if any, and if there are none then by such persons as the Court may direct (*c*).]

Where the estate is settled the timber cannot be sold separately.

33. If lands be devised to trustees in trust to sell for payment of debts, and, subject to that charge, are given to A. for life *without impeachment of waste*, with remainders over, the trustees must not raise the money by a sale of timber, which would be a hardship on the tenant for life, but by a sale of part of the estate itself; and should they have improperly resorted to a fall of timber, the tenant for life would have a charge upon the lands to the amount of the proceeds (*d*).

Implied reconversion.

34. If a fund be subject to the ordinary trusts of a marriage settlement, with a power of varying securities and of selling out any part thereof and investing the proceeds on a *purchase of a*

Beaumont's Mortgage Trusts, 12 L. R. Eq. 86; *Re Wilkinson's Mortgaged Estates*, 13 L. R. Eq. 634.

(*a*) Where the power of sale is in the trustees, with the consent of the tenant for life, a petition by the trustees must be served on the tenant for life, but not on the remainderman, *Re Pryse's Estate*, 10 L. R. Eq. 531; [*Re Nagle's Trusts*, 6 Ch. D. 104;] and the sanction of the Court being required for the protection of the beneficiaries, they must be served; *Re Brown's Trust Estate*, 9 Jur. N.S. 349; *Re Palmer's Will*, 13 L. R. Eq. 408; and a petition by mortgagees should be served on the mortgagor; see *Re Hirst's Mortgage*, 45 Ch. D. 263. Where trustees had an absolute power of sale, Kay, J., did not require service on the infant beneficiaries, but observed that it might in some cases be expedient to require such service; *Re Wadsworth*, W. N. 1890, p. 143.]

[(*b*) 45 & 46 Vict. c. 38, s. 17.]

[(*c*) 45 & 46 Vict. c. 38, s. 60; and see *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.]

(*d*) *Davies* v. *Wescombe*, 2 Sim. 425.

freehold estate to be held "upon such trusts as will best and nearest correspond with the trusts thereinbefore declared" of the securities sold out (being trusts for the benefit of the parents and issue), and with a direction that the purchase to be so made shall be "deemed *personal estate* for all the purposes of the settlement and go accordingly," but *without a general receipt clause*, a trust for *reconversion* is implied, and the trustees can sell and sign a valid receipt (*a*).

[Trustees of personal estate, whose trust authorises them to call in the trust property, and invest the proceeds and vary the investments, have an implied power of sale over real estate covenanted to be settled upon similar trusts (*b*).]

Sale may be by private contract or by auction.

35. The sale may be conducted by *public auction* or *private contract*, as the one or the other mode may be most advantageous, according to the circumstances of the case (*c*), and of course it is not an essential preliminary to a sale by private contract that the trustees should have previously attempted a sale by auction, or even have inserted a public advertisement that the property was for sale (*d*). And it was held under the old Insolvent Debtors Act, 7 Geo. 4, c. 57, s. 20, directing a sale by *auction*, that the assignees of the insolvent might sell a real estate by *private contract*, after an ineffectual attempt to dispose of it by auction (*e*). And, again, though the subsequent Insolvent Debtors' Act, 1 & 2 Vict. c. 110, s. 47, directed the assignees of insolvents to sell "in such manner" as the major part, in value, of the creditors should direct, yet in a case where the creditors resolved that there should be a reserved bidding of 325*l.*, and the assignees sold by auction for 310*l.*, it was held that the clause was merely *directory*, and that the deviation from the resolution of the creditors did not, therefore, vitiate the sale (*f*).

Sale must not be delegated.

36. The trustee cannot without responsibility *delegate* the trust for sale (*g*); but there seems to be no objection to the

(*a*) *Tait* v. *Lathbury*, 35 Beav. 112; and see *Master* v. *De Croismar*, 11 Beav. 184.

[(*b*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.]

(*c*) See *Ex parte Dunman*, 2 Rose, 66; *Ex parte Hurly*, 2 D. & C. 631; *Ex parte Ladbroke*, 1 Mont. & A. 384; *Davey* v. *Durrant*, 1 De G. & J. 535. As to trusts created since 28th Aug. 1860, the legislature has now enacted to this effect, unless the settlement direct to the contrary; 23 & 24 Vict. c. 145, s. 1; [(repealed by 45 & 46 Vict. c. 38, s. 64, as to which see *post*, p. 483, note (*b*)); 44 & 45 Vict. c. 41, s. 35.]

(*d*) See *Davey* v. *Durrant*, 1 De G. & J. 535; and see *Harper* v. *Hayes*, 2 Giff. 210; 2 De G. & J. 542.

(*e*) *Mather* v. *Priestman*, 9 Sim. 352.

(*f*) *Wright* v. *Maunder*, 4 Beav. 512; and see *Sidebotham* v. *Barrington*, 4 Beav. 110.

(*g*) *Hardwick* v. *Mynd*, 1 Anst. 109.

employment of agents by him, where such a course is conformable to the common usage of business, and the trustee acts as prudently for the *cestuis que trust* as he would have done for himself (*a*). But an agent for sale must not be allowed to receive the purchase-money (*b*); [and an agent should not be employed to do anything out of the ordinary scope of his business; and it has been held that the trustee's solicitor ought not to choose the valuer, as the choice is a matter on which the discretion of the trustee should be exercised (*c*).]

If the sale be by auction, proper advertisements must be given.

37. If the trustee think a sale by *auction* the more eligible mode, he must see that all proper advertisements are made, and due notice given. It was ruled in an old case (*d*) that a *cestui que trust* could not, by alleging the want of these preliminary steps, obtain an injunction against the sale; for the trustee being personally responsible to the *cestui que trust* for any consequential damage, the Court, it was said, could not regard it as a case of irreparable injury. But in more recent cases an injunction has been granted, it being the clear duty of the trustee to procure for the *cestuis que trust* the most advantageous sale (*e*).

[Prior charges.]

[38. By the Conveyancing and Law of Property Act, 1881, as to trusts or powers created since 31st December, 1881, and unless the settlement otherwise directs, a trustee may sell, or concur in selling, all or any part of the property either subject to prior charges or not (*f*).]

Conditions of sale.

39. A trustee may sell subject to any reasonable *conditions of sale* (*g*), but would not be justified in clogging the property with restrictions that were evidently uncalled for by the state of the title (*h*). [Prior to the recent enactments it was] usual, in penning a trust for sale, to give express authority to the trustees to insert *special conditions of sale;* [but] as to trusts created after 28th August, 1860, and where the settlement did

(*a*) *Ex parte Belchier*, Amb. 218; [*Re Speight*, 22 Ch. Div. 727; 9 App. Cas. 1;] and see *Ord* v. *Noel*, 5 Mad. 438; *Rossiter* v. *Trafalgar Life Assurance Association*, 27 Beav. 377.

[(*b*) As to appointing a solicitor to be agent for the purpose only of receiving the purchase-money, see *post*, p. 496.]

[(*c*) *Fry* v. *Tapson*, 28 Ch. D. 268.]

(*d*) *Pechel* v. *Fowler*, 2 Anst. 549.

(*e*) *Anon. Case*, 6 Mad. 10; *Blennerhasset* v. *Day*, 2 B. & B. 133. As to restraining a *mortgagee* from selling, see *Matthie* v. *Edwards*, 2 Coll. 465; *S. C.* on appeal *nomine Jones* v. *Matthie*, 11 Jur. 504; *Jenkins* v. *Jones*, 2 Giff. 99.

[(*f*) 44 & 45 Vict. c. 41, s. 35.]

(*g*) *Hobson* v. *Bell*, 2 Beav. 17.

(*h*) *Wilkins* v. *Fry*, 2 Rose, 375; *S. C.* 1 Mer. 268; *Rede* v. *Oakes*, 4 De G. J. & S. 505, 10 Jur. N.S. 1246; *Dance* v. *Goldingham*, 8 L. R. Ch. App. 902; [*Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. Div. 86.]

not otherwise direct, trustees [were authorised by Lord Cranworth's] Act to insert such *special or other stipulations*, either as to title or evidence of title or otherwise, as they might think fit (*a*). [This enactment has since been repealed (*b*), but its place had been previously supplied by the Conveyancing and Law of Property Act, 1881, s. 35, which provides that, as to trusts for sale and powers of sale created by instruments coming into operation after the 31st day of December, 1881, trustees may, unless the instrument creating the trust or power otherwise provides, sell or concur with any other persons in selling, subject to any such conditions respecting title and evidence of title or other matter, as they think fit (*c*).] But still this would be no warrant for the introduction of stipulations which are plainly not rendered necessary by the state of the title, and are calculated to damp the success of the sale; [as, for instance, a condition limiting the commencement of the title to a recent date where there is no difficulty in giving the earlier title and no special advantage in withholding it, or a condition making all recitals in the abstracted documents conclusive evidence of the matters recited, or a condition that the property is sold subject to the existing tenancies, restrictive covenants, and other incidents of tenure (if any) when there are no such tenancies or covenants (*d*), but the opinion was expressed that a condition limiting the title to ten years in a case where the land was broken up into small lots, and the condition was inserted for the purpose of saving expense, was reasonable and proper under special circumstances (*e*). And] trustees would, it is conceived, be justified in inserting a condition, now not uncommon, empowering the vendor, if unable, or unwilling, for *reasonable cause*, to remove the purchaser's objection, to cancel the contract. Such a condition may be depreciatory at the sale itself, and yet beneficial in its results (*f*).

[40. Where trustees have agreed to sell property subject to conditions of such a nature that the sale could be impeached by the *cestuis que trust*, the Court has declined, at the instance [Depreciatory condition.]

(*a*) 23 & 24 Vict. c. 145, s. 2.

[(*b*) 45 & 46 Vict. c. 38, s. 64. The repeal is not to affect the operation, effect, or consequence of any instrument executed or made before the commencement of the Act. The section of Lord Cranworth's Act may therefore be called in aid in cases of settlements executed after 28th Aug., 1860, and prior to the Conveyancing and Law of Property Act, 1881.]

[(*c*) 44 & 45 Vict. c. 41, s. 35.]

[(*d*) *Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. Div. 586.]

[(*e*) *Dunn* v. *Flood*, 28 Ch. Div. 586.]

(*f*) *Falkner* v. *Equitable Reversionary Society*, 4 Drew. 352.

of the trustees, to enforce the contract against the purchaser (*a*) ;

[Trustee Act, 1888.] but in future, by virtue of the provisions of the Trustee Act, 1888 (*b*), upon any sale made by a trustee, no purchaser will be at liberty to make any objection against the title upon the ground that the conditions of sale were depreciatory. It is further enacted (*c*) that "no sale made by a trustee shall be impeached by any *cestui que trust* upon the ground that any of the conditions, subject to which the sale was made, may have been unnecessarily depreciatory, unless it shall also appear that the consideration for the sale was thereby rendered inadequate;" and in favour of purchasers; there is a further provision that after the execution of the conveyance no sale shall be impeached upon the like ground, "unless it shall appear that the purchaser was acting in collusion" with the trustee at the time when the contract for such sale was made.

[51 & 52 Vict. c. 59.] 41. As a tenant for life selling under the powers of the Settled Land Act, 1882, is by sect. 53, in relation to the exercise of the power to have the duties and liabilities of a trustee, it is conceived that the same rules with regard to depreciatory conditions apply to him as to any other trustee.]

Selling in lots. 42. There is no rule to prevent the trustees from selling in *lots*, should the auctioneer or other experienced person recommend it as the most advisable course (*d*), and this liberty is now given by express enactment as to trusts created since 28th August, 1860, where the settlement does not direct the contrary (*e*).

[Cheque for deposit.] [43. A trustee or mortgagee is justified, on the sale of a property of large value, in allowing the custom of auctioneers to accept a cheque in lieu of cash for the deposit to be acted upon, and will not be held guilty of negligence if the cheque be dishonoured (*f*).]

Buying in. 44. *Trustees of bankrupts* cannot *buy in* at the auction without the authority of the creditors, and where the assignees had put up the estate in two lots, and bought them in, and afterwards

[(*a*) *Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. Div. 586; and see Dart. V. & P. 6th ed., pp. 83, 84, 199.]

[(*b*) 51 & 52 Vict. c. 59, s. 3, sub-s. 3. The Act applies to trusts previously created (s. 12).]

[(*c*) 51 & 52 Vict. c. 59, s. 3. As the difficulty of proving that the price was inadequate would in general be very great, the protection afforded to the trustee seems sufficient.]

(*d*) See Co. Lit. 113*a* ; *Ord* v. *Noel*, 5 Mad. 438; *Ex parte Lewis*, 1 Gl. & J. 69.

(*e*) 23 & 24 Vict. c. 145, s. 1. [Repealed by 45 & 46 Vict. c. 38, s. 64; a similar power having been previously given to trustees under instruments coming into operation after 31st December, 1881, by 44 & 45 Vict. c. 41, s. 35. As to the effect of the repealing clause, see p. 483, note (*b*).]

[(*f*) *Farrer* v. *Lacy Hartland & Co.*, 25 Ch. D. 636; 31 Ch. Div. 42.]

upon a re-sale there was a gain upon one lot and a loss upon the other, the balance upon the whole being in favour of the estate, Lord Eldon compelled the assignees to account for the diminution of price on the one lot, and would not allow them to set off the increase of price on the other lot (*a*).

It may be thought perhaps that as trustees in bankruptcy act under a statute they have less discretionary power than belongs to ordinary trustees; but in *Taylor* v. *Tabrum* (*b*) the same principle was applied to trustees in the proper sense of the word.

By 23 & 24 Vict. c. 145, as to trusts created [after 28th August, 1860, and prior to the repeal of the Act,] and where the settlement does not otherwise direct, trustees may sell at one time or at several times, and may *buy in*, or *rescind* a *private contract*, and resell without being responsible (*c*).

[By a later Act as to trusts or powers created since 31st December, 1881, where the settlement does not otherwise direct, trustees may "vary any contract for sale," and may "buy in at any auction or rescind any contract for sale and resell without being answerable for any loss" (*d*).]

45. By the Vendor and Purchaser Act, 1874 (*e*), it is enacted, by the *first* section, that as to any contract "made *after* 31*st December*, 1874, and subject to any stipulation to the contrary, *forty years* shall be substituted as the period of commencement of title which a purchaser may require in place of *sixty years*, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required." 37 & 38 Vict. c. 78.

And the *second* section (as to any contract made *after* 31*st December*, 1874, and subject to any stipulation to the contrary), enacts—

(1) That "under a contract to grant or assign a *term of years*, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the *freehold*" (*f*).

(*a*) *Ex parte Lewis*, 1 Gl. & J. 69; and see *Ex parte Buxton*, Id. 355; *Ex parte Baldock*, 2 D. & C. 60; *Ex parte Gover*, 1 De G. 349; *Ex parte Tomkins*, Sugd. V. & P. 815, 14 ed.

(*b*) 6 Sim. 281; see *Ord* v. *Noel*, 5 Mad. 440; *Conolly* v. *Parsons*, 3 Ves. 628, note.

(*c*) 23 & 24 Vict. c. 145, ss. 1 and 2. [Since repealed: see p. 483, note (*b*), and p. 484, note (*e*).]

[(*d*) 44 & 45 Vict. c. 41, s. 35.]

(*e*) 37 & 38 Vict. c. 78.

[(*f*) By section 4, sub-s. 2 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), the benefit of this provision is now in effect extended to trustees *lending* upon security of leaseholds, see *ante*, p. 360.]

(2) That recitals, statements and descriptions of facts, matters, and parties in instruments twenty years old "shall, unless and except so far as they shall be *proved* to be *inaccurate*, be taken to be sufficient evidence of the truths of such facts, matters and descriptions."

(3) That "the inability of the vendor to furnish the purchaser with a *legal covenant*" for production of documents shall not be an objection to the title, if "the purchaser will, on completion of the contract, have an *equitable right* to the production."

(4) That "such covenants for production as the purchaser can and shall require, shall be furnished at *his* expense, and the *vendor* shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser."

(5) That "where the vendor retains *any part* of an estate to which any documents of title relate, he shall be entitled to *retain* such documents."

By the *third* section, it is enacted that "*trustees* who are either vendors or purchasers may sell or buy without excluding the operation of the *second* section."

This express reference to the *second* section, suggests a doubt whether by implication trustees were meant to be excluded from the benefit of the *first* section. It is conceived, however, that no such distinction was intended, and that trustees who buy or sell may take advantage of the general enactment contained in the *first* section.

[44 & 45 Vict. c. 41.]

[46. The 3rd section of the Conveyancing and Law of Property Act, 1881, enacts (as to any *sale* made after the 31st December, 1881, and subject to any stipulation to the contrary in the contract of sale)—

(1) That "under a contract to *sell and assign* a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the *leasehold* reversion."

(2) That "where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement."

(3) That a purchaser shall not require the production, or any abstract or copy of any document "dated or made before the time prescribed by law, or stipulated for commencement of the title, even though the same creates a power subsequently exercised" by an abstracted instrument, or "require any information

or make any requisition, objection, or inquiry with respect to any such deed, will or document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title is recited, covenanted to be produced or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any document forming part of that prior title are correct, and give all the material contents of the document so recited, and that every document so recited was duly executed by all necessary parties, and perfected if and as required by fine, recovery, acknowledgment, inrolment or otherwise." [44 & 45 Vict. c. 41.]

(4) That "where land sold is held by lease (not including underlease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion."

(5) That "where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date."

(6) That "on a sale of any property, the expenses of the production and inspection of all documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying and producing all certificates, declarations, evidences and information not in the vendor's possession, and all copies or abstracts of, or extracts from, any documents not in the vendor's possession," if required by a purchaser for any purpose, shall be borne by him (*a*); "and where the vendor

[(*a*) It was held by Pearson, J., that under this section the purchaser must bear the expense of procuring and making an abstract of any deed not in

retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser."

(7) That "on a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense."

And by the 13th section, "on a contract to grant a lease for a term of years, to be derived out of a leasehold interest with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion."

And by the 66th section, trustees and their solicitors are exonerated from all liability for omitting to exclude the application of the above-mentioned stipulations to any contract they may enter into, but nothing in the Act is to make the adoption in connection with any contract of any further or other stipulations improper.]

Clearing the title.

47. Trustees for sale may do all reasonable acts which they are professionally advised are proper for the purpose of clearing the title and completing the sale (*a*).

Succession duty.

48. Trustees for sale who are to stand possessed of the proceeds upon trust for one person for life with remainder to another, can, whether the power of sale be or not exercisable with the consent of the tenant for life or of the successor, *i.e.*, the remainderman, give a good title to the purchaser free from *succession duty*; for the duty attaches on the interest of the successor, *i.e.*, the money in the hands of the trustees who are responsible, and the sale is by a title which is paramount to the successor's interest; and if the sale is to be by *consent*, the power of selling free from the duty is by the Act not to be thereby prejudiced (*b*). So trustees for sale who are to stand possessed of the proceeds to pay legacies

the vendor's possession of which he requires an abstract, even though it forms part of the title which the vendor is bound to adduce, and the vendor is in a position to compel its production; but this construction of the section was overruled by the Court of Appeal, and it was held that the Act does not relieve the vendor from the obligation to furnish the purchaser with a proper abstract of title, either for the statutory period or for such period as may be agreed upon, but the section proceeds upon the assumption that such an abstract has been furnished, *Re Johnson and Tustin*, 28 Ch. D. 84; 30 Ch. Div. 42.]

(*a*) *Forshaw* v. *Higginson*, 8 De G. M. & G. 827.

(*b*) 16 & 17 Vict. c. 51, ss. 42, 44; see *Harding* v. *Harding*, 2 Giff. 597; *Hobson* v. *Neale*, 8 Exch. 368; *Earl Howe* v. *Earl of Lichfield*, 2 L. R. Ch. App. 155; *Dugdale* v. *Meadows*, 9 L. R. Eq. 212, affirmed on app. 6 L. R. Ch. App. 501. [See also 52 Vict. c. 7, ss. 12–16.]

can pass the estate free from duty, for the succession duty does not attach where legacy duty is payable (*a*), and the legacy duty is not a charge on the estate, but is payable in respect of the proceeds in the hands of the trustees (*b*).

Hardship.

49. The Court will not enforce a contract against trustees where it presses with extreme *hardship*. Thus, where trustees, not being apprised of the real amount of the incumbrances upon an estate, entered into a personal engagement with the purchaser to clear off all incumbrances, the Court would not compel the trustees to fulfil their contract, but left the parties to law (*c*), and the bill was dismissed without costs (*d*).

Letting into possession.

50. The purchaser, after the contract, should not be let into *possession* of the estate until the completion of the sale by payment of the full purchase-money (*e*).

Of "granting" in the operative part of the conveyance.

51. Formerly, in drawing the conveyance, the word "*grant*" being commonly (though erroneously) supposed to contain a warranty (*f*), the trustee, instead of "granting, bargaining, selling, and releasing," was often, from extra caution, made to "bargain, sell, and release," with the omission of the word "grant" (*g*). And more recently, in order to secure the trustees from the possibility of parting with any interest vested in them beneficially, or from being construed to guarantee anything beyond the powers of their trust, it has not been unusual to insert in the operative part of the instrument the words "according to their estate and interest as such trustees." [And now, since the Conveyancing Act, 1881 (*h*), the words "as trustees" are inserted in order that the covenants against incumbrances may be implied in the conveyance.]

Covenants.

52. A trustee cannot be compelled to enter into any other covenant for *title* than against incumbrances by his own acts (*i*). But it would be prudent in trustees to apprise the public that they sell in that character, that the purchaser may not say he was led to suppose from the advertisements of sale, that the vendors were the beneficial proprietors, and that the contract

(*a*) As to leaseholds, see 16 & 17 Vict. c. 51, ss. 1 and 19.

(*b*) 16 & 17 Vict. c. 51, s. 18. [As to Estate Duty, see 52 Vict. c. 7.]

(*c*) *Wedgwood* v. *Adams*, 6 Beav. 600.

(*d*) *S. C.* 8 Beav. 103.

(*e*) *Oliver* v. *Court*, 8 Price, 166, *per* Chief Baron Richards; see *Browell* v. *Reed*, 1 Hare, 434.

(*f*) See Co. Lit. 384*a*, note (1), Hargrave and Butler's edit.

(*g*) See now 8 & 9 Vict. c. 106, s. 4.

[(*h*) 44 & 45 Vict. c. 41 s. 7 (1); see *post*, p. 490.]

(*i*) *White* v. *Foljambe*, 11 Ves. 345, *per* Lord Eldon; *Onslow* v. *Lord Londesborough*, 10 Hare, 74, *per Cur.*; *Worley* v. *Frampton*, 5 Hare, 560; *Stephens* v. *Hotham*, 1 K. & J. 571; and *Page* v. *Broom*, 3 Beav. 36. This is carried to such an extent that,

must, therefore, draw with it the usual incidents, and that the purchaser ought to have the benefit of the ordinary covenants. If the trust for sale is to be exercised with the *consent* [or *at the request*] *of the tenant for life* who joins in a sale, he must enter into the usual covenants for title (*a*).

Mortgagees' covenants.

53. *Mortgagees* with a *power of sale* are regarded as trustees, and covenant only against their own acts (*b*). To the extent of their mortgage money they are beneficially interested, not however as owners of the estate, but only as incumbrancers entitled to a charge.

[Conveyancing Act, 1881.]

[54. By the Conveyancing and Law of Property Act, 1881, s. 7, where, in any conveyance made after the 31st December, 1881, any person conveys, and is expressed to convey, as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, a covenant against incumbrances by such person in the form stated in the Act is to be deemed to be included in the conveyance, and is by virtue of the Act to be implied, but such covenant is not to be implied unless the person so conveying is in the conveyance expressed to convey in one of the above capacities.

The benefit of the covenant so implied is to be annexed to and go with the estate of the implied covenantee. A covenant so implied may be varied or extended by deed.]

Attested copies and covenant for production.

55. It was laid down by Lord Eldon, that *assignees of bankrupts* were bound, in case they could not deliver up the title deeds, to furnish the purchaser with *attested copies* and to *covenant for production* of the originals, the covenant to be confined to the period during which the assignees should continue

where a lessor grants a lease with a covenant for perpetual renewal, devisees in trust of the lessor, though bound to grant a new lease, are not bound to enter into a similar covenant. In these cases the court has, in order to secure the lessee without making the trustees personally liable, declared the right of the lessee to a perpetual renewal, and directed the new lease to contain a recital of the old lease, and of the declaration of the Court in obedience to which the trustees purport to demise; *Copper Mining Company* v. *Beach*, 13 Beav. 478; *Hodges* v. *Blagrave*, 18 Beav. 405. So, if A. agrees to grant a lease to B. and B. dies, A. can compel the executors of B. to accept the lease, but the lease is so framed that the executors of B. are guarded against all personal liability; *Phillips* v. *Everard*, 5 Sim. 102; *Stephens* v. *Hotham*, 1 K. & J. 571; but in the latter case the V. C. added that if the lease were a *beneficial* lease *claimed* by the *executors*, that would be a different case, and they must enter into full covenants, p. 580; and see *Staines* v. *Morris*, 1 V. & B. 12.

(*a*) *Earl Poulett* v. *Hood*, 5 L. R. Eq. 115; [*Re Sawyer and Baring's Contract*, 53 L. J. N.S. Ch. 1104; 33 W. R. 26; 51 L. T. N.S. 356.]

(*b*) Sugd. Vend. & Pur. p. 61, 11th edit.; [Dart. Vend. & Pur. 6th edit., p. 146.]

in office (*a*). And trustees, where they retain the title deeds, are equally required to give attested copies, and [either to] covenant for production during the period of their own custody, giving at the same time all such right at law or in equity as they lawfully can to call for the production as against the holder for the time being (*b*), [or else to give a statutory acknowledgment under the recent Act.] It is not easy to suggest a case where upon a sale by trustees the purchaser would not be entitled in equity (which would be sufficient) to call for the production of the deeds, but should there occur a case where the purchaser would not have such a right either at law or in equity, he could not be compelled to complete, but might claim to be discharged from his contract and be paid his costs, which would fall upon the trust estate or the trustees personally, according to the propriety or impropriety of their conduct in proceeding to a sale without guarding themselves by an express condition.

[Statutory acknowledgment.]

[56. Under the Conveyancing and Law of Property Act, 1881 (*c*), sect. 9, the practice has been introduced of giving an acknowledgment in writing of the right of the purchaser to the production of the documents of title, and to delivery of copies thereof in lieu of the old covenant for production, and with reference to this acknowledgment the following points are noticeable :—

(1) The person who "retains possession of the documents" (by which, apparently, is meant the person who *has* the documents in his possession, or under his control), and he only can give the statutory acknowledgment.

(2) The acknowledgment binds the documents in the possession or under the control of every person, who from time to time has such possession or control, but binds the "individual possessor or person so long only as he has possession or control thereof."

(3) The acknowledgment does not confer any right to damages for loss or destruction of or injury to the documents from whatever cause arising.

(4) The acknowledgment satisfies any liability to give a covenant for production and delivery of copies of or extracts from documents.

The obligations and liabilities arising under the statutory

(*a*) *Ex parte Stuart*, 2 Rose, 215.

(*b*) See *Onslow* v. *Lord Londesborough*, 10 Hare 74, Sugd. Vend. & Pur. 54, 13 edit.

[For two forms of covenant, one suggested by the author of this work, the other stated to be under Lord Eldon's own hand, see the last edition of this work, p. 443.]

[(*c*) 44 & 45 Vict. c. 41.]

acknowledgment correspond with those which arose under the old qualified covenant for production usually entered into by trustees independently of the Act, and it is conceived that trustees may safely give the acknowledgment for documents in their possession, and that they cannot be required to do more than give this acknowledgment.

[Statutory undertaking.]

57. The same section has introduced the practice of giving an undertaking in writing for safe custody of the documents retained, which "imposes on the person giving it and on every person having possession or control of the documents from time to time, but on each individual possessor or person so long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident," and under this, trustees who have the custody of documents as to which a former holder has given the statutory undertaking will be personally liable for their safe custody, but it is conceived that they will, in the absence of neglect on their part, be entitled to be recouped out of their trust estate any loss they may suffer in respect of the documents.

The undertaking for safe custody involves a personal liability which trustees are not by law bound to take upon themselves and they should accordingly decline to give the statutory undertaking when retaining the possession of documents.]

Sale of leaseholds.

58. In a sale of *leaseholds* by *trustees* who take by *assignment*, they cannot, in any case, require from a purchaser a covenant of indemnity against a breach of the covenants; for, as regards *themselves*, they took the lease by assignment without personally covenanting, and therefore cease to be liable on the assignment over; and, as regards a covenant for the protection of the *settlor*, he has become a stranger by the execution of the trust deed, and the trustees could neither, in the absence of an express stipulation, insist upon a benefit to one with whom there is no existing privity, nor, as they are bound to make the sale the most beneficial to the *cestuis que trust*, could they insert a condition in favour of a stranger which might operate as a discouragement to purchasers (*a*).

Executor of lessee.

59. The *executor* of a *lessee* upon assigning the term would be entitled to such a covenant, his testator's estate being liable under the original covenants of his testator.

Practice of the Court.

60. Subject to the effect of the Act to be mentioned presently, where a lessee's estate is in course of distribution under the direction of the Court, a portion of the estate is usually reserved for

(*a*) See *Wilkins* v. *Fry*, 1 Mer. 244; *Garratt* v. *Lancefield*, 2 Jur. N.S. 177.

the purpose of forming an indemnity fund against the covenants of the lease (*a*), unless the risk be inconsiderable (*b*). But no indemnity is provided where the testator's estate is not liable, as where the testator himself was not a *lessee*, but the *assignee* of a lease, and had entered into no covenants (*c*). And if the executor has assented to the bequest unconditionally, he is held to have waived his claim to indemnity (*d*).

Principle of practice.

It is difficult to say upon what principle this practice of the Court is based. In some of the older cases the judges seem to have thought that it was to indemnify the *executor*. But as the distribution of the assets is made by the *Court*, and is *not the act of the executor*, it is impossible to maintain that the executor can be personally liable for the debt. In other cases the fund is said to be set apart out of regard to the interests of the lessor. But if the lessor can prove by way of claim in the suit, why should the Court protect one who will not protect himself; and if he cannot prove in the suit (*e*), it seems anomalous that the Court, while it refuses to hear the lessor on the subject of his interest, should deal with the assets behind his back in respect of such interest. The whole doctrine, said V. C. Kindersley, is in a very unsatisfactory state, and does not seem to be founded on sound principle (*f*).

22 & 23 Vict. c. 35.

By Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 27), where an *executor* has satisfied all accrued liabilities under a *lease*, and has set apart a fund to answer covenants for expenditure of *fixed sums* on the property (which would not include rents) and assigns the lease to a purchaser, he may distribute the assets without being personally liable to the lessor, who however may still follow the assets in the hands of the recipients.

Practice since the Act.

The practice of the Court for the future has not been settled (*g*), but it is presumed that where a lease is sold under the direction of the Court, and all existing liabilities have been satis-

(*a*) *Cochrane* v. *Robinson*, 11 Sim. 378; *Fletcher* v. *Stevenson*, 3 Hare, 360; *Dobson* v. *Carpenter*, 12 Beav. 370; *Hickling* v. *Boyer*, 3 Mac. & G. 635; *Brewer v. Pocock*, 23 Beav. 310.

(*b*) *Dean* v. *Allen*, 20 Beav. 1; *Brewer* v. *Pocock*, 23 Beav. 310; and see *Reilly* v. *Reilly*, 34 Beav. 406.

(*c*) *Garratt* v. *Lancefield*, 2 Jur. N.S. 177. N.B. It may be collected from the judgment that the ordinary covenant to indemnify had not been entered into by the testator on the occasion of the assignment to him.

(*d*) *Shadbolt* v. *Woodfall*, 2 Coll. 30; and see *Smith* v. *Smith*, 1 Dr. & Sm. 384.

(*e*) See *King* v. *Malcott*, 9 Hare, 692; *Re Haytor Granite Company*, 1 L. R. Eq. 11; *Smith* v. *Smith*, 1 Dr. & Sm. 387.

(*f*) *Smith* v. *Smith*, 1 Dr. & Sm. 387.

(*g*) *Smith* v. *Smith*, 1 Dr. & Sm. 384. In *Reilly* v. *Reilly*, 34 Beav. 406, the Court after a lapse of eight years, and no claim having been made, distributed the fund which had been set apart for an indemnity.

fied, and provision made for future fixed sums covenanted to be laid out on the property, the Court will not think it necessary to protect a lessor, who, as the legislature has now pronounced, cannot under such circumstances claim protection out of Court. In other cases the law will remain as it was, and the general principle would appear to be, that the Court should (not by way of indemnity to the executor, except as to costs of resisting proceedings against him, but *ex debito justitiæ* to a *bonâ fide* future creditor) set apart a fund where it plainly appears that future liabilities will arise, and that the whole estate itself is not a sufficient security, and the devisee of the lease cannot give adequate security either by personal undertaking or otherwise. [And in recent cases, both in England (*a*) and in Ireland (*b*), the Court has refused to set aside any part of the assets, or to give the executor any further indemnity than that which arises by reason of the administration of the estate by the Court. But where the estate consists to an appreciable extent of leaseholds, which involve a liability in the executor, he is entitled as of right to have the estate administered by the Court for his protection (*c*).]

Assignment of a *chose in action.*

61. In the assignment of a *chose in action* [not falling within sect. 25 of the Judicature Act, 1873,] the trustee may be required to give a *power of attorney* to receive the money, and to sue in his name, but this should be accompanied by a proviso that no action or suit shall be commenced unless the assignor consent, or unless the assignee tender a sufficient *indemnity* (*d*). [But in the case of an absolute assignment by writing within sect. 25, as the assignee can, by giving notice under the Act, acquire the right to sue at law in his own name for the *chose in action*, it is conceived that a trustee could not be compelled to give such a power of attorney.]

Sale by mortgagee.

62. In a *mortgage* accompanied with a *power of sale*, the mortgagee, who is a *quasi* trustee, can under the power make a title to the purchaser without the concurrence of the mortgagor (*e*); and a clause in the mortgage deed that the mortgagor shall, if required, be a party to the conveyance, is considered a contract for the exclusive benefit of the mortgagee, and not as imposing

[(*a*) *Re Bosworth*, 29 W. R. 885; 45 L. T. N.S. 136.]

[(*b*) *Buckley* v. *Nesbitt*, 5 L. R. Ir. 199; *Fitzgerald* v. *Lonergan*, cited 5 L. R. Ir. 203.]

[(*c*) *Re Bosworth*, 45 L. T. N.S. 136.]

(*d*) *Ex parte Little*, 3 Moll. 56.

(*e*) *Corder* v. *Morgan*, 18 Ves. 344; *Clay* v. *Sharpe*, cited Id. 346, note (*b*); *Alexander* v. *Crosbie*, 6 Ir. Eq. Rep. 518.

the necessity of procuring the mortgagor's consent to the sale (*a*).

Whether the *cestuis que trust* should be parties.

63. If the trustees have a power of signing discharges for the purchase-money, the *cestuis que trust* need not be made parties to the conveyance (*b*); but as trustees are bound to covenant against their own incumbrances only, the *cestuis que trust*, where it is practicable, are usually made parties to the deed, that the purchaser may have the benefit of their covenants for title according to the extent of their respective interests (*c*). In sales, however, under the direction of the Court of Chancery, it is the rule *not* to make the *cestuis que trust* parties; for this would involve the necessity of previously inquiring *who* are beneficially interested, and in *what* proportions, whereas it is a common proceeding of the Court to order a sale in the first instance, and leave the rights of the respective parties to be settled by a subsequent adjudication (*d*).

[Trustees having power of sale, whether persons "absolutely entitled" under Lands Clauses Act.]

[64. The question has arisen whether trustees having a power of sale, and enabled by the recent enactments or otherwise to give a complete discharge for purchase-money, are persons "absolutely entitled" within the meaning of the Lands Clauses Consolidation Act, 1845, s. 69, so as to give the Court jurisdiction to order money in Court, under that Act, to be paid out to such trustees without having their *cestuis que trust* before the Court. The payment has been ordered by the Court in cases where the corporation or company by whom the money has been paid in have consented (*e*), but in the most recent case the jurisdiction has been doubted by the Court of Appeal (*f*). It is clear, however, that under the Settled Land Act, 1882, section 21, which authorises payment of capital money arising under that Act to any person "becoming absolutely entitled or empowered to give an absolute discharge," the Court has a discretion to order such payment; but it cannot be demanded as of right (*g*).

(*a*) *Corder* v. *Morgan*, 18 Ves. 347, *per* Sir W. Grant.

(*b*) See *Binks* v. *Lord Rokeby*, 2 Mad. 227.

(*c*) See *Re London Bridge Acts*, 13 Sim. 176.

(*d*) *Wakeman* v. *Duchess of Rutland*, 3 Ves. 233, 504; affirmed in D. P. 8 B. P. C. 145; *Colston* v. *Lilley*, 3 May, 1855, V. C. Stuart at chambers; *Wyman* v. *Carter*, 12 L. R. Eq. 309; *Re Williams's Estate*, 5 De G. & Sm. 515; *Cottrell* v. *Cottrell*, 2 L. R. Eq. 330; and see *Loyd* v. *Griffith*, 3 Atk. 264; *Freeland* v. *Pearson*, 7 L. R. Eq. 246.

[(*e*) *Re Hobson's Trusts*, 7 Ch. Div. 708; *Re Thomas's Settlement*, W. N. 1882, p. 7; *Re Ward's Estates*, 28 Ch. D. 100, where it was held to make no difference that the trust for sale was at the request of some other person, if that person concurred with the trustees in asking for the payment to them of the money.]

[(*f*) *Re Smith*, 40 Ch. Div. 386.]

[(*g*) *S. C.*]

[Receipt of money by solicitor or agent.]

65. Independently of powers recently conferred by statute, and in the absence of special circumstances, trustees were not justified in authorising their solicitor or other agent to receive purchase-money which ought to be paid personally to them (*a*), so that in general, even though a written authority, signed by the trustees and authorising a purchaser to pay the purchase-money to their solicitors, were produced, the purchaser could not be required to act upon it.

[Conveyancing Act, 1881.]

By the 56th section of the Conveyancing and Law of Property Act, 1881 (*b*) it was enacted that "where a solicitor produces a deed having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt." In the recent case of *Re Bellamy and the Metropolitan Board of Works* (*c*), it was held that this section did not alter or enlarge the powers of trustees as to giving an authority to an agent to receive purchase-money for them, and that, therefore, in the absence of special circumstances justifying trustees in giving such an authority, a purchaser from them could insist upon paying the money to the trustees personally or to their joint account at a bank designated by them. But the

[Trustee Act, 1888.]

Trustee Act, 1888 (*d*), has altered the law in this respect, by enacting that "it shall be lawful for a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration or property receivable by such trustee under the trust by permitting such solicitor to have the custody of, and to produce (*e*), a deed containing any such receipt as is referred to in the 56th section of the Conveyancing and Law of Property Act, 1881; and no trustee shall be charge-

[(*a*) *Per* Cotton, L.J., in *Re Bellamy and the Metropolitan Board of Works*, 24 Ch. Div. 387, at p. 400; but see ibid., p. 397, and *Robertson* v. *Armstrong*, 28 Beav. 123; *Hope* v. *Liddell*, 21 Beav. 202; *Webb* v. *Ledsam*, 1 K. & J. 385; *Ferrier* v. *Ferrier*, 11 L. R. Ir. 56; and see Sugd. V. & P. 14th edit. 667.]

[(*b*) 44 & 45 Vict. c. 41.]

[(*c*) 24 Ch. Div. 387; and see *Day* v. *Woolwich Equitable Building Society*, 40 Ch. D. 491, 494.]

[(*d*) 51 & 52 Vict. c. 59, s. 2, sub-s. 1.]

[(*e*) *Semble*, at the time of payment to or receipt by the agent, see *Day* v. *Woolwich Equitable Building Society*, 40 Ch. D. 491, 493.]

able with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by such solicitor shall have the same validity and effect, by virtue of the said 56th section, as the same would have had if the person appointing such solicitor had not been a trustee." As this enactment only authorises the appointment of a solicitor as agent, it does not enable trustees to appoint one of themselves to receive purchase-money, and if the money is to be paid to them directly the purchaser can, it seems, require *all of them* to attend personally to receive it (*a*).

The recent statutory provision extends only to the receipt of the money and not to the retention of it—it being expressly provided (*b*) that the trustee shall not be exempt from any liability which he would have incurred if the Act had not passed, "in case he permits such money, valuable consideration, or property to remain in the hands or under the control of the solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such solicitor to pay or transfer the same to the trustee."

Production of the deed pursuant to section 56 of the Conveyancing Act is "equivalent to a special authority given to the solicitor to receive the money" (*c*) and the person producing the deed must be the solicitor acting for the party to whom the money is expressed to be paid (*d*).

66. The Trustee Act, 1888, further enacts (*e*) that "it shall be lawful for a trustee to appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to such trustee under or by virtue of a policy of assurance, by permitting such banker or solicitor to have the custody of and to produce such policy of assurance with a receipt signed by such trustee," but (as under the clause already referred to) the trustee is to be liable in respect of the money in case he permits it to remain in the hands or under the control of the banker or solicitor longer than is reasonably necessary. [Receipt of policy money by trustees.]

[67. In cases not falling within the above statutory provisions it is clear that payment to a solicitor or agent *without* a written [In cases not within recent Acts.]

[(*a*) *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592; and it is open to question whether even where one of the trustees is himself a solicitor, his appointment as agent to receive the money is authorised by the Act.]

[(*b*) 51 & 52 Vict. c. 59, s. 2, sub-s. 1.]

[(*c*) *Re Bellamy*, 24 Ch. Div. 387, 399, *per* Cotton, L.J.]

[(*d*) *Day* v. *Woolwich Equitable Building Society*, 40 Ch. D. 491.]

[(*e*) 51 & 52 Vict. c. 59, sec. 2, sub-s. 2.]

or other express authority from the trustees, will be no discharge (*a*). However, if the money has been put into a channel by which it may reach the hands of the vendor, and the vendor by his agent delivers a receipt for it to the purchaser, the vendor cannot afterwards throw the loss of the money on the purchaser (*b*).]

Deposit money.

68. When trustees sell by auction, the *auctioneer* is their agent, and the trustees will be answerable if they improperly trusted him, or be guilty of any unnecessary delay in recovering the deposit from him (*c*).

Trustees bound to answer inquiries.

69. Trustees for sale for *payment of debts* are of course bound at any time to answer inquiries by the author of the trust, or the persons claiming under him, as to what estates have been sold and what debts have been paid (*d*).

Custody of vouchers.

70. When the affairs of the trust have been finally settled, the trustees will be entitled to the possession of the *vouchers* as their discharge to the *cestuis que trust;* but the *cestuis que trust* will have a right to the inspection of them (*e*); but not to copies without paying for them.

Land discharged when money raised.

71. The *land* is discharged so soon as the fund has been actually raised, even though the proceeds may be misapplied, and do not reach their proper destination. The remedy of the parties aggrieved is against the trustees personally, without any *lien* upon the estate (*f*). And if a legacy be charged on land (either by the creation of a term or without a term), on the *insufficiency of the personal estate,* and the personal estate was originally sufficient, but becomes insufficient by the *devastavit* of the executor, the land is discharged (*g*) unless the devisees of the land are also the persons by whose default the insufficiency arose (*h*).

Effect of administration suit.

72. The effect of an *administration suit* upon a trust for sale is that the trustees do not lose their powers, but must exercise them under the direction of the Court, and if they have a *legal power*

(*a*) *Re Fryer*, 3 K. & J. 317; and see *Viney* v. *Chaplin*, 2 De G. & J. 468; [*Ex parte Swinbanks*, 11 Ch. D. 525.]

(*b*) *West* v. *Jones*, 1 Sim. N.S. 205; [*Gordon* v. *James*, 30 Ch. Div. 249; *Coupe* v. *Collyer*, 62 L. T. N.S. 927.]

(*c*) See *Edmonds* v. *Peake*, 7 Beav. 239.

(*d*) *Clarke* v. *Earl of Ormonde*, Jac. 120, *per* Lord Eldon.

(*e*) Ib. *per eundem.*

(*f*) *Anon.* 1 Salk. 153; *Juxon* v. *Brian*, Pr. Ch. 143; *Carter* v. *Barnardiston*, 1 P. W. 505; see 518; *Hutchinson* v. *Massareene*, 2 B. & B. 49; and see *Omerod* v. *Hardman*, 5 Ves. 736; *Dunch* v. *Kent*, 1 Vern. 260; *Culpepper* v. *Aston*, 2 Ch. Ca. 115; *Harrison* v. *Cage*, 2 Vern. 85; *Hepworth* v. *Hill*, 30 Beav. 476.

(*g*) *Richardson* v. *Morton*, 13 L. R. Eq. 123. But see *contra*, *Re Massey*, 14 Ir. Rep. 355.

(*h*) *Humble* v. *Humble*, 2 Jur. 696; *Howard* v. *Chaffers*, 2 Dr. & Sm. 236.

of sale they can execute it with the sanction of the Court for the purpose of passing the legal estate. But the power, though exercised under the eye of the Court, must of course be pursued as strictly as if there were no suit, and though the trustees may be able to pass the legal estate, yet in equity no good title will be conferred as against a *cestui que trust* who was not a party to the suit, or otherwise bound by the exercise of the power. Trustees for sale, with a power of signing receipts, can, if there be no suit, convey the estate, and sign a valid discharge for the purchase-money, but if the *Court* and not the trustees sell the estate, the purchaser would not acquire a good title as against any *cestui que trust* who was not a party to the suit or not bound by the order. These observations must not be taken to interfere with the legal power of an *executor*, even after decree, to deal with the general personal assets of the testator (*a*).

[73. If in an administration action, or an action for the execution of the trusts of a written instrument, a sale is ordered of any property vested in any executor, administrator, or trustee, the conduct of the sale is to be given to such executor, administrator or trustee, unless the Court otherwise directs (*b*). [Conduct of sale by Court.]

Where a sale is ordered by the Court, the Court may authorise the same to be carried out by proceedings altogether out of Court (*c*).] [Sale out of Court.]

SECTION II.

THE POWER OF TRUSTEES TO SIGN DISCHARGES FOR THE PURCHASE-MONEY.

THE power of trustees to sign discharges for the purchase-money resolves itself into two questions:—First: Are the trustees justified in making the *sale* at all? and, Secondly: Supposing the sale itself to be proper, is the purchaser bound to see to the *application* of his purchase-money?

First. Are the trustees justified in proceeding to a sale?

1. If a testator *devise an estate* to trustees, and direct a sale of it for payment of debts *on the insufficiency of the personal assets,* Trust for sale for payment of debts.

(*a*) *Berry* v. *Gibbons*, 8 L. R. Ch. App. 747.

[(*b*) Rules of the Supreme Court Ord. 50, R. 10. Where there were four trustees, and one, who was also tenant for life, was plaintiff, and the others were defendants, the conduct of the sale was given to the three defendant trustees, *Re Gardner*, 48 L. J. N.S. Ch. 644; 51 L. T. N.S. 82.]

[(*c*) Ord. 51, R. 1A (b).]

the trustees *ought* not to dispose of the realty, until it appears that the personal fund is not equal to meet the demands of the creditors. But the point we have here to consider is, how will the *purchaser* be affected, and, as he has no means of investigating the accounts, he is not to be prejudiced should it prove eventually that the personalty is sufficient (*a*). All that could reasonably, and which perhaps *would* be required of him, is, that he should apply to the executor, where the trustee does not sustain that character, and ask if the necessity for the sale has arisen. However, a purchaser is prevented in such a case from dealing exclusively with the trustee out of Court, where a *suit* has been instituted for the administration of the estate (*b*). And the Court itself cannot make a good title where it has been found in the suit that *all the debts have been paid* (*c*).

Power of sale on insufficiency of personal estate.

2. But if a testator give not the *estate* but a *power of sale* only to his trustees, and that conditional on the insufficiency of the personal estate, then the purchaser must at his peril ascertain that the power can be exercised (*d*). The difference between a trust and a power is this. In the former case, the trustees, having the legal estate, can transfer it to the purchaser by their ownership; and equity, as the purchaser had no opportunity of discovering the true state of things, will not allow his title to be impeached. But where there is a power merely, the insufficiency of the personal estate is a condition precedent; and if it did not pre-exist in fact, the power never arose, and the purchaser took nothing by the assumed execution of it.

Case of selling more than the trust requires.

3. A purchaser is not bound to ascertain whether *more* is offered for sale than is sufficient to answer the purposes of the trust: for how is the purchaser to know what exact sum is wanted, without investigating the accounts? And if the sale be by auction the trustees cannot tell *à priori* what the property will fetch. Besides, the trustees are entitled, as incident to their office, to raise their costs and expenses (*e*).

Pierce *v.* Scott.

4. But where a testator directed on the insufficiency of his

(*a*) *Culpepper* v. *Aston*, 2 Ch. Ca. 115, *per* Lord Nottingham; *Keane* v. *Robarts*, 4 Mad. 356, *per* Sir J. Leach; Co. Lit. 290, b, note by Butler, sect. 14; *Shaw* v. *Borrer*, 1 Keen, 559; *Greetham* v. *Colton*, 11 Jur. N.S. 848; but see Fearne's P. W. 121.

(*b*) *Culpepper* v. *Aston*, 2 Ch. Ca. 116, 223, *per* Lord Nottingham; and see *Walker* v. *Smalwood*, Amb. 676; and *supra*.

(*c*) *Carlyon* v. *Truscott*, 20 L. R. Eq. 348.

(*d*) *Culpepper* v. *Aston*, 2 Ch. Ca. 221; *Dike* v. *Ricks*, Cro. Car. 335; *S. C.* Sir W. Jones, 327.

(*e*) *Spalding* v. *Shalmer*, 1 Vern. 301; *Thomas* v. *Townsend*, 16 Jur. 736.

personal estate a sale in the first instance of estate A., and, should that not answer the purpose, then of estate B., and the trustees, *fifteen* years after the testator's death, contracted for the sale of B. first, and then filed a bill for specific performance, alleging the existence of debts, and that A. was already in mortgage, or otherwise charged to the full value, the Court, considering it was unlikely that creditors would have lain by for so many years, and that the non-existence of debts might therefore be suspected, and that what was ground for suspicion might be deemed notice to a purchaser, determined against the title (*a*).

Secondly. Supposing the sale to be proper, is the purchaser bound to see to the *application* of his purchase-money?

Lord St. Leonards' Act.

We must here advert *in limine* to some important recent enactments. By *Lord St. Leonards' Act*, 22 & 23 Vict. c. 35, s. 23 (passed 13th August, 1859), it is declared that "the *bonâ fide* payment to and the receipt of any person to whom any *purchase* or *mortgage* money *shall be payable* upon any *express* or *implied* trust *shall* effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary *shall be* expressly declared by the instrument creating the trust or security." It will be observed, 1. That the Act applies not to all moneys subject to a trust, but only to moneys arising from *sales* and *mortgages* and subject to a trust. 2. That the language of the section, more particularly of the latter part of it, is in the future tense, so that the enactment is not to be retrospective. If future settlors are to have the option of excluding the operation of the Act, it should not affect prior settlements by settlors who had no such option. 3. As regards trusts or mortgages created by instruments since the date of the Act, it would seem that to the extent of sale moneys and mortgage moneys the whole doctrine in equity of seeing to the application of money has been swept away. It cannot be said that where A. is trustee for B. the money is payable to B. and not to A., and that therefore the clause shall not apply, for the doctrine of equity is that the money is *payable* to A., but the purchaser or mortgagee is bound to see it properly *applied* by A.

Lord Cranworth's Act.

By *Lord Cranworth's Act*, 23 & 24 Vict. c. 145, s. 29 (passed 28th August, 1860), it was enacted that "The receipts in writing of any trustees or trustee for *any money* payable to them or him by reason or in exercise of any *trusts* or *powers*" should be good

(*a*) *Pierce* v. *Scott*, 1 Y. & C. 257.

discharges; but by section 34, the operation of the Act was expressly confined to instruments executed after the passing of the Act.

[Conveyancing Act; receipt of trustee now sufficient under trust whenever created.]

[By the Conveyancing and Law of Property Act, 1881, which repealed the 29th section of Lord Cranworth's Act, "the receipts in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power" are made sufficient discharges, and the section applies to trusts created either before or after the commencement of the Act (*a*).]

As the clauses in [the Acts prior to the Conveyancing and Law of Property Act, 1881, were not retrospective, and questions may still arise on titles as to the validity of receipts by trustees who had no express powers of signing receipts, and the earlier authorities are of importance with reference to the construction and application of the recent enactments,] it is necessary to consider generally and apart from legislative enactment the power of trustees for sale to sign receipts.

Principle of requiring a purchaser to see to the application of his purchase-money.

1. As a general rule, if a person have in his hands money or other property to which another person is entitled, he cannot discharge himself from liability but by payment or transfer to the true owner. If an estate be vested in A. upon trust to sell and, divide the proceeds between B. and C., in a Court of *law* the absolute ownership is in A., and his receipt, therefore, will discharge the purchaser; but in equity B. and C., the *cestuis que trust*, are the true proprietors, and A. is merely the instrument for the execution of the settlor's purpose, and the receipt, therefore, to be effectual, must be signed by B. and C. (*b*).

The rule controlled by the intention of the settlor.

2. Such is the *primâ facie* rule in trusts; but in every instance it is liable to be controlled and defeated by an intention to the contrary collected from the instrument creating the trust, whether that intention be *expressed* or *implied*.

Either expressed

3. The former is the case, if the settlor direct in *express* terms that the receipts of A., the trustee, shall discharge the purchaser from seeing to the application of the purchase-money; for B. and C. cannot at the same moment claim under and contradict the instrument—they cannot avail themselves of the sale, and reject the proviso affecting the receipt.

[(*a*) 44 & 45 Vict. c. 41, ss. 36, 71. The purchaser must of course satisfy himself that the money is "payable" to the trustee. He would not, it is apprehended, be justified in paying to a bare trustee.]

(*b*) See *Weatherby* v. *St. Giorgio*, 2 Hare, 624. The power of the vendor to sign a discharge for the purchase-money is a question not of *conveyance* but of *title*; *Forbes* v. *Peacock*, 12 Sim. 521.

The words in a *power of attorney*, "to sign discharges in the name of the assignor *or otherwise*, and to do all other acts *as the principal might have done*," have been held to carry such a direction (*a*) where not controlled by a subsequent receipt clause tending to negative that intent (*b*). But the receipt clause has not always been liberally construed; as where trustees were entitled to receive a sum of *stock* with a power of varying securities, a receipt signed for *cash* was held to be no discharge, though the Court said that had there been any indication of an intention to exercise the power of varying securities for which cash would be required, the decision might have been different (*c*). It would have been more satisfactory had the Court held that as the trust fund in the hands of the trustees in the shape of cash did not necessarily imply a breach of trust the receipt was sufficient.

Or implied.

4. In what cases a power of signing receipts is *implied*, has never been satisfactorily ascertained. However, two principles appear to be the basis upon which most of the distinctions taken by the Courts have been founded.

Direction to sell implies power in some one to sign discharges at time of sale.

5. *First.* In the creation of a trust for *immediate* sale, it is implied that a legal and equitable discharge for the purchase money shall be *signed by some one at the time of the sale.* There can be no conveyance of the estate without payment of the money, and there can be no such payment without a complete discharge. Should the settlor have contemplated a sale at a time when, as he must have known, the *cestuis que trust*, or some of them, were either not in existence, or not of capacity to execute legal acts (*d*)

(*a*) *Binks* v. *Lord Rokeby*, 2 Mad. 227; see 238, 239; *Desborough* v. *Harris*, 5 De G. M. & G. 439. In this case L. C. Cranworth considered that an assignment of a policy by way of *mortgage* vests a *power* of signing receipts in the mortgagee from the nature of the case, and independently of any express power of signing receipts, for the possession of the policy is evidence that something is due, and the Insurance Company cannot be expected to take the account between mortgagor and mortgagee. Of course it would be otherwise if the company had express notice that the mortgage had been satisfied. The difficulty felt by the insurance companies in such cases has been, that after paying upon the equitable title they might incur costs pending an action upon the legal title. However, a defendant may now plead an equitable defence at law; and if successful upon the equitable defence would recover his costs in the action. See further *Ottley* v. *Gray*, 16 L. J. N.S. Ch. 512; *Curton* v. *Jellicoe*, 14 Ir. Ch. Rep. 180. The assignee of a policy is now enabled to bring an action in a court of law; 30 & 31 Vict. c. 144, s. 1. And see 36 & 37 Vict. 3. 66.

(*b*) *Brasier* v. *Hudson*, 9 Sim. 1.

(*c*) *Pell* v. *De Winton*, 2 De G. & J. 13.

(*d*) *Sowarsby* v. *Lacy*, 4 Mad. 142; *Lavender* v. *Stanton*, 6 Mad. 46; and see *Breedon* v. *Breedon*, 1 R. & M. 413; *Cuthbert* v. *Baker*, Sugd. Vend. & Purch. 842, 843, 11th ed.

[or could only be ascertained *in futuro* (*a*)], the intention must be presumed that the receipts of the trustees should be a release to the purchaser.

As to *cestuis que trust* out of the jurisdiction.

As to *cestuis que trust* who, *after* the date of the instrument, go *out of the jurisdiction*, or are otherwise incapacitated to concur, the general rule does not apply, for it cannot be said that the settlor *meant* the trustees to sign receipts for them, the presumption being the other way.

Where trust is annexed to the purchase-money it is implied that the trustee shall apply it.

6. *Secondly.* If a sale be directed, and the proceeds are not simply to be paid over to certain parties, but there is a *special* trust annexed, the inference is that the settlor meant to confide the execution of the trust to the hands of the trustee, and not of the purchaser, and that the trustee therefore can sign a receipt (*b*).

Mr. Booth's opinion.

An opinion of Mr. Booth shows that even in his time regard was had to the nature of the trust in exempting the purchaser from liability. A testator had directed his trustees to sell and invest the proceeds upon the trusts thereinafter mentioned, and then gave his wife an annuity of 50*l.* a year, for her life, to be paid out of the proceeds, and subject thereto, gave the fund to his son ; but in case of his death under twenty-one, to the person entitled to his Taunton lands. Mr. Booth wrote, " I am of opinion, that all that will be incumbent on the purchaser to see done will be to see that the trustees invest the purchase-money, in their names, in some of the public stocks or funds, or on Government securities, and in such case the purchaser will not be answerable for any misapplication, after such investment of the money, of any moneys which may arise by the dividends or interest, or by disposition of such funds, stocks, or securities, *it not being possible that the testator should expect from any purchaser any further degree of care or circumspection than during the time that the*

(*a*) *Balfour* v. *Welland*, 16 Ves. 151, see 156.

(*b*) *Doran* v. *Wiltshire*, 3 Sw. 699 ; *Balfour* v. *Welland*, 16 Ves. 157 ; *Wood* v. *Harman*, 5 Mad. 368 ; *Locke* v. *Lomas*, 5 De G. & Sm. 326. See *Glynn* v. *Locke*, 3 Dr. & War. 11 ; *Ford* v. *Ryan*, 4 Ir. Ch. Rep. 342. In *Cox* v. *Cox*, 1 K. & J. 251, Vice-Chancellor Wood held, that a power of signing receipts was by no means one inserted as of course in legal instruments, but often excluded, and when excluded, was never implied, except under very special circumstances. The question in that case arose upon the construction of a will which gave to the tenant for life the like powers of selling and exchanging as were contained in a settlement referred to, and in which were not only powers of sale and exchange, but also a power of signing receipts, and the Vice-Chancellor was of opinion that the powers of sale and exchange only, without the power of signing receipts, were incorporated by reference.

transaction for the purchase was carrying on, and therefore the testator must be supposed to place his sole confidence in the trustees, and this is the settled practice in these cases, and I have often advised so much, and no more, to be done." And in this opinion Mr. Wilbraham also concurred (*a*).

Trust to pay debts.

7. To the principle under consideration is referable the well-known rule, that a purchaser is not bound to see to the application of his money where the trust is for payment of *debts generally;* for to ascertain who are the creditors, and what is the amount of their respective claims, is matter of trust involving long and intricate accounts, and requiring the production of vouchers which the purchaser would have no right to require (*b*). And mere absence of statement of the purpose for which the money is wanted will not make a purchaser or mortgagee liable on the ground of presumed knowledge that the money was to be applied otherwise than for payment of debts (*c*). So if the trust be for payment of a *particular* debt named, and of the testator's *other* debts (*d*). So if the trust be for payment of debts and *legacies*, the purchaser is equally protected; for as the discharge of the debts must precede that of the legacies, and the purchaser is not called upon to mix himself up with the settlement of the debts, he is necessarily absolved from all liabilities in respect of the legacies (*e*).

Scheduled debts or legacies.

8. But if the trust be for payment of *particular* or *scheduled*

(*a*) 2 Cas. and Op. 114.

(*b*) *Forbes* v. *Peacock*, 11 Sim. 152; and see *S. C.* 12 Sim. 528; 1 Ph. 717; *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; *Corser* v. *Cartwright*, 7 L. R. H. L. 731; *Dowling* v. *Hudson*, 17 Beav. 248; *Culpepper* v. *Aston*, 2 Ch. Ca. 223; *Watkins* v. *Cheek*, 2 S. & S. 205, *per* Sir J. Leach; *Anon.* Mos. 96; *Hardwick* v. *Mynd*, 1 Anst. 109; *Johnson* v. *Kennett*, 3 M. & K. 630, *per* Lord Lyndhurst; *Rogers* v. *Skillicorne*, Amb. 189, *per* Lord Hardwicke; *Walker* v. *Smalwood*, Id. 677, *per* Lord Camden; *Barker* v. *Duke of Devonshire*, 3 Mer. 310; *Abbot* v. *Gibbs*, 1 Eq. Ca. Ab. 358; *Binks* v. *Rokeby*, 2 Mad. 238, *per* Sir T. Plumer; *Dunch* v. *Kent*, 1 Vern. 260, admitted; *Elliot* v. *Merryman*, Barn. 78; *Smith* v. *Guyon*, 1 B. C. C. 186, and cases cited Ib. note; *Ithell* v. *Beane*, 1 Ves. 215; *per* Lord Hardwicke; *Lloyd* v. *Baldwin*, Ib. 173, *per eundem*; *Dolton* v. *Hewen*, 6 Mad. 9; *Ex parte Turner*, 9 Mod. 418, *per* Lord Hardwicke; *Gosling* v. *Carter*, 1 Coll. 644; *Eland* v. *Eland*, 1 Beav. 235; *S. C.* 4 M. & Cr. 420; *Jones* v. *Price*, 11 Sim. 557: *Currer* v. *Walkley*, 2 Dick. 649, corrected from Reg. Lib. Sugd. Vend. & Purch. 168, 10th ed.

(*c*) *Corser* v. *Cartwright*, 7 L. R. H. L. 731.

(*d*) *Robinson* v. *Lowater*, 17 Beav. 592; 5 De G. M. & G. 272.

(*e*) *Rogers* v. *Skillicorne*, Amb. 188; *Smith* v. *Guyon*, 1 B. C. C. 186; *Jebb* v. *Abbott*, and *Beynon* v. *Gollins*, cited Co. Lit. 290 b, note by Butler; *Williamson* v. *Curtis*, 3 B. C. C. 96; *Johnson* v. *Kennett*, 3 M. & K. 630; *per* Lord Lyndhurst; 6 Ves. 654, note (*a*); *Watkins* v. *Cheek*, 2 S. & S. 205, *per* Sir J. Leach; *Eland* v. *Eland*, 1 Beav. 235; *S. C.* 4 M. & Cr. 420; *Page* v. *Adams*, 4 Beav. 269. *Forbes* v. *Peacock*, 12 Sim. 528; 1 Ph. 717.

debts only (*a*), or of *legacies only* (*b*), then, as there is no trust to be executed requiring time or discretion, but the purchase-money is simply to be distributed amongst certain parties, there is no reason why the purchaser should not, under the general rule, be expected to see that the purchase-money finds its way into the proper channel. And the purchaser, where legacies only were charged, continued to be bound to see to the application of his money, though by 3 & 4 W. 4. c. 104, the real estate of all persons deceased since the 29th of August, 1833, was rendered liable, in the hands of the heir or devisee, to the payment of debts generally, whether by specialty or simple contract (*c*).

3 & 4 Wm. 4. c. 104.

Where, notwithstanding a charge of debts, the purchaser must see to the application of his money.

9. And even where the estate is subjected by the testator to a trust for payment of debts generally, the purchaser will not be indemnified by the receipt of the trustee if there be any collusion between them (*d*); or if the purchaser have notice from the intrinsic evidence of the transaction that the purchase-money is intended to be misapplied (*e*); or if a suit has been instituted which takes the administration of the estate out of the hands of the trustees (*f*); and these doctrines, it is conceived, are not affected by the clauses in Lord St. Leonards' and Lord Cranworth's Acts, [and the late Conveyancing Act] which apply only to *bonâ fide* payments.

Purchase from trustees after a length of time.

10. And if the purchaser is dealing with trustees at a great distance of time, and when the trust ought long since to have been executed, the purchaser is bound to enquire and satisfy himself to a fair and reasonable extent, that the trustees are acting in the discharge of their duty (*g*). In *Sabin* v. *Heape*, where *twenty-seven* years had elapsed, and the beneficiaries sub-

(*a*) *Doran* v. *Wiltshire*, 3 Sw. 701, *per* Lord Thurlow; *Smith* v. *Guyon*, 1 B. C. C. 186, *per eundem*, and cases cited, Ib. note; *Rogers* v. *Skillicorne*, Amb. 189, *per* Lord Hardwicke; *Humble* v. *Bill*, 1 Eq. Ca. Ab. 359, *per* Sir N. Wright; *Anon.* Mos. 96; *Spalding* v. *Shalmer*, 1 Vern. 303, *per* Lord North; *Abbot* v. *Gibbs*, 1 Eq. Ca. Ab. 358; *Elliot* v. *Merryman*, Barn. 81, *per* Sir J. Jekyll; *Binks* v. *Rokeby*, 2 Mad. 238, *per* Sir T. Plumer; *Ithell* v. *Beane*, 1 Ves. 215, *per* Lord Hardwicke; *Lloyd* v. *Baldwin*, 1 Ves. 173, *per eundem*; and see *Dunch* v. *Kent*, 1 Vern. 260; *Culpepper* v. *Aston*, 2 Ch. Ca. 223.

(*b*) *Johnson* v. *Kennett*, 3 M. & K. 930; *Horn* v. *Horn*, 2 S. & S. 448.

(*c*) *Horn* v. *Horn*, 2 S. & S. 448.

(*d*) *Rogers* v. *Skillicorne*, Amb. 189, *per* Lord Hardwicke; *Eland* v. *Eland*, 4 M. & Cr. 427, *per* Lord Cottenham.

(*e*) *Watkins* v. *Cheek*, 2 S. & S. 199; *Eland* v. *Eland*, 4 M. & Cr. 427, *per* Lord Cottenham; *Burt* v. *Trueman*, 6 Jur. N. S. 721; and see *Stroughill* v. *Anstey*, 1 De G. M. & G. 648; *Colyer* v. *Finch*, 5 H. L. Ca. 923.

(*f*) *Lloyd* v. *Baldwin*, 1 Ves. 173.

(*g*) *Stroughill* v. *Anstey*, 1 De G. M. & G. 654, *per* Lord St. Leonards; and see *Forbes* v. *Peacock*, 11 Sim. 502; 12 Sim. 528; 11 M. & W. 637; 1 Ph. 717; *Devaynes* v. *Robinson*, 24 Beav. 93; *Sabin* v. *Heape*, 27 Beav. 553; *McNeillie* v. *Acton*, 2 Eq. Rep. 21.

ject to the charge had been let into possession, and the purchaser asked if there were any debts and the vendors declined to answer, it was held that the vendors could make a good title (*a*), and Lord Romilly observed that he had known so many cases where after distribution of the assets, debts had appeared which did not exist at the death of the testator, but which arose subsequently out of obligations entered into by him, that a very liberal term ought to be allowed for the exercise of the power of sale (*b*). [The Court of Appeal has, however, recently expressed an opinion that twenty-seven years is too long a period, and laid down the rule that for a period of twenty years from the testator's death a purchaser should not be bound or entitled to ascertain whether the debts were paid, but that after the lapse of that period it is fair to presume that the debts have been paid and the purchaser is bound to enquire (*c*), and this rule has been followed in Ireland (*d*).]

Power of signing receipts a question of intention at the date of the instrument.

11. As the exemption of the purchaser from seeing to the application of the purchase-money depends as a general rule upon the settlor's *intention*, the question must be viewed with reference to the date of the instrument, and not as affected by circumstances which have subsequently transpired (*e*). Thus, if a trust be created for payment of debts and legacies, and the trustees, after full payment of the debts, contract for the sale of the estate, the purchaser will not, upon this principle, be bound to see to the application of the money in payment of the legacies (*f*).

Forbes *v.* Peacock.

12. In *Forbes* v. *Peacock* (*g*), a testator directed his *debts to be paid*, and gave the estate to his wife (whom he appointed his executrix) for life, subject to his debts and certain legacies, and *empowered* her to sell the estate in her lifetime, and *directed* that if it were not sold in her lifetime, it should be *sold at her death* and the proceeds applied in a manner showing that they were intended to pass through the hands of the *executors*, and the testator requested certain persons to act as executors and *trustees* with his wife. The widow lived twenty-five years, and after her

(*a*) 27 Beav. 553.

(*b*) Ib. 560.

[(*c*) *Re Tanqueray-Willaume and Landau*, 20 Ch. Div. 465.]

[(*d*) *Re Molyneux and White*, 13 L. R. Ir. 382; *Re Ryan and Cavanagh's Contract*, 17 L. R. Ir. 42.]

(*e*) See *Balfour* v. *Welland*, 16 Ves. 156; *Johnson* v. *Kennett*, 3 M. & K. 631; *Eland* v. *Eland*, 4 M. & Cr. 428.

(*f*) *Johnson* v. *Kennett*, 3 M. & K. 624, reversing *S. C.* 6 Sim. 384; *Eland* v. *Eland*, 4 M. & Cr. 420; *Page* v. *Adam*, 4 Beav. 269; *Stroughill* v. *Anstey*, 1 De G. M. & G. 635.

(*g*) 11 Sim. 152; 12 Sim. 528; 11 M. & W. 637; 1 Ph. 717; see *Stroughill* v. *Anstey*, 1 De G. M. & G. 650.

death the surviving executor contracted for the sale of the estate. The Vice-Chancellor of England held that, after so long a lapse of time from the testator's death, the purchaser had a right to ask if the debts had been paid, and if he received no answer, it amounted to notice that they had been paid, and he must see to the application of his purchase-money. The V. C. observed, "When the objection is made by the purchaser that the executors cannot make a good title because all the debts have been paid, *if the question is put by him simply, are there or are there not any debts remaining unpaid, he has a right to an answer*" (*a*). And on a subsequent day he observed, "Here the purchaser has asked the executor whether any of the testator's debts were unpaid at the date of the contract, *and the executor refused to give him an answer*. Under these circumstances, if it should turn out that all the debts were paid, I should hold that the purchaser had notice of that fact, and that he was bound to see that his purchase-money was properly applied" (*b*).

It is evident that this doctrine was not in accordance with former decisions, and the cause was carried on appeal to the Lord Chancellor, when the decision below was reversed (*c*). Lord Lyndhurst said, "If the purchaser had notice that the vendor intended to commit a breach of trust, and was selling the estate for that purpose, he would, by purchasing under such circumstances, be concurring in the breach of trust, and thereby become responsible. But assuming that the facts relied upon in this case amount to notice that the debts had been paid; yet, as the executor had authority to sell not only for the payment of debts but also for the purpose of distribution among the residuary legatees, this would not afford any inference that the executor

(*a*) 12 Sim. 537; see *Sabin* v. *Heape*, 27 Beav. 553. In the case of *A. Solomon*, vendor, and *F. Davey*, purchaser, under the 9th section of 37 & 38 Vict. c. 78, V. C. Hall decided that the vendor was bound to answer the purchaser's enquiry "whether the vendor is or her solicitors are aware of any judgments, settlements, mortgages, charges, or incumbrances of any description affecting the property not disclosed by the abstract of the vendor's title." But the V. C. added that he "must not be considered as altogether approving of the requisition being made in the form above-mentioned. The answer might lead to the disclosure of what the purchaser would rather not know. The requisition should, he thought, be added to, thus, 'and which if remaining undisclosed might prejudicially affect the purchaser,'" March, 1875. [But this view has since been overruled by the Court of Appeal in the case of *Re Ford and Hill*, 10 Ch. Div. 365, where it was held that the purchaser was not entitled to make any such requisition at all.]

(*b*) 12 Sim. 542.

(*c*) 1 Ph. 717; see *Stroughill* v. *Anstey*, 1 De G. M. & G. 653; *Mather* v. *Norton*, 16 Jur. 309; [*Re Tanqueray-Willaume and Landau*, 20 Ch. Div. 465.]

was committing a breach of trust in selling the estate, or that he was not performing what his duty required. The case then comes to this: If authority is given to sell for the payment of debts and legacies, and the purchaser *knows that the debts are paid*, is he bound to see to the application of the purchase-money? I apprehend not."

Lord St. Leonards, with reference to the same important case, observed, "When a testator by his will charges his debts and legacies, he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is, by implication, a declaration by the testator that he intends to entrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee. *That intention does not cease because there are no debts.* If a trust be created for payment of debts and legacies, the purchaser or mortgagee should in no case (in the absence of fraud), be bound to see to the application of the money raised." And his Lordship added, "as to *Forbes* v. *Peacock*, it is quite a mistake to suppose that that was a trust executed at a distance of twenty-five years from the time when it arose, for it was executed at the time when it did arise, which happened to be twenty-five years after the death of the testator" (*a*).

Power of varying securities, and of investment.

13. If a trustee have authority to invest the trust fund with a power of *varying securities*, but without an express power of signing receipts, it is implied from the nature of the trust that he shall sign receipts (*b*); and if he be authorised to *invest on security* simply without power of varying securities he can sign receipts, for he cannot prevent the borrower from paying off the money, and who but the trustee can receive it back (*c*). Indeed a power of *investment* has been held to carry with it a power of *varying the securities* (*d*). Where, however, the trustee was directed to invest upon *security*, but *real security* was not mentioned, and he lent upon a *mortgage*, the Court did not think it so clear that the trustee could sign a receipt when the money was paid off as to compel a purchaser to take a title which depended on that question (*e*). The power of signing a receipt

(*a*) *Stroughill* v. *Anstey*, 1 De G. M. & G. 653, 654.

(*b*) *Locke* v. *Lomas*, 5 De G. & Sm. 326.

(*c*) *Wood* v. *Harman*, 5 Mad. 368.

(*d*) *Re Cooper's Trust*, W. N. 1873, p. 87.

(*e*) *Hanson* v. *Beverley*, Sugd. Vend. & Purch. 848, 11th edit.

in such cases turns on the intention as collected from the instrument, and unless it contain authority to lend on a *mortgage* no power of signing a receipt when the mortgage money is paid off is implied.

Power of sale and exchange.

14. A power of signing receipts was held not to be implied in a power of sale and exchange (*a*). But in that case it was a mere power of sale and exchange, and not the ordinary power inserted in settlements, accompanied with directions for laying out on another purchase with interim investment on securities.

Charge of debts.

15. The case in which a testator, instead of devising the estate upon an *express trust* for payment of debts, creates a *charge* of debts upon his real estate, seems to require particular examination. It might have been a simple and useful rule to hold under such circumstances that the executor, and the executor only, as the person who has administration of the *personal* assets, should, by virtue of an implied power, sell the real estate for payment of the debts; but no such rule ever existed, and we proceed, therefore, to ascertain, as far as we can, by what principle the Court is guided.

Devise to trustees with a charge of debts.

a. If a testator *charge* his real estate with debts, and then *devises it to trustees* upon certain trusts, which do not provide for a sale or perhaps even negative the intention of conferring a power of sale, can the *trustees* give a good title to a purchaser? It is clear that [subject to the restrictions arising under the Settled Land Act, 1882, which will be subsequently discussed (*b*),] the trustees and the executor together can sell (*c*), and the question is, upon what principle this proceeds. Is the *executor* the vendor, and if so, has he a *legal* power which enables him to pass the estate at law independently of the trustee? V. C. (late L. J.) Knight Bruce seemed, on one occasion, to think that the cases of *Shaw* v. *Borrer* and *Ball* v. *Harris* might have been decided on this footing (*d*), and some recent cases lean in the

(*a*) *Cox* v. *Cox*, 1 K. & J. 251.

[(*b*) *Post*, p. 520.]

(*c*) *Shaw* v. *Borrer*, 1 Keen, 559; *Ball* v. *Harris*, 8 Sim. 485; *S. C.* 4 M. & Cr. 264; *Page* v. *Adams*, 4 Beav. 269; and see *Forbes* v. *Peacock*, 11 Sim. 152; 12 Sim. 528; 11 M. & W. 630; 1 Ph. 717; *Sabin* v. *Heape*, 27 Beav. 553; *Corser* v. *Cartwright*, 7 L. R. H. L. 731. In *Shaw* v. *Borrer*, the trustees and executors were co-plaintiffs, and the prayer of the bill was, that the purchase-money might be paid to the executors. This, if done by the order of the Court, would indemnify the trustees; but it did not follow that the trustees, on the completion of the sale *out of Court*, could have allowed the executors to receive the money. The question to whom the money should be paid was not adverted to in the argument, nor does it appear to whom it was paid.

(*d*) *Gosling* v. *Carter*, 1 Coll. 649.

same direction (*a*). But the notion of the executor passing the legal estate in such a case was never suggested until the last few years, and what was said by the Court of Exchequer in *Doe* v. *Hughes* was at least true at the time it was spoken, viz., that not a single case could be produced in which a mere charge had been held to give the executors a legal power (*b*). Have the executors then an *equitable* power, and is the trustee who has the legal estate bound to convey it as the executor directs? This doctrine would be a very rational one, but there is no trace of it in the cases themselves. Apparently they were decided on the familiar principle that in a Court of Equity there is no difference between a charge of debts and a trust for payment of debts (*c*), and that the trustees therefore took the legal estate upon the trusts of the will, the first of which was to pay the testator's debts. It is certainly not a little remarkable that after an examination of all the authorities upon the subject, there does not appear to be one in which the trustee has sold alone, without the concurrence of the executor. This circumstance may be easily accounted for, as trustees of the will are almost invariably appointed executors also, and where that is not the case, the purchaser naturally requires the concurrence of the executor, not on the ground that he is the vendor, but to satisfy the purchaser that the sale of the real estate is *bonâ fide* from the insufficiency of the personal assets. In some of the cases the Court has noticed, but not laid any stress upon, the circumstance of the personal representative concurring (*d*), or of the characters of trustee and personal representative being combined; but in others that fact has been passed over in silence

(*a*) See *Robinson* v. *Lowater*, 17 Beav. 592; 5 De G. M. & G. 272; *Eidsforth* v. *Armstead*, 2 K. & J. 333; *Wrigley* v. *Sykes*, 21 Beav. 337; *Storry* v. *Walsh*, 18 Beav. 568; *Colyer* v. *Finch*, 5 H. L. Ca. 905; *Hodkinson* v. *Quinn*, 1 J. & H. 310; *Greetham* v. *Colton*, 34 Beav. 615.

(*b*) *Doe* v. *Hughes*, 6 Exch. 231. [See *Re Tanqueray-Willaume and Landau*, 20 Ch. Div. 476, where it was regarded as settled law, that a charge alone would not enable the executors to pass the legal estate.]

(*c*) *Elliott* v. *Merryman*, Barn. 81; *Ex parte Turner*, 9 Mod. 418; *Jenkins* v. *Hiles*, 6 Ves. 654, note (*a*); *Bailey* v. *Ekins*, 7 Ves. 323; *Ball* v. *Harris*, 4 M. & Cr. 267; *Wood* v. *White*, 4 M. & Cr. 482; *Commissioners of Donations* v. *Wybrants*, 2 Jon. & Lat. 197.

(*d*) See *Shaw* v. *Borrer*, 1 Keen, 559; *Forbes* v. *Peacock*, 12 Sim. 537; and see V. C. Knight Bruce's remarks upon *Shaw* v. *Borrer*, and *Ball* v. *Harris*, in *Gosling* v. *Carter*, 1 Coll. 649. But in *Ball* v. *Harris*, the V. C. of England observed, "It is manifest that *Harris* (the trustee), who had the legal fee was competent to mortgage that estate to any person who would advance money for the benefit of the testator's estate," 8 Sim. 497; and it is equally clear that Lord Cottenham was of opinion that *Harris* was a trustee for payment of debts, 4 M. & Cr. 267.

as a mere accident, and the Court has relied on the general doctrine that a trustee of the estate charged with debts could sell and sign a valid discharge for the purchase-money (*a*). In *Doe* v. *Hughes* (*b*), the case most adverse to the powers arising from a charge of debts, it was admitted that by a devise to *trustees* of the real estate, subject to a charge of debts, the trustees had thereby imposed upon them the duty of raising the money to pay the debts, and this was the opinion of Lord Hardwicke, as expressed in a case which we do not remember to have seen cited. In *Ex parte Turner* (*c*), where the estate had been given subject to debts, but no express trust was created for the purpose, he observed, "Where a devise is general 'in trust' or 'subject to pay debts,' the *devisee* may sell or mortgage, but *he* must pay the money to the creditors of his devisor; but if he do not, the mortgagee is not to suffer, for in cases of these general devises he is not obliged to see to the application of the money he advances. But even in this case inconveniences often arise, for where the estate is equitable assets, as it is where it is accompanied with a trust, the creditors who have not specific liens upon the land ought to come in equally, and *pari passu*. However, if the *trustee* prefer one creditor to another, where he ought not, the remedy usually is against the trustee, and not the lender of the money, for if the latter was to see to the application of his money upon so general a trust, he could not safely advance his money without a decree in this Court."

If the trustees of an estate charged with debts can, by virtue not of the express trust but of the trust implied by the charge, sell the estate, and sign a receipt for the purchase-money, it would seem to follow that they cannot allow the proceeds to be paid to the *executor* as not being the proper hand to receive (*d*), the executor in that character having no privity with the real estate. The necessity of requiring the concurrence of the personal representative would often lead to practical inconvenience, for on the death of the executor intestate there would be no personal representative of the testator, and the personal assets having been exhausted, there would be no fund for taking out letters of administration; not to mention that, should the executor be held to

(*a*) See *Ball* v. *Harris*, at the passages referred to in the preceding note; *Forbes* v. *Peacock*, 12 Sim. 546.

(*b*) 6 Exch. 231.

(*c*) 9 Mod. 418; and see *Colyer* v. *Finch*, 5 H. L. Cas. 922.

(*d*) See *Gosling* v. *Carter*, 1 Coll. 650, where V. C. Knight Bruce says, "If payment ought to be made to one, it is not, necessarily, a good payment to make that payment to one and another."

have any concern with the proceeds of the real estate, by virtue of the *will*, the administrator, not being appointed by the will, would not succeed to the power of the executor, which should be borne in mind as of some importance in considering whether the sale is substantially that of the executor or of the trustee who takes subject to the charge.

Should the neat point ever call for a decision, it will probably be held that the trustee, without the concurrence of the executor, can give a good title (*a*).

Lord St. Leonards' Act.

By Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 14) where by a will coming into operation after 13th August, 1859, a testator charges real estate with the payment of *debts*, or any *specific legacy or sum*, and devises the estate so charged to *trustees* for the whole of his estate or interest, and makes no *express* provision for raising the debts, legacy, or sum, the *devisees in trust* may sell or mortgage; and by s. 15, the power is continued to all persons taking the estate so charged by survivorship, descent (*b*), or devise; and by s. 17, purchasers and mortgagees are not bound to enquire whether such powers "have been duly and correctly exercised by the person or persons acting in virtue thereof." Where *debts* are charged, of course a purchaser or mortgagee under these powers is not bound to see to the application of his money, and where a *specific legacy* or *sum* is charged, if the above enactments do not *per se* confer a power of signing receipts, the purchaser or mortgagee is exempted from seeing to the application by the 23rd section of the same Act (*c*).

The 18th section declares that the Act shall "not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest, charged with debts or legacies, nor shall it affect the power of any such devisee or devisees to sell or mortgage *as he or they may by law now do*." To make this section consistent with the 14th, the "devise" referred to in the 18th section must mean a *beneficial devise*, and "devisee or devisees" a *beneficial devisee* or *devisees*, and the inference would seem to be that, in the view of the framer of the Act, no legislative assistance was needed in the case of a beneficial devise subject to

(*a*) The recent case of *Hodkinson* v. *Quinn*, 1 J. & H. 303, when closely considered, will be found to afford little aid towards solving this question; and see *Cook* v. *Dawson*, 29 Beav. 126; 3 De G. F. & J. 127.

[(*b*) And sec. 30 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), seems to extend this to the legal personal representatives of a sole surviving trustee.]

[(*c*) See also 44 & 45 Vict. c. 41, s. 36.]

a charge. Indeed the concluding words of the section seem almost tantamount to a declaration of the legislature that beneficial devisees subject to a charge have power to sell or mortgage, which is the case we next proceed to consider (*a*).

Devise to a person beneficially with a charge of debts.

β. If a testator charge his debts and devise the estate subject to the charge to *A. and his heirs* not upon trust but *for his own use*, can the beneficiary in this case make a good title? The answer to the question last discussed is an answer also to this, for if where the express trust negatives the intention of conferring a power to sell the trustee can still make a good title, it is evident that he can only do so by virtue of the charge. Any distinction between the two cases would be in favour of the beneficial devisee, for if the trustee in defiance of the express trust can sell, *à fortiori* the devisee can, who is fettered by no such restriction. In both instances the charge operates as a trust for payment of debts, and is attended with all the same consequences. "A charge," said Lord Eldon, "is in substance and effect *pro tanto* a devise of the estate upon trust to pay the debts" (*b*), and "this," observed Lord St. Leonards, on citing the dictum, "is supported by the current of authorities" (*c*). It is clear that the devisee can, where he also fills the character of executor, make a good title (*d*), and in some of the cases the Court did not in terms rely on the characters being combined (*e*), but it is singular that no authority can be found in which the question whether the devisee alone can make a good title has arisen.

In the Court of Exchequer (*f*) it was said that in a devise to *trustees*, subject to a charge of debts, the trustees could sell; but that a charge in the hands of a *devisee* if the lands were devised, or in the hands of the *heir-at-law* if the lands descended, was a charge only in equity. The Court was there considering, more particularly, the question of *legal* powers; but if it was intended to be said that a devisee, subject to a charge, could not sell and sign a receipt for the money, the doctrine is inconsistent with the nature of a charge of debts in equity as commonly understood.

[(*a*) See *In re Wilson*, 34 W. R. 512; 54 L. T. N.S. 600.]

(*b*) *Bailey* v. *Ekins*, 7 Ves. 323.

(*c*) *Commissioners of Donations* v. *Wybrants*, 2 Jon. & Lat. 198.

(*d*) *Elton* v. *Harrison*, 2 Sw. 276, note; *Elliot* v. *Merryman*, Barn. 78; *Dolton* v. *Young*, 6 Madd. 9; *Johnson* v. *Kennett*, 6 Sim. 384; 3 M. & K. 624; *Eland* v. *Eland*, 1 Beav. 235, 4 M. & Cr. 420; *Page* v. *Adam*, 4 Beav. 269; *Corser* v. *Cartwright*, 8 L. R. Ch. App. 971; affirmed by H. L., 7 L. R. H. L. 731.

(*e*) *Elliot* v. *Merryman*, *Dolton* v. *Young*, *Johnson* v. *Kennett*, *Eland* v. *Eland*, *ubi supra*; *Colyer* v. *Finch*, 5 H. L. Ca. 905, 922.

(*f*) *Doe* v. *Hughes*, 6 Exch. 231.

The prevalent opinion hitherto is believed to have been that a devisee subject to debts can sign a receipt for the purchase money (*a*), and the cases in which the Court has upheld purchases from a devisee with the concurrence of the executor but without relying upon such concurrence, would be a trap for purchasers should the Court now refuse to uphold a purchase from a devisee only. Considering the declaratory words contained at the end of the 18th section of Lord St. Leonards' Act, it may now, it is conceived, be safely assumed that a purchaser from a devisee subject to a charge of debts, will without the concurrence of the executor acquire a good title.

Charge of debts where there is no devise of the estate.

γ. If a testator charge his debts on the real estate, and *does not devise the estate at all*, but allows it to descend to the *heir*, can the heir sell and sign a receipt for the purchase-money? It appears to be clear that he cannot, for he takes nothing under the will, and cannot therefore be regarded as a person constituted by the testator a trustee by implication for payment of debts (*b*); he can pass the legal estate, but he could not sign the receipt; *i.e.* if the heir misapplied the money the creditors might still come upon the estate.

Whether executor can sell in such a case.

But in this case, if the heir is disabled from selling can the *executor* sell (*i.e.* independently of Lord St. Leonards' Act, to be mentioned presently), for otherwise the charge of debts amounts to a direction for a Chancery suit? (*c*). The legal question arose in *Doe* v. *Hughes* (*d*) before the Court of Exchequer, and the Court held that *a charge had no operation at law but must be enforced in equity*. This decision has been found much fault with. The Master of the Rolls said that before the case in the Exchequer he had considered the law to be that a charge of debts gave the *executors* an implied power of sale (*e*); for otherwise, it is argued, in the case of a charge where the estate descends, there can be no sale without the aid of the Court. But this does not appear to follow. If a testator *expressly direct that his estate*

(*a*) See the cases cited in note (*c*), p. 511, *supra*.

(*b*) See *Gosling* v. *Carter*, 1 Coll. 650 (where the V. C. said that the intention to be collected was, that the heir-at-law should have nothing to do with it); *Robson* v. *Flight*, 34 Beav. 110, 5 N. R. 344; *S. C.* on appeal, 4 De G. J. & S. 608; *Doe* v. *Hughes*, 6 Exch. 231; *Forbes* v. *Peacock*, 11 M. & W. 637, 638.

(*c*) See *Robinson* v. *Lowater*, 5 De G. M. & G. 275.

(*d*) 6 Exch. 223.

(*e*) *Robinson* v. *Lowater*, 17 Beav. 601; and see *Wrigley* v. *Sykes*, 21 Beav. 337; *Storry* v. *Walsh*, 18 Beav. 568; *Sabin* v. *Heape*, 27 Beav. 553; *Hodkinson* v. *Quinn*, 1 J. & H. 309; *Cook* v. *Dawson*, 29 Beav. 123; 3 De G. F. & J. 127; *Greetham* v. *Colton*, 34 Beav. 615; *Hamilton* v. *Buckmaster*, 12 Jur. N. S. 986.

shall be sold (without naming the person), and the fund is to be distributed in a way in which the executors alone can distribute it, a power of sale is given to the executors by implication over the legal estate even in Courts of law (*a*). By analogy to this, where there is no direction to sell, but only a charge of debts, this last, though an *umbra* in a Court of law, creates an *equitable* power of sale or mortgage in the view of a Court of Equity—*i.e.* the executor may contract for the sale, and on the acceptance of the title by the purchaser, the person in whom the legal estate is vested will, as being a trustee for the executor, be compellable to convey as the executor directs, and if he refuses, the legal estate may be vested in the purchaser by the aid of the Trustee Acts (*b*). In *Gosling* v. *Carter* (*c*), Vice-Chancellor Knight Bruce declined to give an opinion whether a mere charge of debts gave to the executors a power of sale either at law or in equity, but would not compel a purchaser to take the title from the executor without the concurrence of the heir-at-law. In *Robinson* v. *Lowater* (*d*) the legal estate was already in the purchaser, so that the legal question did not arise, but it was held that the executors had given the purchaser a good title. In *Eidsforth* v. *Armstead* (*e*), Vice-Chancellor Wood professed to follow *Robinson* v. *Lowater*, and held the power of sale to be, according to the report, in the *trustees*, which, however, appears to be a mistake for the *executors*. The surviving trustee had devised the trust estate, and the devisee therefore could not sell, but the surviving trustee was also surviving *executor*, and appointed the devisee his *executor*, and in the character of *executor* the devisee might be thought to represent the original testator, though it seems the better opinion that even then the power of sale would not pass to him (*f*). In *Wrigley* v. *Sykes* (*g*), the Master of the Rolls decided that the executors could contract for

(*a*) *Forbes* v. *Peacock*, 11 M. & W. 630; *Tylden* v. *Hyde*, 2 S. & S. 238; *Bentham* v. *Wiltshire*, 4 Madd. 44.

(*b*) See *Re Wise*, 5 De G. & Sm. 415; *Hodkinson* v. *Quinn*, 1 J. & H. 303.

(*c*) 1 Coll. 650, 652.

(*d*) 17 Beav. 592; 5 De G. M. & G. 272; and see *Storry* v. *Walsh*, 18 Beav. 568.

(*e*) 2 K. & J. 333. It does not appear how the purchaser had got or was to get the legal estate, whether from the executor, as having a legal power, or from the trustee, on the construction that the legal fee simple vested in the trustee under the will, or from the trustee, as having the legal estate during the life of H. Toulmin, with the concurrence of H. Toulmin, as having the legal estate in remainder, so as to extinguish his power of appointing by will. The case loses much of its force from the amicable manner in which the point was submitted to the Court.

(*f*) See Sugd. Powers, 129, 8th ed.

(*g*) 21 Beav. 337; and see *Colyer* v.

the sale of the estate, but guarded himself by saying that the Court, as far as it could, would certainly secure to the purchaser a good legal estate when the conveyance was made. It is conceived that *Doe* v. *Hughes* was a perfectly sound decision upon the legal question, but that the executors have an *equitable power of sale*, and consequently that the holder of the legal estate is a trustee for them (*a*).

[As the power of sale is implied because the executors are appointed by the testator to pay his debts, there has never been any such implication in the case of an administrator who is not appointed by the testator, but is the officer of the Probate Court (*b*).] [Power of sale not implied in administrator.]

By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 16, as to wills taking effect since 13th August, 1859, where a testator *charges* his debts or any *legacy* or *specific sum*, and has *not devised* the hereditaments so charged "in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees," the *executor* for the time being may sell or mortgage (*c*); and by the 23rd section, the purchaser or mortgagee is not bound to see to the application of the money, and it would seem that the executor is thus empowered to pass the *legal* as well as the *equitable* estate, for the clause proceeds that "any sale or mortgage under the Act shall operate only on the estate and interest, whether *legal* or equitable, of the testator, and shall not render it unnecessary to get in any *outstanding* subsisting legal estate." It must not escape notice that the power of sale is confined to the *executor*, the person to whom the testator himself trusted, and is not extended to an *administrator* (*d*). Lord St. Leonards' Act. Power of executor to sell and pass legal estate.

8. Should a testator charge his debts on the real estate, and then devise the estate to A. and his heirs beneficially, and the *devisee dies in the testator's lifetime*, so that the estate descends, can the heir in this case sell and sign receipt? If the heir cannot sell where the estate was never devised, but left to descend, *à fortiori* he cannot in this case, for here not only the Charge of debts where the estate lapses.

Finch, 5 H. L. Cas. 922; *Cook* v. *Dawson*, 29 Beav. 123; *Greetham* v. *Colton*, 34 Beav. 615.

[(*a*) See *Tanqueray-Willaume and Landau*, 20 Ch. Div. 465.]

[(*b*) *Re Clay and Tetley*, 16 Ch. Div. 3.]

[(*c*) Where one executor has renounced probate, the acting executors or executor for the time being may exercise the powers of this section, notwithstanding the will contains an express direction that the property shall be sold by the executors, *Re Fisher and Haslett*, 13 L. R. Ir. 546.]

[(*d*) *Re Clay and Tetley*, 16 Ch. Div. 3.]

heir is not invested with the character of trustee under the will, but the estate, subject to the charge, was devised to another person, who was therefore intended to execute the implied trust. The machinery contemplated by the testator failed by the act of God, and no alternative remains but that the trusts should be executed by the Court (*a*). It is presumed that under these circumstances it could not be held that the executors have by the will even an *equitable* power of sale. The devisee, had he lived, would have been the proper person to execute the trust, and a power of sale cannot belong to the executors, as the testator could not be taken to have contemplated his own intestacy as to real estate.

Lord St. Leonards' Act.

However, by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, ss. 16 & 23, as to wills coming into operation since 13th August, 1859, the executor may sell or mortgage and sign a receipt for the money.

Charge of debts where the estate is subjected to various limitations.

ε. Suppose a testator to charge his debts, and to devise the estate to *A. for life, with contingent remainders or other limitations*, which render it impossible that the implied power of sale can be executed by the devisees. This has occurred in several cases (*b*), and the result appears to be that the Court, if it can possibly avoid it, will not construe the charge as a direction for a Chancery suit, but will assume that a power of sale for payment of the debts was given to some one, and that as it was not given to the devisees it must have been intended for the executors. In such a case the executors must be considered as having an *equitable* power of sale. The case in the Exchequer (*c*) directly decided that the executors have no power themselves to pass the *legal* estate. Where, in the case supposed, the executors take an implied equitable power of sale upon the face of the will, it is immaterial whether the devised estates do or not lapse, except

(*a*) But see *Hardwick* v. *Mynd*, 1 Anst. 109; *Austin* v. *Martin*, 29 Beav. 523. The latter case may possibly be supported on the ground that the mortgagee, who had a power of sale and of signing receipts, was a party to the conveyance; but the reasoning of M.R., if correctly reported, is not satisfactory. How can it be said, for instance, that "the whole of the beneficial interest was vested in T. F. Stephens either in his character of heir-at-law or in his character of *legal personal representative*"? What beneficial interest in a testator's *freehold* estate can vest in his *personal representative*?

(*b*) *Gosling* v. *Carter*, 1 Coll. 644; *Eidsforth* v. *Armstead*, 2 K. & J. 333; *Wrigley* v. *Sykes*, 21 Beav. 337; *Bolton* v. *Stannard*, 4 Jur. N. S. 576; and see *Robinson* v. *Lowater*, 17 Beav. 592; 5 De G. M. & G. 272; *Sabin* v. *Heape*, 27 Beav. 553; *Greetham* v. *Colton*, 34 Beav. 615; *Hooper* v. *Strutton*, 12 W. R. 367.

(*c*) *Doe* v. *Hughes*, 6 Exch. 223.

that the legal estate will, as the event happens, be in the devisees or in the heir-at-law. If a conveyance cannot be obtained, recourse must be had to the Trustee Acts for the transfer of the legal estate.

Lord St. Leonards' Act.

However, Lord St. Leonards' Act, 22 & 23 Vict. c. 35, appears to apply to such a case, for though the devise is not to trustees as required by the 14th section, yet it is a case within the 16th section, where "the whole estate and interest" of the testator "has not become vested in any trustee or trustees;" and it is presumed that the 18th section was meant to except from the Act devises to a person or body of persons taking the *fee-simple or fee-tail in præsenti free from executory limitations over*, and not devises of the fee-simple to several persons in succession for particular estates.

True principle.

The true principle which, independently of the enactments referred to, ought to govern these cases would appear to be, that where a testator devises the estate to trustees, or to a beneficiary, and charges his debts, there the trustees or the beneficiary should have a power of sale and signing receipts, but that where a testator charges his debts, and does not devise the estate, or devises it in such a manner that there is no one who can execute the trust, there the executors should have an equitable power of sale and signing receipts, and that the depositaries of the legal estate should be trustees for them, and bound to convey as they direct; but that where the testator has devised the estate, and therefore provided a hand to execute the trust, but the trustee or devisee dies in the testator's lifetime, there, as the hand to execute the trust has only failed by the act of God, no person has a power of sale or signing receipts, but the trust can only be executed by the Court.

Storry *v.* Walsh.

16. It remains to notice in connection with this subject the decision of Sir J. Romilly, M.R., in the case *Storry* v. *Walsh* (*a*), which appears to show that a devisee, subject to a charge of debts and legacies, may, with the concurrence of the *executors* declaring that all debts and legacies have been paid, *sell for his own private purposes*, and give a good title to a purchaser. This case resembles that of an executor, who is also specific or residuary legatee, selling a chattel interest for his own private debt (*b*).

[Effect of Settled Land Act.]

[17. Before quitting this subject, however, it will be proper to advert to the question whether the power of selling or mortgaging

(*a*) 18 Beav. 559; and see *Howard* v. *Chaffers*, 2 Dr. & Sm. 236.

(*b*) See *infra*, as to receipts of executors, p. 526.

the property which arises under a charge of debts is affected by s. 56 of the Settled Land Act, 1882 (*a*). That Act after giving to the tenant for life of settled property, amongst other large powers, a general power of sale, and a power of mortgaging for specific purposes, and providing by s. 56, sub-s. 1, that powers given by the settlement to trustees are not to be prejudicially affected by the Act, enacts in sub-s. 2, that "the consent of the tenant for life shall, by virtue of the Act, be necessary to the exercise by the trustees of the settlement or other persons of any power conferred by the settlement exercisable for any purpose provided for in the Act," and the question is whether this makes the consent of the tenant for life necessary to the exercise by the trustees of the power of selling or mortgaging which arises under a charge of debts. The power of mortgaging given by the Act is now by section 11 of the Settled Land Act, 1890 (*b*), which is to be read and construed together with the principal Act, extended to the raising of money for the purpose of discharging incumbrances on the settled land, and under s. 21 of the principal Act the proceeds of any sale effected under the general power of selling may be applied in discharging the incumbrances affecting the inheritance of the settled land. The purpose of paying off incumbrances seems to be strictly a "purpose provided for in the Act," and it is difficult, construing the Acts fairly, to avoid the conclusion that the trustees cannot mortgage or sell without the consent of the tenant for life. The result of this construction of the Acts is without doubt inconvenient, and the view that the power of sale arising under a charge of debts is unaffected by the 56th section is supported by weighty opinions(*c*), but until that view has received the sanction of the Court a purchaser could not be safely advised to accept a title from the trustees without the consent of the tenant for life (*d*).]

Who must sign the receipt.

18. As the trust for sale is a joint office, the receipt must be signed by *all the trustees* who have undertaken to act. And where a *power* is given to trustees to discharge the purchaser from seeing to the application of his purchase-money, the receipt must be signed even by a trustee who has parted with the estate by a conveyance to his co-trustees; for the transfer of the estate at law

[(*a*) 45 & 46 Vict. c. 38.]
[(*b*) 53 & 54 Vict. c. 69.]
[(*c*) See Wolstenholme and Turner's Settled Land Act, 5th ed. p. 285.]
[(*d*) As to the meaning of the term "tenant for life," and the limited owners who have the powers of a tenant for life, see sects. 2, 58 and 62; and see also *post*, Chap. xxiii. s. 2, v.]

carries not along with it the confidence in equity (*a*). But the receipt need not be signed by a trustee who has *disclaimed*, for by the effect of disclaimer the acting trustees are put exactly in the same plight as if the renouncing trustee had never been mentioned (*b*).

Power to sign receipts in one, and delegation to another.

19. As a trust cannot be *delegated*, it follows that if A. and B. be trustees for payment of debts, and they convey the estate to C. upon the like trusts, the purchaser could not safely pay his purchase-money upon the receipt of C. In *Hardwick* v. *Mynd* (*c*) the executors and trustees renounced probate, and (probably with the intention of disclaiming) conveyed the estate to C., the heir-at-law; and certain mortgages made by C. were upheld. It might have been argued that as the trustees, by disclaiming, vested the estate in the heir, he was properly the trustee to sell or mortgage. It would be difficult, however, to maintain that the heir under such circumstances could sign a receipt, and certainly the Court did not put it upon that ground, but said that the mortgages if made by the trustees would have been good, and that they were in fact made by them, as they had deputed C. to act for them in the trust. Such a doctrine, however, at the present day could not be sustained.

Power of signing receipts, as regards trustees appointed by the Court.

20. As a general rule, where a special *discretionary* or *arbitrary* power was given to trustees, and the settlement contained no proviso for the appointment of new trustees with similar powers, it was not competent for the *Court*, [prior to the recent Acts,] on the substitution of new trustees by its own inherent jurisdiction, to invest such trustees with that arbitrary power. But in a trust for sale an authority to sign receipts is not a mere power, but enters into the substance of the trust; that is, it is so interwoven with the trust itself that there can be no execution of the trust without the accession of the power; and in such cases the appointment of new trustees by the Court may be taken to have included the power. Thus, suppose A. and B. are trustees of an estate to sell for payment of debts, and on the death of A. and B. the Court appoints C. and D. upon the like trusts; if C. and D cannot sign receipts, they cannot sell, and their appointment as trustees is nugatory (*d*). [But now, by recent Acts (*e*), trustees

(*a*) *Crewe* v. *Dicken*, 4 Ves. 97.

(*b*) *Adams* v. *Taunton*, 5 Mad. 435; *Hawkins* v. *Kemp*, 3 East, 410; *Smith* v. *Wheeler*, 1 Vent. 128.

(*c*) 1 Anst. 109; and see *Lord Braybroke* v. *Inskip*, 8 Ves. 432.

(*d*) See *Drayson* v. *Pocock*, 4 Sim. 283; *Byam* v. *Byam*, 19 Beav. 58; *Bartley* v. *Bartley*, 3 Drew. 385; *Lord* v. *Bunn*, 2 Y. & C. C. C. 98. As to the powers generally of trustees appointed by the Court, see *post*, Chap. xxiii. s. 2.

[(*e*) 23 & 24 Vict. c. 145, s. 27;

appointed by the Court have "the same powers, authorities, and discretions, and may in all respects act" as if originally appointed by the instrument creating the trust.]

Receipt after a breach of trust.

21. It sometimes happens that the trustees *had* clearly at first a power of signing receipts, but subsequently, by a *breach of trust* or some irregularity in the administration of the estate, the fund has got out of its proper channel, and then the question arises, whether, if the person who ought never to have had possession of the fund intend to restore it to its proper state, the trustees can sign a receipt. It may be said that as the power never contemplated a breach of trust, it would not be safe to consider the exercise of the power as an indemnity, if the money cannot be properly paid to the trustees upon any other ground: on the other hand, if the fund be reinstated *in specie*, so that it is standing in the exact form in which the trust required it, and in the names of the persons whom the settlement appointed the trustees, how can it be said that in such a state of things any liability can remain ? (*a*).

Sale where no money is to be received by the trustees.

22. Where the trust estate is *in mortgage*, and the money receivable by the trustees is applicable either wholly or in part in payment of the mortgage, of course the trustees may sell and sign a receipt for the difference, or, if there be no surplus beyond the mortgage, may sell without signing any receipt.

since repealed and its place supplied by 44 & 45 Vict. c. 41, s. 33; and see *post*, Chap. xxiii. s. 2.]

(*a*) See *Lander* v. *Weston*, 3 Drew. 389; *Hanson* v. *Beverley*, Sugd. Vend. & Purch. 848, 11th edit. In *Carver* v. *Richards*, A. & B. were trustees of Mrs. Warren's settlement, dated 31st May, 1825, which contained a power of investing the trust fund on a mortgage of lands of *inheritance in fee simple*, with the usual receipt clause. On 27 July, 1826, the trustees invested 1200*l.* on a mortgage of a *term of* 500 *years*. On 23 November, 1844, the owner of the fee subject to the term paid the 1200*l.* to A. and B. who assigned the term to attend, and the receipt of A. and B., notwithstanding the breach of trust, was held to be sufficient. M. R. 10 December, 1859. The defendants appealed from the decree upon other points, and also included this, but wanted the courage to argue it at the hearing. It not unfrequently happens that trustees without any sufficient power lay out trust money in the purchase of real estate, and then the question arises whether when they want to sell again they can make a good title. The case may be provided for by a special condition of sale or the sanction of the Court may be obtained in a suit for the purpose: see *Robinson* v. *Robinson*, 10 Ir. Rep. Eq. 189. [But in a recent case where trustees had, without any power so to do, purchased land and had it conveyed to them upon the trusts of the settlement and afterwards resold it for a much larger sum than they gave, it was held that upon the purchase-money being invested by the trustees on the securities authorised by the instrument creating the trust, and on one of the *cestuis que trust* concurring in the sale to show that they had not all elected to take the real estate as realty, the purchasers would have a good title from the trustees: *Re Patten and Guardians of the Edmonton Union*, 52 L. J. N.S. Ch. 787; 48 L. T. N.S 870; 31 W. R. 785.]

Hope *v.* Liddell.

23. Where the trustees have a power of signing receipts, it was held not to be necessary that the trustees who signed the receipts, should themselves actually receive the money, provided it was paid to some person by their direction, and the transaction did not on the face of it imply a breach of trust (*a*). Thus, where the purchase-money was expressed in the deed to be paid to the trustee, and a receipt by the trustee was endorsed, but in fact the money was paid, by the direction of the trustee, to the tenant for life; Lord Romilly, M.R., said, that the purchaser was bound to pay the money as the trustee directed (*b*), and having obeyed that direction was exonerated from the consequences. Various transactions might have occurred between the trustee and *cestuis que trust* (such as the execution of a previous mortgage on sufficient security), which would make such a payment perfectly legitimate (*c*). The Court in this case was protecting a *bonâ fide* purchaser, and the principle here laid down must be applied with great caution. A purchaser who has paid his money to another by the direction of the trustee may be protected under the special circumstances of the case, but no purchaser who has the money still in his pocket can be advised to pay it to any other than the trustee or his solicitor duly authorised to act as his agent (*d*) [under the provisions of section 2 of the Trustee Act, 1888, already referred to (*e*).]

Receipts for money extraneous to trust.

24. A power of signing receipts in a settlement will extend only to what the trustees are by the settlement authorised to receive (*f*).

Feme covert.

25. When one of the trustees is a *married woman*, [to whom the provisions of the recent statute are not applicable], the questions arise, can she by virtue of the power sign a receipt without

[(*a*) In *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592, Kay, J., seems to have been of opinion that such a transaction necessarily implied a breach of trust; but see *ante*, p. 311. However, in the present state of the authorities no trustee can be advised to allow his co-trustee to *receive* trust money unless the circumstances of the case render it *necessary*.]

[(*b*) But see as to this *Re Bellamy and Metropolitan Board of Works*, 24 Ch. Div. 387; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592, where it was held that the purchaser could not be compelled to pay to the nominee of the trustees or even to one of the trustees by the direction of the others, and see *ante*, pp. 496, 497.]

(*c*) *Hope* v. *Liddell*, 21 Beav. 202-3; and see *Locke* v. *Lomas*, 5 De G. & Sm. 326; *M'Carogher* v. *Whieldon*, 34 Beav. 107; [*Ferrier* v. *Ferrier*, 11 L. R. Ir. 56;] but see *Pell* v. *De Winton*, 2 De G. & J. 13.

(*d*) [*Re Bellamy and Metropolitan Board of Works*, 24 Ch. Div. 387; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592; and] see *Re Fishbourne*, 9 Ir. Eq. Rep. 340; and *ante*, pp. 496, 497.

[(*e*) See *ante*, pp. 496, 497.]

(*f*) *Pell* v. *De Winton*, 2 De G. & J. 20, *per Cur.*

the concurrence of her husband, who is answerable for her acts; and ought the money to be paid to herself, or to her husband who on the one hand is answerable for her acts, but on the other hand is not the person pointed out by the settlement as the hand to receive it? It would appear on principle that the money cannot be paid to the husband, who is a stranger, and the safest course would be to pay the money into some responsible bank in the joint names of the trustees (excluding the husband), and to take a written receipt from the trustees, to be also signed by the husband as sanctioning the receipt by the wife (*a*). [The concurrence of the husband may however be dispensed with if he has abjured the realm or is an outlaw (*b*), and where a married woman who is a trustee sues under Order 16, Rule 16, without her husband, she can give a good discharge for the money recovered under the judgment without his concurrence (*c*). And where the marriage has taken place since the 31st December, 1882, or the trust has been undertaken by the married woman since that date, she can sign a receipt for the money, without the concurrence of her husband who is not to be answerable for her acts unless he has intermeddled in the trust (*d*).]

Solicitor receiving purchase-money.

26. If the trustees of an estate, bound by a contract for sale of a date prior to the trust deed, execute a conveyance to the purchaser and sign a receipt indorsed, and leave the deed in the hands of the solicitor of the settlor who had contracted to sell, and the solicitor completes the sale and receives the purchase-money and misapplies it, the trustees are personally liable to the *cestuis que trust*, as having improperly enabled the solicitor of a third person to get possession of the fund (*e*).

Practical directions where no power to sign receipts.

27. The following observations of Lord St. Leonards upon the subject of trustees' receipts, deserve every attention. "Where," he says, "a purchaser is bound to see the money applied according to the trust, and the trust is for payment of *debts or legacies*, he must see the money actually paid to the creditors or legatees. In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one; or if the

[(*a*) See *Kingsman* v. *Kingsman*, 6 Q. B. Div. 122, 128, 131.]

[(*b*) Per Lord Selborne, L.C., *Kingsman* v. *Kingsman*, 6 Q. B. Div. 122, 128.]

[(*c*) *Kingsman* v. *Kingsman*, *ubi sup.*]

[(*d*) 45 & 46 Vict. c. 75, ss. 1, 2, 5, 24; see *ante*, p. 35.]

(*e*) *Ghost* v. *Waller*, 9 Beav. 497; and see *Wood* v. *Weightman*, 13 L. R. Eq. 434; *West* v. *Jones*, 1 Sim. N. S. 205; [but see now the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 2, *ante* p. 497.]

creditors or legatees are but few they may be made parties to the conveyance. Another mode by which the purchaser may be secured is an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges, and then the trustee can be made a party to the several conveyances. Sometimes a bill is filed for carrying the agreement into execution, when the purchase-money is of course directed to be paid into Court; and this is the surest mode, because the money will not be paid out of Court without the knowledge of the purchaser" (*a*).

New principle suggested.

28. From the preceding discussion the fundamental principle may be collected, that (where no Act of Parliament applies (*b*)) *a purchaser is in all cases bound to see to the application of his purchase-money, unless a positive intention to the contrary on the part of the settlor be either expressed or implied in the instrument creating the trust.* Such indeed is the conclusion to which the authorities conduct us; but, independently of precedent, it might be suggested that the better principle would be, that, *primâ facie, a direction to sell should imply in all cases a power of signing discharges; but that where it was practicable, and no impediment to the execution of the trust was thereby created, the purchaser should pay his money directly to the party beneficially entitled.* The distinction between the two principles is very material. According to the former rule, if a trust be created for payment of debts and legacies, and the debts be paid, and then the trustees sell, though the purchaser has notice of all debts having been discharged, he is nevertheless not bound to see to the application of his purchase-money, because there was an implied intention by the settlor that the receipts of trustees should be sufficient acquittances (*c*); but, by the operation of the latter rule, the purchaser *would* be bound, for the necessity of his paying the money immediately to the legatees would not, if they were of age, prevent the completion of the sale, and therefore there is no reason why the purchaser should be exempted from seeing to the application. Again, suppose a trust for sale, with a direction to distribute the proceeds between A., B., and C., and that, after the date of the instrument, C. quits the country or cannot be found. According to the first principle, as the absence of C. was not an event in the contemplation of the

Cestui que trust abroad.

(*a*) Vend. & Purch. 848, 11th edit.

(*b*) See 22 & 23 Vict. c. 35, s. 23; 23 & 24 Vict. c. 145, s. 29; [44 & 45 Vict. c. 41, s. 36,] referred to *ante*.

(*c*) See *ante*, p. 507, *et seq.*

settlor, and no inference can be drawn that he meant the trustees to sign receipts, it follows that the sale is rendered impossible, and the contradiction arises, that the settlor having in *express terms* directed a sale, and it being admitted that the will of the settlor is authoritative, yet the execution of that intention is intercepted by the construction of equity. "It were difficult," says Lord St. Leonards, "to maintain that the absence of a *cestui que trust* in a foreign country should, in a case of this nature, impede the sale of the estate" (*a*), and yet to such a result the rule in question, if there be no exception to it, would apparently lead. But according to the other principle suggested, no such obstacle arises. The receipts of the trustees would then *primâ facie* be discharges, as necessary to the execution of the sale; and as C. is not at hand, the purchaser in respect of C.'s share in the purchase-money could not be called upon to observe a rule which would interpose a bar to the accomplishment of the expressed purpose of the settlor (*b*).

[Person interested in several capacities.]

[29. If a person is interested in property in several capacities, and in one of such capacities can give a valid discharge for the purchase-money on the sale of the property, a purchaser who has no notice of an intended misapplication by such person of the purchase money will be discharged by his receipt (*c*), and it is immaterial that the conveyance does not show that the vendor is selling or receiving the purchase-money in the capacity in which he is empowered to do so; and where a person was both executrix and trustee, and as such executrix and trustee had power to carry out a transaction, and she purported to carry out such transaction as a trustee, in which capacity she had not the power, it was held that the transaction was validly effectuated (*d*).]

Receipts of executors.

30. As *executors* are to a certain extent invested with the character of trustees, it may be proper to introduce a few remarks upon their powers in disposing of the assets.

Power to sell or mortgage.

On the death of a testator the personal estate vests wholly in the executor, and to enable him to execute the office with facility, the law permits him, with or without the concurrence of any

(*a*) Sugd. Vend. & Purch. 844, 11th ed.; and see *Forbes* v. *Peacock*, 12 Sim. 544; *Ford* v. *Ryan*, 4 Ir. Ch. Rep. 342.

(*b*) Receipts of trustees are now in most cases made sufficient discharges by Act of Parliament, see *ante*, p. 501.

[(*c*) *Corser* v. *Cartwright*, 7 L. R. H. L. 731; *West of England and South Wales District Bank* v. *Murch*, 23 Ch. D. 138.]

[(*d*) *West of England and South Wales District Bank* v. *Murch*, *ubi supra*.]

co-executor (*a*), to sell or even to mortgage (*b*), by actual assignment or by equitable deposit (*c*), with or without a power of sale (*d*), all or any part of the assets, legal or equitable (*e*); and though liable to render an account to the Court, he cannot be interrupted in the discharge of his office by any person claiming *dehors* the will, as a creditor, or under it, as a legatee. The *creditor* has merely a demand against the executor personally (*f*), the *pecuniary* or *specific legatee* is not entitled to the legacy or bequest until the executor has assented (*g*), and the *residuary legatee* has no lien until the estate has been liquidated and cleared of all liabilities, both *dehors* and under the will (*h*). Upon the sale of the chattel by the executor, the purchaser is not concerned to see to the application of his purchase-money, and it need not be recited in the conveyance that the money is wanted for the discharge of liabilities (*i*): it is sufficient that the purchaser trusts him whom the testator has trusted (*j*): if there be any misapplication, the remedy of the creditor or legatee is not against the purchaser, but the executor (*k*). It is impossible for the purchaser to ascertain the necessity of the sale, for this must depend upon the state of the accounts, which he has no means of investigating without the powers annexed only to the executorship (*l*). Even express notice of the will, and of the

Notice of the will.

(*a*) *Scott* v. *Tyler*, 2 Dick. 725, *per* Lord Thurlow; *Smith* v. *Everett*, 27 Beav. 446; Shep. Touch. 484; *Murrell* v. *Cox and Pitt*, 2 Vern. 570; *Fellows* v. *Mitchell*, 2 Vern. 515; *Doe* v. *Stace*, 15 M. & W. 623; Dyer, 23, a.; and see *Sneesby* v. *Thorne*, 7 De G. M. & G. 399.

(*b*) *Bonney* v. *Ridgard*, 1 Cox, 145, see 148; *Scott* v. *Tyler*, 2 Dick. 727, *per* Lord Thurlow; *Mead* v. *Orrery*, 3 Atk. 240, *per* Lord Hardwicke; *Andrew* v. *Wrigley*, 4 B. C. C. 138, *per* Lord Alvanley; *M'Leod* v. *Drummond*, 17 Ves. 154, *per* Lord Eldon; *Keane* v. *Robarts*, 4 Mad. 357, *per* Sir J. Leach; and see *Humble* v. *Bill*, 2 Vern. 444; *Sanders* v. *Richards*, 2 Coll. 568; *Miles* v. *Durnford*, 2 De G. M. & G. 641.

(*c*) *Scott* v. *Tyler*, 2 Dick. 725, *per* Lord Thurlow; and see *M'Leod* v. *Drummond*, 14 Ves. 360; *S. C.* 17 Ves. 167; *Ball* v. *Harris*, 8 Sim. 485.

(*d*) *Russell* v. *Plaice*, 18 Beav. 21; and see p. 472, *ante*.

(*e*) *M'Leod* v. *Drummond*, 14 Ves. 360, *per* Sir W. Grant; *Nugent* v. *Gifford*, 1 Atk. 463.

(*f*) *Nugent* v. *Gifford*, 1 Atk. 463, *per* Lord Hardwicke; *Mead* v. *Orrery*, 3 Atk. 238, *per eundem*; *M'Leod* v. *Drummond*, 17 Ves. 163, *per* Lord Eldon.

(*g*) *Mead* v. *Orrery*, 3 Atk. 238, 240, *per* Lord Hardwicke. But the executor is bound to assent as soon as the funeral and testamentary expenses and debts have been paid, *Greene* v. *Greene*, 3 I. R. Eq. 102, *per Cur.*

(*h*) *M'Leod* v. *Drummond*, 17 Ves. 163, 169, *per* Lord Eldon; and see *Mead* v. *Orrery*, 3 Atk. 238, 240.

(*i*) *Bonney* v. *Ridgard*, 1 Cox, 148, *per* Lord Kenyon.

(*j*) Id.

(*k*) *Humble* v. *Bill*, 2 Vern. 445, *per Cur.*; *Ewer* v. *Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; *Watts* v. *Kancie*, Toth. 77; *Nurton* v. *Nurton*, id.

(*l*) *Ewer* v. *Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; *Humble* v. *Bill*, 2 Vern. 445, *per Cur.*; *Nugent* v. *Gifford*, 1 Atk. 464, *per* Lord Hardwicke; *Mead* v. *Orrery*, 3 Atk. 242, *per eundem*.

bequests contained in it, works to the purchaser no prejudice; for "every person," said Sir J. Leach, "who deals with an executor has necessarily implied, if not express, notice of the will: but as a purchaser of real estate devised in aid for payment of debts is not bound to inquire into the fact whether the sale is made necessary by the existence of debts, because he has no adequate means to prosecute such an inquiry, so he who deals for personal assets is, for the same reason, absolved from all inquiry with respect to debts: and it is upon this principle altogether indifferent what dispositions may be made in the will with respect to the personal property for which he deals; for whether it be specifically given or be part of the residuary estate, it is equally available in law for the payment of debts" (*a*).

Thus nothing can be clearer than that an executor may go to market with his testator's assets, (even with a chattel specifically bequeathed (*b*),) and the purchaser will not be bound to see to the application of his purchase-money (*c*).

[But an executor or administrator cannot mortgage the assets to raise money for repairing or re-instating dilapidated buildings on leasehold property unless the testator or intestate was liable under covenants to execute the works (*d*).]

Fraud an exception.

31. But *fraud* and *collusion* will vitiate any transaction, and turn it to a mere colour (*e*), and therefore if fraud be proved, either expressed or implied, the parties cannot protect themselves by pleading the general rule (*f*). The only question is, What will amount to a case of fraud?

Sale at a nominal price.

a. The sale cannot stand if the chattel be sold at *a nominal price* or a *fraudulent undervalue* (*g*).

(*a*) *Keane* v. *Robarts*, 4 Mad. 356.

(*b*) *Watts* v. *Kancie*, Toth. 77, 161; *Nurton* v. *Nurton*, Ib.; *Ewer* v. *Corbet*, 2 P. W. 148. As to *Humble* v. *Bill*, 2 Vern. 444, 1 B. P. C. 71, see *Ewer* v. *Corbet*, *ubi supra*; *Andrews* v. *Wrigley*, 4 B. C. C. 137; *M'Leod* v. *Drummond*, 17 Ves. 160.

(*c*) *Bonney* v. *Ridgard*, 1 Cox, 147, *per* Lord Kenyon.

[(*d*) *Ricketts* v. *Lewis*, 51 L. J. N.S. Ch. 837.]

(*e*) *Scott* v. *Tyler*, 2 Dick. 725, *per* Lord Thurlow.

(*f*) *Watkins* v. *Cheek*, 2 S. & S. 205, *per* Sir J. Leach; *M'Leod* v. *Drummond*, 17 Ves. 154, *per* Lord Eldon; *Hill* v. *Simpson*, 7 Ves. 166, *per* Sir W. Grant; *Taner* v. *Ivie*, 2 Ves. 469, *per* Lord Hardwicke; *Keane* v. *Robarts*, 4 Mad. 357, *per* Sir J. Leach; *Crane* v. *Drake*, 2 Vern. 616; *Nugent* v. *Gifford*, 1 Atk. 463, *per* Lord Hardwicke; *Mead* v. *Orrery*, 3 Atk. 240, *per eundem*; *Scott* v. *Tyler*, 2 Dick. 725, *per* Lord Thurlow; *Whale* v. *Booth*, 4 T. R. 625, note (*a*), *per* Lord Mansfield; *Elliot* v. *Merryman*, Barn. 81, *per* Sir J. Jekyll; *Bonney* v. *Ridgard*, 1 Cox, 147, *per* Lord Kenyon; *Earl Vane* v. *Rigden*, 5 L. R. Ch. App. 663, &c.

(*g*) *Scott* v. *Tyler*, 2 Dick. 725, *per* Lord Thurlow; *Ewer* v. *Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; *M'Mullen* v. *O'Reilly*, 15 Ir. Ch. Rep. 251; and see *Drohan* v. *Drohan*, 1 B. & B. 185.

Sale by executor for payment of his own debt.

β. The executor may not sell or pledge the assets for raising money to carry on the testator's business, though in pursuance of the directions contained in his will, for the debts of the business are not the testator's debts, [and a direction by a testator that his trade shall be carried on by his executors does not authorize the employment in that trade of more of the testator's property than was employed by him in his business] (*a*). Nor may the executor sell or pledge in order to pay or secure his own debt (*b*), or for a debt *wrongfully contracted* by him as executor (*c*), for *primâ facie* this is a diversion of the assets to a purpose wholly foreign to the administration, and therefore a *devastavit*. "Though," observed Sir W. Grant, "it may be dangerous at all to restrain the power of *purchasing* from the executor, what inconvenience can there be in holding that the assets known to be such should not be applied in any case for the *executor's debt*, unless the creditor could be first satisfied of his right? It may be essential that the executor should have the power to *sell* the assets, but it is not essential that he should have the power to pay his own creditor; and it is not just that one man's property should be applied to the payment of another man's debt" (*d*).

Where the executor is specific or residuary legatee.

But if the executor *be also the specific* (*e*), *or residuary legatee* (*f*), then it seems to be established upon the authority of several cases that he *may* dispose of the chattel in payment of his own debt, for as soon as the debts and legacies of the testator have been discharged, the property is the executor's; and how is a purchaser to ascertain, but from the mouth of the executor, whether such prior liabilities upon the estate have been fully satisfied?

Where the executor is specific legatee jointly with another, or subject to a charge.

But if the executor is specific or residuary legatee, *jointly*

(*a*) *McNeillie* v. *Acton*, 2 Eq. Rep. 21; 4 De G. M. & G. 744. [But the executors may sell or pledge any part of the property actually employed in the business, and it has been held in a recent case in Ireland that the power of disposition extends to mortgaging the freehold premises upon which the business is carried on; *Devitt* v. *Kearney*, 13 L. R. Ir. 45; reversing *S. C.* 11 L. R. Ir. 225.]

(*b*) *Scott* v. *Tyler*, 2 Dick. 712; *Hill* v. *Simpson*, 7 Ves. 152; *Watkins* v. *Cheek*, 2 S. & S. 205, *per* Sir J. Leach; *Keane* v. *Robarts*, 4 Mad. 357, *per eundem*; *Crane* v. *Drake*, 2 Vern. 616; *Anon. case*, cited Pr. Ch. 434; *Andrew* v. *Wrigley*, 4 B. C. C. 137, *per* Lord Alvanley; and see *Eland* v. *Eland*, 4 M. & Cr. 427; *Miles* v. *Durnford*, 2 De G. M. & G. 641; [*Jones* v. *Stöhwasser*, 16 Ch. D. 577.]

(*c*) *Collinson* v. *Lister*, 20 Beav. 356; 7 De G. M. & G. 634.

(*d*) *Hill* v. *Simpson*, 7 Ves. 169.

(*e*) *Tuylor* v. *Hawkins*, 8 Ves. 209.

(*f*) *Nugent* v. *Gifford*, 1 Atk. 463; corrected from Reg. Lib. 4 B. C. C. 136; *Mead* v. *Orrery*, 3 Atk. 235; *Whale* v. *Booth*, 4 T. R. 625, note (*a*). See the comments of Lord Eldon, *M'Leod* v. *Drummond*, 17 Ves. 163; and see *Bedford* v. *Woodham*, 4 Ves. 40, note; *Storry* v. *Walsh*, 18 Beav. 559.

with others, or subject to certain charges under the will, then he has no power by himself to offer the chattel in payment of his own debt. For in what character does the executor sell? It must be either as executor or as legatee: but it is not as executor, for then he cannot pay his own debt with the testator's assets; nor is it as legatee, for he is not exclusively such, but only jointly with others, or subject to certain charges. The creditor therefore cannot deal for the chattel without the concurrence of the co-legatees, or of the other persons jointly entitled (*a*). And the *mere representation* by the executor that he is absolute owner under the will is no protection, for common prudence requires that the purchaser should look to the will himself and ascertain the fact; and if he neglect this precaution, and assume the executor's veracity, he must incur the hazard of the executor's falsehood (*b*).

Express notice that debts not paid.

The executor in his character of specific or residuary legatee cannot pay or secure the debt of his own creditor out of the testator's assets, if such creditor have *express* notice that any debt of the testator still remains unsatisfied (*c*).

Sale by executor for other private purposes.

γ. If the executor sell or mortgage for money either advanced at the time or to be advanced, the dealing *primâ facie* is in a due course of administration (*d*). "Where," observed Sir W. Grant, "a party having a debt due to him by the executor takes, in satisfaction of that debt, the assets which he knows belong to the executor only in that character, undoubtedly suspicion of fraud must always arise; but where a man is applied to for a loan of money there is no motive of fraud, for he may keep his money if not satisfied with the security" (*e*). But such is the *primâ facie* presumption only, for if there be legal evidence to the purchaser or mortgagee that the immediate or future advance is not on account of the testator's estate, but is meant to be applied to the private purposes of the executor, the Court must regard the transaction as fraudulent, and will not allow it to stand (*f*).

(*a*) *Bonney* v. *Ridgard*, 1 Cox, 145; *Hill* v. *Simpson*, 7 Ves. 152, see 170; and see *Haynes* v. *Forshaw*, 11 Hare, 93; [*Re Queale's Estates*, 17 L. R. Ir. 361.]

(*b*) *Hill* v. *Simpson*, 7 Ves. 152, see 170.

(*c*) See *Nugent* v. *Gifford*, 1 Atk. 464; *Whale* v. *Booth*, 4 L. R. 625, note (*a*); *M'Leod* v. *Drummond*, 17 Ves. 163.

(*d*) *M'Leod* v. *Drummond*, 17 Ves. 155, *per* Lord Eldon.

(*e*) *M'Leod* v. *Drummond*, 14 Ves. 362; and see *Miles* v. *Durnford*, 2 De G. M. & G. 641.

(*f*) *M'Leod* v. *Drummond*, 14 Ves. 353; *S. C.* reversed 17 Ves. 152; *Scott* v. *Tyler*, 2 Dick. 712, compare 17 Ves. 166; and see *Keane* v. *Robarts*, 4 Mad. 358.

Sale of specific chattel, and notice that there are no debts.

δ. A purchaser cannot deal with an executor for the purchase of a chattel specifically bequeathed, if the purchaser have notice, (a fact, however, not easily to be proved, and not lightly to be presumed,) that there were no debts of the testator, or that they have since been discharged (*a*).

Payment to executor who will probably misapply it.

ε. If a person owe money to a testator's estate, and be apprised that the executor *means to misapply it,* he cannot safely hand it over (*b*).

Payment after long interval from testator's death.

ζ. If a great *length of time* has elapsed since the testator's death, it may be argued that here all debts must be *presumed* to be paid, and that the executor is a trustee for the next of kin, and that the money cannot be paid safely to any other than the next of kin as the *cestui que trust.* However, in the absence of all *mala fides* the executor's receipt will in general be sufficient. Where there had been a lapse of sixteen years, Lord Hatherley observed, "there is no authority for holding that merely because a debt to the testator's estate is not called in for some time, we are to imply that the executors have ceased to be executors, and have become trustees. A debtor who has been paying interest for perhaps twenty years, does not therefore become cognizant of the fact of all the testator's estate having been administered, and of the executors having become trustees. The persons with whom the executors are dealing, are not bound to know the state of the testator's assets, and it may be many years before all his debts are paid, and his estate wound up" (*c*). In a case where there had been a lapse of *thirty-five years* from the testator's death, and no allegation of debts, the late V. C. of England held that the executor could sign a receipt (*d*), [but as to real estate the rule has now been adopted that after *twenty years* it is fair to presume that the debts have been paid, and the onus is upon the executors selling under a charge of debts to show that such is not the case (*e*);

(*a*) *Ewer* v. *Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; and see *M'Mullen* v. *O'Reilly*, 15 Ir. Ch. Rep. 251.

(*b*) See *Watkins* v. *Cheek*, 2 S. & S. 199; *Eland* v. *Eland*, 4 M. & Cr. 427; *Stroughill* v. *Anstey*, 1 De G. M. & G. 648.

(*c*) *Charlton* v. *Earl of Durham*, 4 L. R. Ch. App. 438; and see *Sabin* v. *Heape*, 27 Beav. 553.

(*d*) *Gough* v. *Birch*, July 10, 1839, MS.; see *Stroughill* v. *Anstey*, 1 De G. M. & G. 654; [*Re Tunqueray-Willaume and Landau*, 20 Ch. Div. 465; *Re Molyneux and White*, 13 L. R. Ir. 382;] *Ewer* v. *Corbet*, 2 P. W. 148; *Court* v. *Jeffery*, 1 S. & S. 105; *Orrok* v. *Binney*, Jac. 523; *Pierce* v. *Scott*, 1 Y. & C. 257; *Forbes* v. *Peacock*, 11 Sim. 152; *Hawkins* v. *Williams*, 10 W. R. 692; *Greetham* v. *Colton*, 34 Beav. 615; 6 N. R. 311; *Williams* v. *Massy*, 15 Ir. Ch. Rep. 68.

[(*e*) *Re Tunqueray-Willaume and Landau*, 20 Ch. Div. 465; *Re Molyneux and White*, 13 L. R. Ir. 382; *In re Ryan and Cavanagh*, 17 L. R. Ir. 42.]

but the rule does not in general apply to the case of an executor selling the leaseholds of his testator (*a*).] As regards an *administrator* it will be remembered that all necessary protection is thrown around the estate by the bond taken for due administration, and also by the form of proceeding in the Probate Court; for if A., (to whose estate the money is payable) die, leaving B. his next of kin, who afterwards dies, leaving C. his next of kin, who afterwards dies, leaving D. his next of kin, in order to take out letters of administration to A., you must first show yourself to have an interest by taking out letters to B. And again, to take out letters to B. you must first, for the same reason, take out letters to C.; so that, in fact, letters cannot be taken out to A. without previously taking out letters to B. and C. If, in such a case, the receipt of A.'s administrator, even after the lapse of twenty years, were not sufficient, it would be necessary in a suit to make the administrators of B. and C. parties as *cestuis que trust*, a thing quite unheard of in practice. In an extreme case, however, where an administrator who was beneficially entitled to one-fourth, filed a bill *one hundred and fifty years* after the intestate's decease, the Court, while it admitted the plaintiff's legal title to the whole, refused to order payment to him of the other three-fourths, which apparently belonged in equity to other parties (*b*).

Sale by banker by direction of executor.

η. An *agent* is accountable to his principal only, and therefore if an executor employ a banker to sell out part of the testator's stock and remit the proceeds to him, it seems the banker, though he has reason to believe that a misapplication is intended, is bound to transfer the money to the executor, and does not thereby render himself accountable. A contrary doctrine would carry the principle of constructive trust to an inconvenient and, indeed, to an impracticable length (*c*); [and an agent is bound to accept as

[(*a*) *Re Whistler*, 35 Ch. D. 561.]

(*b*) *Loy* v. *Duckett*, Cr. & Ph. 305. [In a recent case, in 1885, where stock standing in the name of an owner, who died in 1791, had been transferred to the Commissioners for the reduction of the National Debt, and an inquiry was directed upon petition who were the persons entitled to the fund, the Court directed that the beneficial title should be inquired into as regarded all the shares to which the legal personal representatives of persons who died before 1871 were entitled; *Ex parte Roskrow*, W. N. 1885, p. 3.]

(*c*) *Keane* v. *Robarts*, 4 Mad. 332, see 356, 359; and see *Davis* v. *Spurling*, 1 R. & M. 64; *S. C.* Taml. 199; *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 585; [*The New Zealand and Australian Land Company* v. *Watson*, 7 Q. B. Div. 374; reversing *S. C.* 5 Q. B. D. 474;] *Crisp* v. *Spranger*, Nels. 109; *Saville* v. *Tancred*, 3 Sw. 141, note; *Ex parte Barnwell*, 6 De G. M. & G. 801; *Gray* v. *Johnston*, 3 L. R. H. L. 1. In this

correct the trustees' statement as to the intended application of the fund (*a*).] But an agent who derives a *personal benefit* from the breach of trust of his principal will be accountable (*b*).

Sale before probate.

θ. Though an executor *can* make an assignment and give a receipt for purchase-money before *probate*, yet a purchaser is not *bound to pay* his purchase-money before probate, which is the evidence of the executor's title (*c*).

[Payment by order of executor.]

[32. If a person indebted to a testator's estate pays a third party by order of the executor, and obtains the executor's receipt without notice that the payment is wrongfully made, he thereby obtains a complete discharge (*d*).]

Who may impeach the sale.

33. Wherever, as in the several cases mentioned, there is suspicion of fraud, the transaction may be impeached by creditors (*e*), or specific (*f*), residuary (*g*), or even pecuniary legatees (*h*).

Effect of time.

But in no case will the Court grant relief where the right of

case, before the House of Lords, the doctrine as laid down by *Lord Cairns* was, that on the one hand bankers were not on grounds of mere suspicion or curiosity, to refuse to honour the cheque of an executor or trustee, being their customer, and on the other hand, that bankers were not, under shelter of that title, to be at liberty to become parties or privies to a breach of trust, and to pay away trust money when they *knew* it was going to be misapplied, and for the purpose of its being so misapplied; and he stated the result of the cases to be, that to justify a banker in refusing payment, 1. There must be a misapplication or breach of trust actually intended, 2. The bankers must be privy to such intended misapplication or breach of trust, and 3. That any personal benefit to the bankers designed or stipulated for, would be the strongest evidence of such privity; Ib. p. 11. But the principle enunciated by *Lord Westbury* went further, for he said that a banker could not be allowed to set up the *jus tertii* against the order of his own customer, or refuse to honour his draft on any other ground than some sufficient one resulting from the act of the customer himself, and that if a banker became incidentally aware that a trustee, his customer, meditated a breach of trust, and drew a cheque for that purpose, the banker had no right to refuse payment of the cheque, as this would be making himself party to an inquiry as between his customer and third persons. But that if a trustee being indebted to a banker, applied part of the trust estate in the banker's hands to the payment of the debt, the banker became *particeps criminis*, and was answerable; Ib. p. 14. It would seem, therefore, that, in Lord Westbury's opinion, if the trustee did not himself confess the breach of trust, the banker could not refuse payment on evidence *aliunde* that a breach of trust was intended; and see *Barnes* v. *Addy*, 9 L. R. Ch. App. 244.

[(*a*) *Rodbard* v. *Cooke*, 25 W. R. 555.]

(*b*) *Pannell* v. *Hurley*, 2 Coll. 241; *Bodenham* v. *Hoskyns*, 2 De G. M. & G. 903; [*Foxton* v. *Manchester and Liverpool District Banking Company*, 44 L. T. N.S. 406.]

(*c*) *Newton* v. *Metropolitan Railway Company*, 1 Dr. & Sm. 583.

[(*d*) *Ferrier* v. *Ferrier*, 11 L. R. Ir. 56; and see *ante*, p. 495.]

(*e*) *Crane* v. *Drake*, 2 Vern. 616; *Anon. case*, cited Pr. Ch. 434; and see *Nugent* v. *Gifford*, 1 Atk. 463; *Mead* v. *Orrery*, 3 Atk. 238.

(*f*) *Humble* v. *Bill*, 2 Vern. 444; *Scott* v. *Tyler*, 2 Dick. 712.

(*g*) See *Burting* v. *Stonard*, 2 P. W. 150; *Mead* v. *Orrery*, 3 Atk. 235, see 238; *M'Leod* v. *Drummond*, 17 Ves. 161, 169.

(*h*) *Hill* v. *Simpson*, 7 Ves. 152; and see *M'Leod* v. *Drummond*, 17 Ves. 169.

unravelling the transaction has been neglected for a period of twenty years (*a*).

Executor or administrator of a trustee.

34. The preceding powers belong to executors and administrators for the purpose of administration of the testator's or intestate's estates. But these powers cannot be assumed to exist where property, though legally vested in an executor or administrator, is not available for the ordinary purposes of administration. Thus the *executor* or *administrator* of a surviving *trustee* stands on no higher ground than an ordinary trustee, and cannot therefore pass a good title to the purchaser, unless it be warranted by the terms of the trust.

SECTION III.

DISABILITY OF TRUSTEES FOR SALE TO BECOME PURCHASERS OF THE TRUST PROPERTY.

We now come to the subject of *purchases by trustees* of the property vested in them upon trust.

Under this head it will be proper to consider, *First*, The extent and operation of the rule, that a trustee shall not purchase the trust estate; *Secondly*, The species of relief to which the *cestui que trust* is entitled; *Thirdly*, The time within which the *cestui que trust* must apply to the Court.

First. The extent of the rule.

Trustee for sale may not purchase.

1. A trustee for *sale*, that is, a trustee who is selling, is absolutely and entirely disabled from purchasing the trust property (*b*), whether it be real estate or a chattel personal (*c*), land, or a ground rent (*d*), in reversion or possession (*e*), whether the pur-

(*a*) *Andrew* v. *Wrigley*, 4 B. C. C. 125; *Bonney* v. *Ridgard*, 1 Cox, 145; *Mead* v. *Orrery*, 3 Atk. 235, see 243; and see *M'Leod* v. *Drummond*, 14 Ves. 353; reversed 17 Ves. 152, see 171.

(*b*) *Fox* v. *Mackreth*, 2 B. C. C. 400; *S. C.* 2 Cox, 320; affirmed in D. P. 4 B. P. C. 258, &c. That *Fox* v. *Mackreth* was decided upon this ground, see *Gibson* v. *Jeyes*, 6 Ves. 277; *Ex parte Lacey*, Id. 627; *Ex parte James*, 8 Ves. 353; *Coles* v. *Trecothick*, 9 Ves. 247; *Ex parte Bennett*, 10 Ves. 394.

(*c*) *Crowe* v. *Ballard*, 2 Cox, 253; *S. C.* 3 B. C. C. 117; *Killick* v. *Flexney*, 4 B. C. C. 161; *Hall* v. *Hallet*, 1 Cox, 134; *Whatton* v. *Toone*, 5 Mad. 54; 6 Mad. 153; *Armstrong* v. *Armstrong*, 7 L. R. Ir. 207.

(*d*) *Price* v. *Byrn*, cited *Campbell* v. *Walker*, 5 Ves. 681.

(*e*) *Re Bloye's Trust*, 1 Mac. & G. 488, see 492, 495; *Spring* v. *Pride*, 4 De G. J. & S. 395; as "the inability to contract depends not on the subject matter of the agreement, but on the fiduciary character of the contracting party," *Aberdeen Railway Co.* v. *Blakie*, 1 Macq., at p. 472, *per* Lord Cranworth.

chase be made in the trustee's own name or in the name of a trustee for him (*a*), directly, or indirectly, [as to a purchaser upon a contract or understanding (amounting to more than mere expectation) that the purchaser shall resell to the trustee (*b*),] by private contract or public auction (*c*), from himself as the single trustee, or with the sanction of his co-trustees (*d*); for he who undertakes to act for another in any matter cannot, in the same matter, act for himself (*e*). The situation of the trustee gives him an opportunity of knowing the value of the property, and as he acquires that knowledge at the expense of the *cestui que trust*, he is bound to apply it for the *cestui que trust's* benefit (*f*). Besides, if the trustee appeared at the auction professedly as a bidder, that would operate as a discouragement to others, who seeing the vendor ready to purchase at or above the real value, would feel a reluctance to enter into the competition, and so the sale would be chilled (*g*).

Trustee who has disclaimed.

But the rule does not apply to a person named as trustee, but who has *disclaimed* without having acted in the trust (*h*), [or to a person who has the power of becoming a trustee though he never actually does become one (*i*),] or to a *tenant for life* whose *consent to the sale* is required by the terms of the power (*j*); or to mere nominal trustees, as *trustees to preserve contingent remainders* (*k*); or where A. is the trustee in fee for B. in fee, and A. has *no duty to perform* (*l*); or where a trustee sells to the

(*a*) *Campbell* v. *Walker*, 5 Ves. 678; *S. C.* 13 Ves. 601; *Randall* v. *Errington*, 10 Ves. 423; *Crowe* v. *Ballard*, 2 Cox, 253; *S. C.* 3 B. C. C. 117; *Hall* v. *Hallet*, 1 Cox, 134; *Watson* v. *Toone*, 6 Mad. 153; *Baker* v. *Carter*, 1 Y. & C. 250; *Knight* v. *Majoribanks*, 2 Mac. & G. 12.

[(*b*) *Re Postlethwaite*, 59 L. T. N.S. 58; reversed on appeal on other grounds; 37 W. R. 200; 60 L. T. N.S. 514; and see *Parker* v. *M'Kenna*, L. R. 10 Ch. 96, at p. 125.]

(*c*) *Campbell* v. *Walker*, *Randall* v. *Errington*, *ubi supra*; *Ex parte Bennett*, 10 Ves. 381, see 393; *Ex parte James*, 8 Ves. 337, see 349; *Whelpdale* v. *Cookson*, 1 Ves. 9; *S. C.* stated from R. L. *Campbell* v. *Walker*, 5 Ves. 682; *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lacey*, Id. 625; *Lister* v. *Lister*, Id. 631; *Whichcote* v. *Lawrence*, 3 Ves. 740; *Attorney-General* v. *Lord Dudley*, G. Coop. 146; *Downes* v. *Grazebrook*, 3 Mer. 200.

(*d*) *Whichcote* v. *Lawrence*, 3 Ves. 740; *Hall* v. *Noyes*, cited Id. 748; and see *Morse* v. *Royal*, 12 Ves. 374.

(*e*) *Whichcote* v. *Lawrence*, 3 Ves. 750; *per* Lord Rosslyn; *Ex parte Lacey*, 6 Ves. 626, *per* Lord Eldon; *Re Bloye's Trust*, 1 Mac. & G. 495.

(*f*) See *Ex parte James*, 8 Ves. 348; [*Luddy's Trustee* v. *Peard*, 33 Ch. D. 500.]

(*g*) See *Ex parte Lacey*, 6 Ves. 629.

(*h*) *Stacey* v. *Elph*, 1 M. & K. 195; and see *Chambers* v. *Waters*, 3 Sim. 42.

[(*i*) *Clark* v. *Clark*, 9 App. Cas. 733.]

(*j*) *Howard* v. *Ducane*, T. & R. 81; *Bevan* v. *Habgood*, 1 J. & H. 222; *Dicconson* v. *Talbot*, 6 L. R. Ch. App. 32, see *ante*, p. 344.

(*k*) *Sutton* v. *Jones*, 15 Ves. 587; *Naylor* v. *Winch*, 1 S. & S. 567; *Pooley* v. *Quilter*, 4 Drew. 189; *Parkes* v. *White*, 11 Ves. 226.

(*l*) *Pooley* v. *Quilter*, 4 Drew. 189;

trustees of his own settlement under which he has a partial interest (*a*); [or to a company in which he is a shareholder (*b*).]

Lord Rosslyn's doctrine.

2. Lord Rosslyn is reported to have considered that to invalidate a purchase by a trustee it was necessary to show that he had gained an *actual advantage* (*c*); but the doctrine (if any such was ever held by his Lordship (*d*)) has since been expressly and unequivocally denied (*e*). The rule is now universal, that, *however fair the transaction*, the *cestui que trust* is at liberty to set aside the sale and take back the property (*f*). If a trustee were permitted to buy in an *honest* case, he might buy in a case *having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise* (*g*). Thus a trustee for the sale of an estate might, by the knowledge acquired by him in that character, have discovered a valuable coal mine under it, and, locking that up in his own breast, might enter into a contract for the purchase by himself. In such a case, if the trustee chose to deny it, how could the Court establish the fact against the denial? The probability is that a trustee who had once conceived such a purpose would never disclose it, and the *cestui que trust* would be effectually defrauded (*h*).

Trustee may not buy as agent.

3. As a trustee cannot buy on his own account, it follows that he cannot be permitted to buy as *agent* for a third person: the Court can with as little effect examine how far the trustee has made an undue use of information acquired by him in the course of his duty in the one case as in the other (*i*).

Agent of trustee may not buy.

4. And the rule against purchasing the trust property applies to an *agent* employed by the trustee for the purposes of the sale,

and see *Denton* v. *Donner*, 23 Beav. 289, 290.

(*a*) *Hickley* v. *Hickley*, 2 Ch. D. 190.

[(*b*) *Farrar* v. *Farrars, Limited*, 40 Ch. Div. 395.]

(*c*) See *Whichcote* v. *Lawrence*, 3 Ves. 750.

(*d*) See *Ex parte Lacey*, 6 Ves. 626; *Lister* v. *Lister*, Id. 632.

(*e*) *Ex parte Bennett*, 10 Ves. 385; *Ex parte Lacey*, 6 Ves. 627; *Attorney-General* v. *Lord Dudley*, G. Coop. 148; *Ex parte James*, 8 Ves. 348; *Mulvany* v. *Dillon*, 1 B. & B. 409, see 418.

(*f*) *Ex parte Lacey*, 6 Ves. 625, see 627; *Owen* v. *Foulkes*, cited Id. 630, note (*b*); *Ex parte Bennett*, 10 Ves. 393, *per* Lord Eldon; *Randall* v. *Errington*, 10 Ves. 423, see 428, *Campbell* v. *Walker*, 5 Ves. 678, see 680; *Ex parte James*, 8 Ves. 347, 348, *per* Lord Eldon; *Lister* v. *Lister*, 6 Ves. 631; *Gibson* v. *Jeyes*, 6 Ves. 277, *per* Lord Eldon; and see *Kilbee* v. *Sneyd*, 2 Moll. 186; [*Re Postlethwaite*, 59 L. T. N.S. 58; 37 W. R. 200; 60 L. T. N.S. 514.]

(*g*) *Ex parte Bennett*, 10 Ves. 385, *per* Lord Eldon.

(*h*) *Ex parte Lacey*, 6 Ves. 627, *per* Lord Eldon; and see *Ex parte Bennett*, 10 Ves. 385, 394, 400; *Ex parte James*, 8 Ves. 348, 349; *Parkes* v. *White*, 11 Ves. 226; *Campbell* v. *Walker*, 5 Ves. 681; *Lister* v. *Lister*, 6 Ves. 632; *Ex parte Badcock*, 1 Mont. & Mac. 239.

(*i*) *Ex parte Bennett*, 10 Ves. 381, see 400; *Coles* v. *Trecothick*, 9 Ves. 248, *per* Lord Eldon; and see *Gregory* v. *Gregory*, G. Coop. 204; [*Mockerjee* v. *Mockerjee*, 2 L. R. Ind. App. 18.]

as strongly as to the trustee himself (*a*). And an *agent not for sale, but for management only* (*b*), [a solicitor or counsel (*c*),] and a *receiver* appointed by the Court (*d*) stand in a confidential relation, and cannot purchase without putting themselves at arm's length, and a full disclosure of their knowledge; [and the partner of a trustee, or any other person through whom the trustee may directly or indirectly derive benefit by reason of the purchase, cannot purchase the trust property from the trustee (*e*).]

Trustees may not lease to themselves.

5. The *lease* of an estate is in fact the sale of a partial interest in it, and therefore trustees for sale cannot demise to one of themselves, but the lessee, while he shall be held to his bargain if disadvantageous to him, shall be made to account for the profits if it be in his favour (*f*).

Specific performance.

6. Where a trustee for sale was the purchaser by an agent at the auction, the *heir* of the trustee had no right to have the contract completed at the expense of the *personal* estate, though the *cestuis que trust* were willing to acquiesce in the sale (*g*).

Trustee may purchase from the *cestui que trust.*

7. When it is said that a trustee for sale may not purchase the trust property, the meaning must be understood to be that the trustee may not *purchase from himself,* that is, he cannot perform the two functions of seller and buyer; for there is no rule that a trustee, whether for sale or otherwise, may not *purchase from* his *cestui que trust* (*h*). Hence, while a purchase by a trustee conducting the *sale,* either personally or by his agent, cannot stand, a purchase by a trustee from a *cestui que trust* of the interest of the latter in the trust *may* stand, if the trustee

(*a*) *Whitcomb* v. *Minchin*, 5 Mad. 91; *In re Bloye's Trust*, 1 Mac. & G. 488, see 495; [*Martinson* v. *Clowes*, 21 Ch. D. 857.]

(*b*) *King* v. *Anderson*, 8 Ir. R. Eq. 147, 625; *Alven* v. *Bond*, 1 Flan. & Kelly, 196. [But the Court refused to restrain the manager of a business from doing business with the customers on his own account; *Re Irish*, 40 Ch. D. 49.]

[(*c*) *Carter* v. *Palmer*, 8 Cl. & F. 657; 11 Bli. N. S. 397; *Brown* v. *Kennedy*, 4 De G. J. & S. 217; 10 Jur. N. S. 141; *Cookson* v. *Lee*, 23 L. J. Ch. 243; *Pisani* v. *Attorney-General of Gibraltar*, 5 L. R. P. C. 516; *McPherson* v. *Watt*, 3 App. Cas. 254, and see *ante*, p. 316.]

(*d*) *Alven* v. *Bond*, 1 Flan. & Kelly, 196; *White* v. *Tommy*, referred to, Ib. 224.

[(*e*) *Ex parte Moore*, 51 L. J. N.S. Ch. 72; 45 L. T. N.S. 558; 30 W. R. 123; *Ex parte Burnell*, 7 Jur. 116; *Ex parte Forder*, W. N. 1881, p. 117.]

(*f*) *Ex parte Hughes*, 6 Ves. 617; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 491, see 500.

(*g*) *Ingle* v. *Richards* (No. 1), 28 Beav. 361.

(*h*) *Ex parte Lacey*, 6 Ves. 626, *per* Lord Eldon; *Coles* v. *Trecothick*, 9 Ves. 244, 246, *per eundem*; *Gibson* v. *Jeyes*, 6 Ves. 277, *per eundem*; *Downes* v. *Grazebrook*, 3 Mer. 208, *per eundem*; *Randall* v. *Errington*, 10 Ves. 426, *per* Sir W. Grant; *Whichcote* v. *Lawrence*, 3 Ves. 750, *per* Lord Rosslyn; *Sanderson* v. *Walker*, 13 Ves. 601, *per* Lord Eldon; *Ayliffe* v. *Murray*, 2 Atk. 59, *per* Lord Hardwicke; *Kilbee* v. *Sneyd*, 2 Moll. 214, *per* Sir A. Hart.

can show that the fullest information and every advantage were given to the *cestui que trust* (*a*). However, a purchase by a trustee from his *cestui que trust* is at all times a transaction of great nicety, and one which the Courts will watch with the utmost jealousy (*b*), [and will set aside if the consideration was insufficient (*c*);] and the exception runs, it is said, so near the verge of the rule, that it might as well have been included within it (*d*).

The relation of trustee and *cestui que trust* must first be dissolved.

8. Before any dealing with the *cestui que trust*, the relation between the trustee and *cestui que trust* must be *actually* or *virtually* dissolved. The trustee may, if he pleases, retire from the office, and qualify himself for becoming a purchaser by divesting himself of that character (*e*), or if he retain the situation, the parties must be put so much at arm's length, that they agree to stand in the adverse situations of vendor and purchaser (*f*), the *cestui que trust* distinctly and fully understanding that he is selling to the trustee, and consenting to waive all objections upon that ground (*g*), and the trustee fairly and honestly disclosing all the necessary particulars of the estate, and not attempting a furtive advantage to himself by means of any private information (*h*). The trustee will not be allowed to go on acquainting himself with the nature of the property up to the moment of sale, and then, casting aside his character of trustee, turn his experience to his own account (*i*).

Instances where trustee has been allowed to purchase.

9. In what cases a trustee will be at liberty to become a purchaser, may be best illustrated by a few instances.

Where the *cestui que trust* took the whole management of the sale himself, chose, or at least approved, the auctioneer, made surveys, settled the plan of sale, fixed the price, and so had a perfect knowledge of the value of the property, and then by his

(*a*) *Denton* v. *Donner*, 23 Beav. 285; *Luff* v. *Lord*, 34 Beav. 220; [*Readdy* v. *Prendergast*, 55 L. T. N.S. 767.]

(*b*) *Coles* v. *Trecothick*, 9 Ves. 244, *per* Lord Eldon; *Ex parte Lacey*, 6 Ves. 626, *per eundem*; *Downes* v. *Grazebrook*, 3 Mer. 209, *per eundem*; [*Plowright* v. *Lambert*, 52 L. T. N.S. 646.]

[(*c*) *Mockerjee* v. *Mockerjee*, 2 L. R. Ind. App. 18; *Plowright* v. *Lambert*, 52 L. T. N.S. 646.]

(*d*) *Morse* v. *Royal*, 12 Ves. 372, *per* Lord Erskine.

(*e*) *Downes* v. *Grazebrook*, 3 Mer. 208, *per* Lord Eldon.

(*f*) *Gibson* v. *Jeyes*, 6 Ves. 277, *per* Lord Eldon; and see *Ex parte Lacey*, 6 Ves. 626, 627; *Ex parte Bennett*, 10 Ves. 394; *Morse* v. *Royal*, 12 Ves. 373; *Sanderson* v. *Walker*, 13 Ves. 601; [*Re Worssam*, 46 L. T. N.S. 584; *Readdy* v. *Prendergast*, 55 L. T. N.S. 767.]

(*g*) See *Randall* v. *Errington*, 10 Ves. 427.

(*h*) *Coles* v. *Trecothick*, 9 Ves. 247, *per* Lord Eldon; *Morse* v. *Royal*, 12 Ves. 373, 377, *per* Lord Erskine; *Gibson* v. *Jeyes*, 6 Ves. 277, *per* Lord Eldon; *Randall* v. *Errington*, 10 Ves. 427, *per* Sir W. Grant; [*Re Worssam*, 46 L. T. N.S. 584; *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500.]

(*i*) See *Ex parte James*, 8 Ves. 352; *Spring* v. *Pride*, 4 De G. J. & S. 395.

agent, but with his own personal consent, agreed to sell a lot which had been bought in to one of the trustees for sale acting as agent for another, Lord Eldon said, that if in any instance the rule was to be relaxed by consent of the parties, this was the case, and decreed the agreement to be specifically performed (*a*).

Again, a *cestui que trust* had strongly urged the purchase upon one of his trustees, who at first expressed an unwillingness, but afterwards, upon being pressed, agreed to the terms; and the sale was supported (*b*).

So, where a trustee for sale had endeavoured in vain to dispose of the estate, and then purchased himself of the *cestui que trust*, at a fair and adequate price, and there was no imputation of fraud or concealment, Lord Northington said he did not "*like* the circumstance of a trustee dealing with his *cestui que trust*, but upon the whole, he did not see any principle upon which he could set the transaction aside" (*c*).

Solicitor of the *cestui que trust*.

10. It has been pronounced too dangerous to allow the *cestui que trust's* solicitor, without a *special* authority, to bind his employer by such a contract with the trustee (*d*).

Creditors.

11. Where the *cestuis que trust* are creditors, it has been held that the trustee cannot purchase with the sanction of the major part of them, but that the liberty must be given by the unanimous voice of the whole body (*e*). However, the Court has sanctioned purchases of a bankrupt's estate by *assignees*, where the assent of a general meeting of creditors had been obtained (*f*); and the Court would, no doubt, in executing the trust of a creditors' deed, allow a trustee to purchase, if it were really for the benefit of the creditors.

Court will not authorise the trustee to bid.

12. The Court has no jurisdiction on behalf of the *cestuis que trust* who are *sui juris* to authorise a trustee to bid, for that is a question the *cestuis que trust* are entitled to decide for themselves (*g*). So far as the Court is concerned, it will not give a trustee leave to bid, for it is his duty to communicate all the information he can for the benefit of the sale, and this he might not be disposed to do if he were allowed to purchase himself (*h*). But if a sale by auction under the direction of the Court has been

(*a*) *Coles* v. *Trecothick*, 9 Ves. 234.
(*b*) *Morse* v. *Royal*, 12 Ves. 355.
(*c*) *Clarke* v. *Swaile*, 2 Eden, 134.
(*d*) *Downes* v. *Grazebrook*, 3 Mer. 209, *per* Lord Eldon.
(*e*) *Sir G. Colebrooke's case*, cited *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, Id. 628; the cases cited Id. 630, note (*b*). *Whelpdale* v. *Cookson* (cited *Campbell* v. *Walker*, 5 Ves. 682), was doubted by Lord Eldon, 6 Ves. 628.
(*f*) *Anon. case*, 2 Russ. 350; *Ex parte Bage*, 4 Mad. 459.
(*g*) See *Ex parte James*, 8 Ves. 352.
(*h*) *Tennant* v. *Trenchard*, 4 L. R. Ch. App. 545.

tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may be induced to accept the offer (*a*).

[Effect of leave to bid.]

[13. Where, in an administration action, leave was given to the solicitor for the defendant (the executor) to bid at the sale, which was to be conducted by the plaintiffs' solicitors, independently of the executor, it was held that the effect of the leave was to put an end to the fiduciary relation in which he formerly stood, and to place him in the position of a mere stranger, and that he was under no obligation to disclose to the Court any facts within his knowledge affecting the value of the property. But if the intending purchaser lays information on any particular subject before the Court for the purpose of guiding its discretion and obtaining its approval of the sale, he is bound to disclose all the material facts within his knowledge relating to that subject; but it does not follow that because information on some material point or points is offered or is given on request by a purchaser from the Court, it must therefore be given on all others as to which it is neither offered nor requested, and concerning which there is no implicit representation, positive or negative, direct or indirect, in what is actually stated (*b*).]

Where *cestuis que trust* are infants.

14. If the *cestuis que trust* be under disability, as infants, the trustee, as he cannot be released from the liabilities of his situation, cannot by any act *in pais* become the purchaser of the estate (*c*); but, if it be absolutely necessary that the property should be sold, and the trustee is ready to give more than any one else, he may institute proceedings in equity, and apply to the Court to be allowed to purchase, and the Court will then examine into the circumstances, ask who had the conduct of the transaction, whether there is reason to suppose the premises could be sold better, and upon the result of that inquiry will let another person prepare the particulars of sale, and allow the trustee to bid (*d*); and, generally, if the Court can see clearly that under the circumstances of the case it would be for the benefit of the *cestui que trust* that the trustee should purchase (as at a certain sum beyond what could be obtained elsewhere), the Court would sanction a sale to the trustee (*e*).

(*a*) *Tennant* v. *Trenchard*, 4 L. R. Ch. App. 547.

[(*b*) *Boswell* v. *Coaks*, 23 Ch. D. 302; 27 Ch. Div. 424; 11 App. Cas. 232.]

(*c*) *Campbell* v. *Walker*, 5 Ves. 678; *S. C.* 13 Ves. 601.

(*d*) *Campbell* v. *Walker*, 5 Ves. 681, 682, *per* Lord Alvanley.

(*e*) *Farmer* v. *Dean*, 32 Beav. 327.

15. The principles laid down with reference to *trustees for sale* are of course applicable to all who, though differing in name, are invested with the *like fiduciary character*, as executors and administrators (*a*), an executor in his own wrong (*b*), trustees for creditors (*c*), an agent (*d*), &c.; but a mortgagee may purchase from his mortgagor (*e*), surviving partners may purchase from the representatives of a deceased partner (*f*), [the trustee in the joint bankruptcy of surviving partners, who have a large claim against the estate of the deceased partner, may purchase from the representatives of the deceased partner (*g*),] and the creditor taking out execution is not precluded from becoming the purchaser of the property upon a sale by the sheriff (*h*); [and a person named as executor, but who, in fact, never proves the will, is not precluded from purchasing from the executor who proves (*i*).]

Of executors, administrators, assignees, &c.

Secondly. As to the *terms* upon which the sale will be set aside.

1. The *cestui que trust*, if he chooses it, may have the specific estate reconveyed to him by the trustee (*j*), or, where the trustee has sold it with notice, by the party who purchased (*k*), the *cestui que trust* on the one hand repaying the price at which the trustee bought, with interest at 4 per cent. (*l*), and the trustee or purchaser on the other accounting for the profits of the estate (*m*), but not

Cestui que trust may recover the specific estate.

(*a*) *Hall* v. *Hallett*, 1 Cox, 134; *Killick* v. *Flexney*, 4 B. C. C. 161; *Watson* v. *Toone*, 6 Mad. 153; *Kilbee* v. *Sneyd*, 2 Moll. 186; *Baker* v. *Carter*, 1 Y. & C. 250; and see *Naylor* v. *Winch*, 1 S. & S. 566; [*Re Pepperell*, 27 W. R. 410; *Gray* v. *Warner*, 42 L. J. Ch. 556; 28 L. T. N.S. 835; 21 W. R. 808; *Re Harvey*, 58 L. T. N.S. 449; W. N. 1888, p. 38; *Beningfield* v. *Baxter*, 12 App. Cas. 167.]

(*b*) *Mulvany* v. *Dillon*, 1 B. & B. 408.

(*c*) *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lacey*, Id. 625, and the cases cited Id. 630, note (*b*); *Ex parte Bennett*, 10 Ves. 395, *per* Lord Eldon; *Ex parte Reynolds*, 5 Ves. 707; *Ex parte James*, 8 Ves. 346, *per* Lord Eldon; *Ex parte Morgan*, 12 Ves. 6; *Ex parte Bage*, 4 Mad. 459; *Ex parte Badcock*, 1 Mont. & Mac. 231; *Pooley* v. *Quilter*, 2 De G. & J. 327.

(*d*) *King* v. *Anderson*, 8 I. R. Eq. 147, reversed Ib. 625; *Murphy* v. *O'Shea*, 2 Jon. & Lat. 422.

(*e*) *Knight* v. *Majoribanks*, 11 Beav. 322; 2 Mac. & G. 10.

(*f*) *Chambers* v. *Howell*, 11 Beav. 6. As to purchases by one partner under an execution against another partner, see *Perens* v. *Johnson*, 3 Sm. & G. 419.

[(*g*) *Boswell* v. *Coaks*, 23 Ch. D. 302; 27 Ch. Div. 424; 11 App. Cas. 232.]

(*h*) *Stratford* v. *Twynam*, Jac. 418.

[(*i*) *Clark* v. *Clark*, 9 App. Cas. 733.]

(*j*) See *Ex parte James*, 8 Ves. 351; *Ex parte Bennett*, 10 Ves. 400; *Lord Hardwicke* v. *Vernon*, 4 Ves. 411; *York Buildings' Company* v. *Mackenzie*, 8 B. P. C. 42; *Aberdeen Town Council* v. *Aberdeen University*, 2 App. Cas. 544.

(*k*) *Attorney-General* v. *Lord Dudley*, G. Coop. 146; *Dunbar* v. *Tredennick*, 2 B. & B. 304.

(*l*) *Watson* v. *Toone*, 6 Mad. 153; *Ex parte James*, 8 Ves. 351, *per* Lord Eldon; *Whelpdale* v. *Cookson*, stated from R. L. *Campbell* v. *Walker*, 5 Ves. 682; *Hall* v. *Hallet*, 1 Cox, 134, see 139; *York Buildings' Company* v. *Mackenzie*, *ubi supra*, &c.

(*m*) *Ex parte James*, 8 Ves. 351, *per*

with interest (*a*), and, if he was in actual possession, being charged with an occupation rent (*b*). [But if the consideration passing from the trustee is not wholly pecuniary, and the *cestui que trust* has by subsequent dealings put it out of his power to restore to the trustee the benefits derived from him, he has lost his right to set aside the transaction (*c*).]

Allowances for repairs.

2. The trustee will have all just allowances made to him for *improvements and repairs* which are substantial and lasting (*d*), or such as have a tendency to bring the estate to a better sale (*e*), as in one case for a mansion house erected, plantations of shrubs, &c. (*f*); and in estimating the improvements, the buildings pulled down, if they were incapable of repair, will be valued as old materials, but otherwise they will be valued as buildings standing (*g*). Should the property have been *deteriorated* by the acts of the trustee, his purchase-money will suffer a proportionate reduction (*h*). [And if the subject-matter of the sale be a business sold as a going concern, and the purchasing trustee carry it on under his own personal direction, on the sale being set aside he will be allowed to deduct from the profits all outgoings for wages of assistants, expenditure for stock, &c., but will not be allowed any salary for his own management of the business (*i*).]

Case of actual fraud.

3. Where the contract is vitiated by the presence of *actual fraud*, allowance will still be made to the trustee for necessary repairs (*j*), and in one case allowance was also made for improvements (*k*); but in another case of actual fraud the Court refused any allowance for improvements. "If," said Lord Fitzgibbon, "a man has acquired an estate by rank and abominable fraud, and shall afterwards expend the money in improving the estate, is he therefore to retain it in his hands against the lawful proprietor? If such a rule should prevail, it would justify a proposition I once heard at the bar, that the common equity of the country was *to improve the right owner out of the possession of his estate*" (*l*).

Lord Eldon; *Ex parte Lacey*, 6 Ves. 630, *per eundem*; *Watson* v. *Toone*, Mad. 153; *Whelpdale* v. *Cookson*, *York Buildings' Company* v. *Mackenzie*, *ubi supra*.

(*a*) *Macartney* v. *Blackwood*, 1 Ridg. Knapp & Sch. 602.

(*b*) *Ex parte James*, 8 Ves. 351, *per* Lord Eldon.

[(*c*) *Re Worssam*, 46 L. T. N.S. 584; 51 L. J. Ch. 669; *Dimsdale* v. *Dimsdale*, 3 Dr. 556, 577.]

(*d*) *Ex parte Hughes*, 6 Ves. 624, 625; *Ex parte James*, 8 Ves. 352; *Campbell* v. *Walker*, 5 Ves. 682; *Davey* v. *Durrant*, 1 De G. & J. 535; *King* v. *Anderson*, 8 I. R. Eq. 625, see 636.

(*e*) *Ex parte Bennett*, 10 Ves. 400.

(*f*) *York Buildings' Company* v. *Mackenzie*, 8 B. P. C. 42.

(*g*) *Robinson* v. *Ridley*, 6 Mad. 2.

(*h*) *Ex parte Bennett*, 10 Ves. 401.

[(*i*) *Re Norrington*, 13 Ch. Div. 654.]

(*j*) *Baugh* v. *Price*, 1 G. Wils. 320.

(*k*) *Oliver* v. *Court*, 8 Price, 172.

(*l*) *Kenney* v. *Browne*, 3 Ridg. 518;

Trustee paying purchase-money into Court.

4. A trustee, the sale having taken place during the pendency of a suit, had paid part of his purchase-money into Court, which had been *invested in the funds*. On the purchase being set aside, the trustee claimed the benefit of the rise of the stock, but it was held that he was entitled only to his purchase-money with interest, for had there occurred a fall of the stock, he could not have been compelled to submit to the loss (*a*).

Trustee to be discharged from the sale immediately.

5. If the trustee is to be discharged from the situation of purchaser, he is to be discharged at once, and the Court will order an immediate re-conveyance upon immediate repayment of the money (*b*).

Lessees not prejudiced.

6. The reconveyance of the estate will be without prejudice to the titles and interests of *lessees* and others who have contracted with the trustee *bonâ fide* before the pendency of the suit (*c*).

Of submitting the estate to a re-sale.

7. But the *cestui que trust*, particularly where the assignee in bankruptcy has become the purchaser, may claim, not a re-conveyance of the specific estate, but a *re-sale* of the property under the direction of the Court. The terms of the re-sale have not always been uniform. In *Whelpdale* v. *Cookson* (*d*), Lord Hardwicke said the majority of the creditors should *elect* whether the purchase should stand; so that should they elect to re-sell, and the estate should be sold at a still lower price, the creditors would suffer. The doctrine of Lord Thurlow appears to have been, that the property should be put up at the price at which the trustee purchased, and if any advance was made, the sale should take effect, but if no bidding, the trustee should be held to his bargain (*e*). Lord Alvanley followed the authority of Lord Hardwicke, and directed an inquiry whether it was for the benefit of the infants that the premises should be re-sold, and, if for their benefit, that the sale should be made (*f*). "To this principle," said Lord Eldon, "the objection is that a great temptation to purchase is offered to trustees, the question whether the re-sale would be advantageous to the *cestui que trust* being of necessity determined at the hazard of a wrong determination" (*g*). Lord Eldon therefore conceived it best to adopt the rule of Lord Thurlow, and so he decreed in *Ex*

and see *Stratton* v. *Murphy*, 1 Ir. Rep. Eq. 361.

(*a*) *Ex parte James*, 8 Ves. 337, see 351.

(*b*) See *Ex parte Bennett*, 10 Ves. 400, 401.

(*c*) *York Buildings' Company* v. *Mackenzie*, 8 B. P. C. 42; see the decree.

(*d*) Cited *Campbell* v. *Walker*, 5 Ves. 682.

(*e*) See *Lister* v. *Lister*, 6 Ves. 633; *Ex parte James*, 8 Ves. 351.

(*f*) *Campbell* v. *Walker*, 5 Ves. 678, see 682.

(*g*) *Sanderson* v. *Walker*, 13 Ves. 603.

parte Hughes (*a*), and *Ex parte Lacey* (*b*). Sir W. Grant, in a subsequent case (*c*), said he was not aware that Lord Eldon had laid down any general rule as to the terms; but a few days after, having consulted the Lord Chancellor upon the subject, and discovering his mistake, he framed his decree in conformity with the Lord Chancellor's decisions. The same principle has since been followed in numerous other cases (*d*), and the practice may be considered as settled.

Allowances for repairs, &c.

8. Should the trustee have *repaired or improved* the estate, the expense of the repairs and improvements, if allowed, will be added to the purchase-money, and the estate be put up at the accumulated sum (*e*).

Re-selling in lots.

9. Where the trustee has purchased in one lot, the *cestui que trust* cannot insist on a re-sale in different lots. If desirous of reselling the property in that mode, they must pay the trustee his principal and interest, and then, as the absolute owners, they may sell as they please (*f*).

Difficulty of Lord Hardwicke's rule.

10. In the application of Lord Hardwicke's rule it was a question constantly occurring, whether the body of creditors at large could be bound by the resolution of the majority to insist upon a re-sale; but by the practice of Lord Eldon, the difficulty on that head is avoided (*g*), for as the creditors cannot by possibility sustain an injury, it is competent to any individual creditor to try the experiment (*h*).

The remedy against trustee who has sold the property.

11. If before the *cestui que trust* commences proceedings for relief the trustee has passed the estate into the hands of a purchaser *without notice*, the *cestui que trust* may compel the trustee to account for the difference of *price* (*i*), or for the difference between the sum the trustee paid and the real *value* of the estate at the time of the purchase (*j*), with interest at 4 per cent. (*k*).

Purchase of shares by a trustee.

12. An administrator had become the purchaser of some shares

(*a*) 6 Ves. 617.
(*b*) Id. 625; and see *Ex parte Reynolds*, 5 Ves. 707.
(*c*) *Lister* v. *Lister*, 6 Ves. 633.
(*d*) *Ex parte James*, 8 Ves. 337; *Ex parte Bennett*, 10 Ves. 381; *Robinson* v. *Ridley*, 6 Mad. 2.
(*e*) *Ex parte Bennett*, 10 Ves. 400; *Ex parte Hughes*, 6 Ves. 625; *Robinson* v. *Ridley*, 6 Mad. 2.
(*f*) See *Ex parte James*, 8 Ves. 351, 352.
(*g*) *Ex parte Hughes*, 6 Ves. 624.
(*h*) *Ex parte James*, 8 Ves. 353; and see *Ex parte Lacey*, 6 Ves. 628.
(*i*) *Fox* v. *Mackreth*, 2 B. C. C. 400; *S. C.* 2 Cox, 320; *Hall* v. *Hallet*, 1 Cox, 134; *Whichcote* v. *Lawrence*, 3 Ves. 740; *Ex parte Reynolds*, 5 Ves. 707; *Randall* v. *Errington*, 10 Ves. 423.
(*j*) See *Lord Hardwicke* v. *Vernon*, 4 Ves. 411.
(*k*) *Hall* v. *Hallet*, 1 Cox, 134, see 139.

in Scotch mines, part of the assets, and afterwards sold them to a stranger at a considerable advance of price, and Lord Thurlow decreed the trustee to account for every advantage he had made, but said he could not go the length of ordering the defendant to replace the shares. He conceived the plaintiff, one of the next of kin, had no such *election* of choosing between the *specific thing* and the *advantage* made of it (*a*).

Costs.

13. The *costs of the suit* will, as a general rule, follow the decree—that is, if the trustee be compelled to give up his purchase, unless his conduct was perfectly honourable and the sale is set aside on the mere dry rule of equity (*b*), he must pay the expenses he has himself occasioned (*c*); and if the charge be unfounded, the costs must be paid by the plaintiff. But if there be great delay on the part of the *cestui que trust*, the costs will be refused him, though he succeed in the suit (*d*); and, on the other hand, if the suit be dismissed, not because the transaction was not originally impeachable, but merely on account of the great interval of time, the Court may refuse to order the plaintiff to pay the costs of the defendant (*e*).

Where the sale is set aside after the purchaser's death.

14. If the *trustee devise the estate* purchased by him, and the purchase is set aside as against the devisee, it is conceived that as the devise carried all the testator's interest in the property the monies repaid will belong to the devisee. But if the *trustee die intestate*, then whether monies repaid shall belong to the next of kin or the heir of the trustee is a question of great difficulty. In favour of the former it may be urged, that as there is no equity between the heir-at-law and next of kin, the monies repaid being in fact personal estate must belong to the next of kin: that the Court rescinds the transaction by taking an account of rents and allowing 4 per cent. interest on the purchase-money from the time of the purchase, and that the rents and interest accrued during the life of the intestate must certainly be regarded as personal estate, and that the right of the next of kin is supported by *Lawes* v. *Bennett* (*f*), and other cases, where a lessee has an option of purchasing and the option is exercised after the death of the lessor, in which case there is a retrospective conversion.

(*a*) *Hall* v. *Hallet*, *ubi sup.*

(*b*) *Baker* v. *Carter*, 1 Y. & C. 250.

(*c*) *Whichcote* v. *Lawrence*, 3 Ves. 752; *Hall* v. *Hallet*, 1 Cox, 141; *Sanderson* v. *Walker*, 13 Ves. 601, 604; *Crowe* v. *Ballard*, 2 Cox, 253; *S. C.* 3 B. C. C. 117; *Dunbar* v. *Tredennick*, 2 B. & B. 304; *Smedley* v. *Varley*, 23 Beav. 358.

(*d*) *Attorney-General* v. *Lord Dudley*, G. Coop. 146.

(*e*) *Gregory* v. *Gregory*, G. Coop. 201.

(*f*) 1 Cox, 167.

On the other hand, it may be argued that a purchase by a trustee is not void but voidable only, and that the heir is clearly not bound to account for the rents while he was in possession, and that the Court takes an account of rent and interest *ab initio*, not for the purpose of increasing the trustee's personal estate, but for measuring the price which the *cestui que trust* must pay for recovering the estate; that the heir takes all the title which the intestate could give him, subject to an equity subsisting in another, to wrest the estate from him upon certain terms, and that the monies repaid are in fact the estate, after satisfying the outstanding claims: that the cases decided upon contract have no application, as the monies are here repaid contrary to the contract: that a different doctrine would lead to great inconvenience in adjusting the accounts of rent and interest, and also from intermediate settlements or other dispositions by the heir; it would be very hard, for instance, that purchasers under a marriage settlement, with constructive notice, should, because they cannot have the whole benefit, be deprived of every benefit. The inclination of the author's opinion is in favour of the real representative, but the point remains to be decided.

Thirdly. As to the time within which the sale may be set aside.

Cestui que trust must set aside the sale in reasonable time.

1. If the *cestui que trust* desire to set aside the purchase, he must make his application to the Court in *reasonable time*, or he will not be entitled to relief (*a*). A long acquiescence under a sale to a trustee is treated as evidence that the relation between the trustee and *cestui que trust* had been previously abandoned, and that in all other respects the purchase was fairly conducted (*b*).

What considered a reasonable time.

2. A sale cannot, in general, be set aside after a lapse of twenty years (*c*); but in these cases the Court does not confine itself to that period by analogy to the Statute of Limitations, for relief has been refused after an acquiescence of eighteen years (*d*); and seventeen years (*e*); and it is presumed that even a shorter period would be a bar to the remedy, where the *cestui que trust*

(*a*) *Campbell* v. *Walker*, 5 Ves. 680, 682, *per* Lord Alvanley; *Chalmer* v. *Bradley*, 1 J. & W. 59, *per* Sir T. Plumer; *Ex parte James*, 8 Ves. 351, *per* Lord Eldon; *Webb* v. *Rorke*, 2 Sch. & Lef. 672, *per* Lord Redesdale; *Randall* v. *Errington*, 10 Ves. 427, *per* Sir W. Grant. But see *Baker* v. *Peck*, 9 W. R. 186.

(*b*) *Parkes* v. *White*, 11 Ves. 226, *per* Lord Eldon; and see *Morse* v. *Royal*, 12 Ves. 374, 378.

(*c*) *Price* v. *Byrn*, cited *Campbell* v. *Walker*, 5 Ves. 681; *Barwell* v. *Barwell*, 34 Beav. 371.

(*d*) *Gregory* v. *Gregory*, G. Coop. 201, affirmed on appeal, see Jac. 631; *Champion* v. *Rigby*, 1 R. & M. 539; *Roberts* v. *Tunstall*, 4 Hare, 257; *King* v. *Anderson*, 8 Ir. R. Eq. 625.

(*e*) *Baker* v. *Read*, 18 Beav. 398.

could offer no excuse for his *laches* (*a*). However, the sale has been opened after an interval of ten years (*b*), and eleven years (*c*); and even after a much greater lapse of time where the executor had purchased in the names of trustees for himself, and the transaction was attended with circumstances of disguise and concealment (*d*).

Of persons under disability.

3. Persons not *sui juris*, as *femes covert* and infants, cannot be precluded from relief on the ground of acquiescence during the continuance of the disability (*e*). But *femes covert* as to property settled to their *separate use*, [or belonging to them as their separate property under the Married Women's Property Act, 1882 (*f*),] if their power of anticipation be not restricted, are regarded as *femes sole* (*g*).

Time allowed to a class of persons.

4. A *class* of persons, as *creditors*, cannot be expected in the prosecution of their common interest to exert the same vigour and activity as *individuals* would do in the pursuit of their exclusive rights (*h*). Accordingly creditors have succeeded in their suits after a *laches* of twelve years (*i*); but even creditors will be barred of their remedy if they be chargeable with very gross *laches*, as with acquiescence in the sale for a period of thirty-three years (*j*).

Time no bar where circumstances not known.

5. For *laches* to operate as a bar, it must be shown that the *cestui que trust knew* the trustee was the purchaser; for while the *cestui que trust* continues ignorant of that fact, he cannot be blamed for not having quarrelled with the sale (*k*).

Distress of *cestui que trust*.

6. The effect of the length of time may also be materially influenced by the continued *distress* of the *cestui que trust* (*l*), but poverty is merely an ingredient in the case, and will not alone displace the bar (*m*).

(*a*) See *Oliver* v. *Court*, 8 Price, 167, 168.

(*b*) *Hall* v. *Noyes*, cited *Whichcote* v. *Lawrence*, 3 Ves. 748; [and see *Re Worssam*, 46 L. T. N.S. 584; 51 L. J. Ch. 669.]

(*c*) *Murphy* v. *O'Shea*, 2 Jon. & Lat. 422.

(*d*) *Watson* v. *Toone*, 6 Mad. 153; [and see *Re Postlethwaite*, 59 L. T. N.S. 58; reversed on appeal, 37 W. R. 200; 60 L. T. N.S. 514.]

(*e*) *Campbell* v. *Walker*, 5 Ves. 678; *S. C.* 13 Ves. 601; *Roche* v. *O'Brien*, 1 B. & B. 330, see 339.

[(*f*) 45 & 46 Vict. c. 75.]

(*g*) See *infra*.

(*h*) *Whichcote* v. *Lawrence*, 3 Ves. 740, see 752; *Ex parte Smith*, 1 D. & C. 267; *Hardwick* v. *Mynd*, 1 Anst. 109; [*Boswell* v. *Coaks*, 27 Ch. Div. 424]; and see *Kidney* v. *Coussmaker*, 12 Ves. 158; *York Buildings' Company* v. *Mackenzie*, 8 B. P. C. 42; *Ex parte Smith*, 1 D. & C. 267.

(*i*) *Anon. case* in the Exchequer, cited *Lister* v. *Lister*, 6 Ves. 632.

(*j*) See *Hercy* v. *Dinwoody*, 2 Ves. jun. 87; *Scott* v. *Nesbitt*, 14 Ves. 446.

(*k*) *Randall* v. *Errington*, 10 Ves. 423, see 427; *Chalmer* v. *Bradley*, 1 J. & W. 51.

(*l*) *Oliver* v. *Court*, 8 Price, 127; see 167, 168; and see *Gregory* v. *Gregory*, G. Coop. 201; *Roche* v. *O'Brien*, 1 B. & B. 342.

(*m*) *Roberts* v. *Tunstall*, 4 Hare, 257; see p. 267.

Confirmation of the sale.

7. Of course the *cestui que trust* may ratify the sale to the trustee by an express and actual *confirmation* (*a*); and if the *cestui que trust* choose to confirm it, he cannot afterwards annul his own act on the ground of no adequate consideration (*b*). But—

Requisites of good confirmation.

a. The confirming party must be *sui juris*—not labouring under any disability, as infancy or coverture (*c*). But, in the case of real estate a *feme covert* can, if it be not settled to her separate use without anticipation, confirm the purchase under the operation of the Fines and Recoveries Act (*d*). And in confirmation, as in acquiescence, a *feme covert* who has property, whether real or personal, settled to her separate use, [or belonging to her as her separate property under the recent Act (*e*),] (provided her power of anticipation be not restrained), has, to the extent of her interest in the property, all the capacity of a *feme sole* (*f*).

β. The confirmation must be a solemn and deliberate act, not, for instance, fished out from loose expressions in a letter (*g*); and particularly where the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the Court will watch it with the utmost strictness, and not allow it to stand but on the very clearest evidence (*h*).

γ. There must be no *suppressio veri* or *suggestio falsi*, but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case (*i*).

δ. It has been laid down that the confirming party must not be ignorant of the *law*, that is, he must be aware that the transaction is of such a character that he could impeach it in a Court of Equity (*j*); but it [has been] doubted whether this view is

(*a*) *Morse* v. *Royal*, 12 Ves. 355; *Clarke* v. *Swaile*, 2 Eden, 134; and see *Chesterfield* v. *Janssen*, 2 Ves. 125; *S. C.* 1 Atk. 301.

(*b*) *Roche* v. *O'Brien*, 1 B. & B. 353, *per* Lord Manners.

(*c*) *Campbell* v. *Walker*; 5 Ves. 678; *S. C.* 13 Ves. 601; *Roche* v. *O'Brien*, 1 B. & B. 330, see 339; and see *Scott* v. *Davis*, 4 M. & Cr. 92; [and *Buckmaster* v. *Buckmaster*, 35 Ch. Div. 21; *S. C. nom. Seaton* v. *Seaton*, 13 App. Cas. 61.]

(*d*) 3 & 4 W. 4. c. 74; and see 8 & 9 Vict. c. 106.

[(*e*) 45 & 46 Vict. c. 75.]

(*f*) See *infra*.

(*g*) *Carpenter* v. *Heriot*, 1 Eden, 338; and see *Montmorency* v. *Devereux*, 7 Cl. & Fin. 188.

(*h*) *Morse* v. *Royal*, 12 Ves. 373, *per* Lord Erskine.

(*i*) See *Murray* v. *Palmer*, 2 Sch. & Lef. 486; *Baugh* v. *Price*, 1 G. Wils. 320; *Morse* v. *Royal*, 12 Ves. 373; *Cole* v. *Gibson*, 1 Ves. 507; *Roche* v. *O'Brien*, 1 B. & B. 338, and following pages; *Adams* v. *Clifton*, 1 Russ. 297; *Cockerell* v. *Cholmeley*, 1 R. & M. 425; *S. C.* Taml. 444; *Chesterfield* v. *Janssen*, 2 Ves. 146, 149, 152, 158; *Chalmer* v. *Bradley*, 1 J. & W. 51.

(*j*) *Cann* v. *Cann*, 1 P. W. 727; *Dunbar* v. *Tredennick*, 2 B. & B. 317;

consistent with the established doctrine, that mistake of *law* as distinguished from mistake of *fact* forms no ground for relief (*a*).

ε. The confirmation must be wholly distinct from and independent of the original contract (*b*)—not a conveyance of the estate executed in pursuance of a covenant in the original deed for further assurance (*c*).

ζ. The confirmation must not be wrung from the *cestui que trust* by distress or terror (*d*).

η. Where the *cestuis que trust* are a class of persons, as creditors, the sanction of the major part will not be obligatory on the rest, but the confirmation to be complete, must be the joint act of the whole body (*e*).

Burney v. *Macdonald*, 15 Sim. 15; *Molony* v. *L'Estrange*, 1 Beat. 413; *Crowe* v. *Ballard*, 2 Cox, 357; *S. C.* 1 Ves. jun. 220; *S. C.* 3 B. C. C. 120; *Watts* v. *Hyde*, 2 Coll. 377; *Cockerell* v. *Cholmeley*, 1 R. & M. 425; *Murray* v. *Palmer*, 2 Sch. & Lef. 486; *Roche* v. *O'Brien*, 1 B. & B. 339; *Ex parte James*, 9 L. R. Ch. App. 609.

(*a*) See *Midland Great Western Railway of Ireland Company* v. *Johnson*, 6 H. L. Cas. 798; *Stafford* v. *Stafford*, 1 De G. & J. 202; *Stone* v. *Godfrey*, 5 De G. M. & G. 76; *Re Saxon Life Assurance Company*, 2 J. & H. 412; [but see and consider *Rogers* v. *Ingham*, 3 Ch. Div. 351, 356, 357, as showing that the doctrine may not be applicable where a fiduciary relation exists, and *Cooper* v. *Phibbs*, 2 L. R. H. L. 149, 170, as to the meaning of the maxim, "ignorantia juris neminem excusat."]

(*b*) See *Wood* v. *Downes*, 18 Ves. 128; *Morse* v. *Royal*, 12 Ves. 373; *Scott* v. *Davis*, 4 M. & Cr. 91, 92; *Roberts* v. *Tunstall*, 4 Hare, 267.

(*c*) *Roche* v. *O'Brien*, 1 B. & B. 330, see 338; *Wood* v. *Downes*, 18 Ves. 120, see 123; and see *Fox* v. *Mackreth*, 2 B. C. C. 400.

(*d*) See *Roche* v. *O'Brien*, 1 B. & B. 330; *Dunbar* v. *Tredennick*, 2 B. & B. 317; *Crowe* v. *Ballard*, 2 Cox, 257.

(*e*) *Sir G. Colebrooke's case*, cited *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, Id. 628; the cases cited, Id. 630, note (*b*). *Whelpdale* v. *Cookson*, cited *Campbell* v. *Walker*, 5 Ves. 682, has been doubted by Lord Eldon, 6 Ves. 628.

CHAPTER XIX.

DUTIES OF TRUSTEES FOR PURCHASE.

A TRUST for *purchase* is not so frequent as a trust for *sale*, and yet occurs often enough to merit a separate consideration.

Trustees liable for consequences of breach of duty.

1. The general rule is that trustees for purchase, like all other trustees, are bound to discharge the duty prescribed, and failing to do so are answerable for the consequences; as, if a specific fund be bequeathed to trustees upon trust to lay out on a purchase, and they neglect to call in the fund and lay it out, they are liable to compensate the *cestuis que trust* for the consequences (*a*).

May enter into a previous contract.

2. It is almost unnecessary to premise, that trustees for purchase are not confined to the mere act of *paying* the purchase-money and taking a *conveyance*, but may in the ordinary course of business, enter into a previous written *contract* as a preliminary to the purchase.

Must see to value.

3. A material point to which trustees of this kind have to advert is the intrinsic *value* of the estate proposed to be bought, and, to arrive at a sound conclusion on this head, they must employ a valuer of their own (*b*), and must not rely upon any valuation made on behalf of the vendor; "Nothing," said Lord Romilly, "is more uncertain than a valuation, and the Court has constantly to observe upon the great discrepancy between valuations made by those persons who want to enhance, and by those persons who want to depreciate the value of the property. A man *bonâ fide* forms his opinion, but he looks at the case in a totally different way, when he knows on whose behalf he is acting;" and in reference to the case of a loan by trustees on mortgage (which is not on principle distinguishable from a

(*a*) *Craven* v. *Craddock*, W. N. 1868, p. 229.

[(*b*) In *Fry* v. *Tapson*, 28 Ch. D. 268; it was held that the appointment of the valuer could not be left to the trustees' solicitor, but that the trustees were bound to exercise their own judgment as to the selection of a valuer, see *ante*, p. 356.]

purchase) he added, "a trustee cannot with propriety lend trust money on mortgage upon a valuation made by or on behalf of the mortgagor. If he does so, and the valuer has *bonâ fide* valued the property at double its value, the trustee must take the consequences: he ought to have employed a valuer on his own behalf to see to it" (*a*).

There must be a good title.

4. Another question of importance is that of *title*. Every direction or authority to lay out trust money upon a purchase of real estate, carries with it the tacit condition that there shall be a good title. Whether, therefore, the trustees are proposing to purchase by *private contract* or by *auction*, they must take care not to bind themselves by any agreement which shall preclude them from requiring a good marketable title. If the intended contract or conditions of sale contain anything of a special character, the trustees should lay them before their counsel for his opinion, whether the stipulations are consistent with their trust (*b*). Formerly a good marketable title was one traced back for a period of sixty years, but by 37 & 38 Vict. c. 78, s. 1, a forty years' title has now been substituted. [And by the Trustee Act, 1888 (*c*), section 4, sub-s. 3, it is now provided that "no trustee shall be chargeable with breach of trust only upon the ground that, in effecting the purchase of any property, or in lending money upon the security of any property, he shall have accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted."

[Trustee Act, 1888.]

[Conditions incorporated in the contract.]

5. The 2nd section of the Act 37 & 38 Vict. c. 78, as to contracts for sale made after the 31st December, 1874, and the 3rd section of the Conveyancing and Law of Property Act, 1881 (*d*), as to contracts for sale made after the 31st December, 1881, incorporate in such contracts various conditions and stipulations (*e*) unless the same are expressly excluded, and by the 3rd section of the former Act and the 66th section of the latter Act trustees who are purchasers are authorised to buy without excluding the application of the Acts, and the 66th section of the latter Act expressly

(*a*) *Ingle* v. *Partridge*, 34 Beav. 412-414; [but see *Re Godfrey*, 23 Ch. D. 483, where trustees were held not liable though they had not made an independent valuation, and in all cases the true test seems to be whether the trustees have acted as prudent men would in dealing with their own property; see *ante*, p. 354.]

(*b*) See *Eastern Counties Railway Company* v. *Hawkes*, 5 H. L. Cas. 363.

[(*c*) 51 & 52 Vict. c. 59.]

[(*d*) 44 & 45 Vict. c. 41.]

[(*e*) For these conditions and stipulations see *ante*, p. 485, *et seq.*]

exonerates trustees and their solicitors from all liability for so doing, but nothing in that Act is to be taken to imply that the adoption in connection with or application to any contract or transaction of any further or other provisions, stipulations, or words is improper.

[Official searches.]

6. Sect. 2 of the Conveyancing Act, 1882 (*a*) provides for an official search being made on the request of a purchaser for entries of judgments, Crown debts, and similar matters, and provides that when a solicitor acting for trustees obtains an office copy certificate of the result of the search under the section the trustees shall not be answerable for any loss that may arise from error in the certificate.

[Yorkshire Register.]

7. As to lands situate in Yorkshire, "The Yorkshire Registries Act, 1884" (*b*), provides for an official search of the register being made at the request of any person, and further exempts any trustee, executor, or other person in a fiduciary position who has obtained a certificate of the result of an official search or a certified copy of any document enrolled in the register, or of any entry in the register from any loss, damage, or injury that may arise from any error in such certificate or copy. And where a deed or will has been enrolled at full length, the comparison of an abstract with the copy so enrolled is to be a sufficient discharge of the duty to compare the abstract with the original document.]

Deposit.

8. As a *deposit* is almost invariably required upon a sale by auction, and not uncommonly by private contract, it is conceived that trustees would be justified upon signing the contract in paying a deposit in part discharge *de bene esse* of the purchase-money. But generally the character of trustee is pleaded as an excuse for not paying a deposit, and is allowed.

Where purchase-money is in Court.

9. Where the money is in *Court* the trustee must enter into a *conditional contract*, that is, "subject to the approbation of the Court," and then apply by petition or summons at chambers for the Court's sanction, and the practice is to direct an inquiry whether the proposed purchase is fit and proper, and if so, whether a *good title* can be made. "As long," said Sir G. Jessel, "as an estate is under the administration of the Court, the Court does not allow a purchase or mortgage or any other investment to be made, without seeing to its safety. The Court has to protect the property for all claimants, and a reference is

[(*a*) 45 & 46 Vict. c. 39.] [(*b*) 47 & 48 Vict. c. 54, ss. 20, 23.]

made to ascertain the propriety of the investment, that is to say, its propriety in all respects" (*a*). And the practice is not to inquire whether a good title can be made *subject to the conditions*, but whether a good title can be made *absolutely*, and if in the course of investigation an objection to the title arises, it is brought under the attention of the judge, who then exercises his discretion (the whole title being before him), whether the objection can be waived with reasonable safety (*b*). "Much too great laxity," observed V. C. Wood, "has been gaining ground amongst the advisers of those who have to manage trust property, and there is a disposition to rest satisfied with imperfect titles. I cannot approve of such a practice, and cannot permit trustees to take a defective title, even though it may be in accordance with the contract" (*c*).

How purchase will affect the interest of *cestuis que trust.*

10. Trustees for purchase have to look not only to the adequacy of the *value* and the goodness of the *title*, but also to the effect which the purchase will have upon the *relative interests* of the *cestuis que trust.*

Purchase of houses.

Thus where the property is directed by the settlement to be held in trust for a person for life with remainders over, a trustee might no doubt purchase an estate with a suitable *house* upon it, but (without saying that he could not legally do so) he ought not to purchase a house merely. This is a property of a wasting nature, and the tenant for life could not be compelled to preserve it against natural decay. A power to invest on *Government Annuities* would not justify the purchase of *Long Annuities*, and there is a similar difference between land and houses, the former being worth about thirty years' purchase, and the latter much less, so that the tenant for life would be benefited at the expense of the remainderman (*d*).

Ground rents.

11. Even a purchase of *ground rents* of houses, though coming under the description in the trust deed of "hereditaments," is not free from objection, for the object would of course be to procure for the tenant for life a higher income, but this would be at the cost of the remainderman in point of security. Should the houses be burnt down, and should the lessee have neglected to insure or the insurance monies not be forthcoming, the trustee might have nothing to show for the purchase but a worthless

(*a*) *Bethell* v. *Abraham*, 17 L. R. Eq. 27.

(*b*) *Ex parte The Governors of Christ's Hospital*, 2 H. & M. 166.

(*c*) *Ex parte The Governors of Christ's Hospital*, 2 H. & M. 168.

(*d*) See *Moore* v. *Walter*, 8 L. T. N.S. 448; 11 W. R. 713.

site, and then the remainderman might seek to hold him responsible as for a fraudulent execution of his trust in equity, though the purchase was within the words of the trust according to the letter (*a*). However, it has been held that the purchase of freehold ground rents reserved upon building leases for ninety-nine years is justifiable under a power to purchase "hereditaments in fee-simple in possession" (*b*).

A timbered estate.

12. Again, if a sum be given to be laid out in the purchase of an estate to be settled on a person for life *without impeachment of waste*, with remainders over, trustees should not purchase a *wood estate*, as the tenant for life, on being put into possession, could by a fall of the timber possess himself of a great part of the capital or *corpus* of the fund (*c*); and, on the contrary, if the tenant for life were *impeachable for waste*, he would lose the fruit of so much as was the value of the timber (*d*). But trustees may purchase an estate where the timber forms no overwhelming proportion of the value, for it cannot be supposed that the trustees were meant to purchase land without trees upon it.

Mines.

13. Trustees again should not purchase *mines;* for if the mines be open, the tenant for life might exhaust them, and leave nothing to the remainderman; and if not open, the tenant for life, if impeachable for waste, would get nothing and the remainderman would take the whole (*e*). But under *special circumstances* the Court has sanctioned the purchase of mines (*f*).

Advowsons.

14. *Advowsons* again would be very undesirable as a purchase, for though the advowson or any particular presentation (before a vacancy) might be sold, there would be no annual or regular fruit. The remainderman, *after* the tenant for life's death, might sell the advowson and get back all he was entitled to; but in the meantime the tenant for life would be reaping no benefit.

Copyholds for lives.

15. Copyholds for *lives*, if customarily renewable, might substantially be equal to freeholds, but they would not fall within the terms of a trust to purchase estates of *inheritance* (*g*).

(*a*) See *Read* v. *Shaw*, Sugd. Powers Append. 953; and see Ib. p. 864, 8th ed.; and *Middleton* v. *Pryor*, Amb. 393.

(*b*) *Re Peyton's Settlement*, 7 L. R. Eq. 463.

(*c*) See the subject discussed in *Burges* v. *Lamb*, 16 Ves. 174.

[(*d*) But see now 45 & 46 Vict. c. 38, s. 35, under which a tenant for life impeachable for waste in respect of timber may cut and sell ripe timber and will be entitled to one-fourth of the proceeds.]

[(*e*) But see now 45 & 46 Vict. c. 38, ss. 6–11, under which the tenant for life whether impeachable for waste or not may grant mining leases, and will be entitled to one-fourth or three-fourths of the mineral rents as the case may be.]

(*f*) *Bellot* v. *Littler*, W. N. 1874, p. 156; 22 W. R. 836; 30 L. T. N.S. 861.

(*g*) *Trench* v. *Harrison*, 17 Sim. 111.

Trustees buying from one of themselves.

16. Trustees having a trust or power to purchase must exercise a *joint* discretion as to the propriety of the purchase, and, therefore, as no man can be judge in his own case, they are precluded from buying from one of themselves. If such a purchase be really desirable, it might be carried out by a friendly suit for obtaining the sanction of the Court.

Consent of tenant for life.

17. A trust or power to purchase is sometimes accompanied with a condition that it shall be with the *consent of the tenant for life*. In such a case can the trustees purchase from the tenant for life himself? It is now settled that trustees with a similar power of sale and exchange can either sell to or exchange with the tenant for life (*a*), but this has always been regarded as hardly defensible on principle, and as an exception to the general rule. An exchange is in substance nothing more than a mutual sale, and when the simple case of a purchase by trustees from a tenant for life with power of consenting comes before the Court, it may be upheld, but in the meantime it would not be prudent for trustees, before actual decision, to incur the risk.

Equity of redemption.

18. Trustees, without a special power for the purpose, ought not to purchase an *equity of redemption* merely (*b*), for the mortgagee might seek to foreclose, when there might be a difficulty of redeeming, or might sell over the heads of the trustees under the power of sale, or might consolidate his mortgage with some other mortgage on another estate of the mortgagor, and so oblige the trustees to redeem both. [Nor will the trustees be justified in purchasing an equity of redemption merely because their investments comprise a second mortgage on the property, and they are impowered to invest upon freehold, leasehold, and chattel real securities, "including equitable mortgages by deposit," with the usual power to vary investments (*c*)].

Should always get the legal estate.

19. It would not be too much to lay down the rule broadly that trustees should never purchase without getting the *legal estate*.

Repairs and improvements.

20. A trust to buy an estate will not justify the investment

N.B. The words "of inheritance" in the marginal note, do not occur in the statement of the settlement in the body of the report, but seem to be implied.

(*a*) *Howard* v. *Ducane*, T. & R. 81.

[(*b*) *Worman* v. *Worman*, 43 Ch. D. 296; and see *Ex parte Craven*, 17 L. J. N.S. Ch. 215; *Re Galbraith*, 10 Ir. R. Eq. 368, where the Court held that monies paid into Court under the Lands Clauses Consolidation Act, 1845, ought not to be re-invested in the purchase of an equity of redemption.]

[(*c*) *Worman* v. *Worman*, 43 Ch. D. 296.]

of part of the trust fund upon a purchase, and the expenditure of a further part upon *repairs and improvements*, however substantial, either of the purchased estate (*a*), or of an estate settled to the like uses (*b*). But in a recent case where money was bequeathed to be laid out on a purchase of land to be annexed to a settled estate, and part of the settled estate was the advowson of a rectory of which the parsonage house was so dilapidated as to require rebuilding, which the testator had contemplated, V. C. Malins held that the proposed expenditure was within the spirit of the trust, and that the trustees would be justified in applying a competent part of the trust fund for the purpose (*c*). And monies liable to be laid out on a purchase of lands to be settled to certain uses may be laid out in the erection of *new buildings*, though not in the *repair of old buildings* on the lands settled to those uses (*d*), [or in draining the lands in settlement (*e*), and under its original jurisdiction the Court can sanction the expenditure of settled money in repairs necessary for the preservation of real estate settled in the same way (*f*).

[Settled Land Act.]

21. Now, by the Settled Land Act, 1882, sect. 33, money in the hands of trustees, and liable to be laid out in the purchase of land to be made subject to the settlement, may, at the option of the tenant for life, be invested or applied as capital money arising under the Act, and under this it may be made applicable for the improvements authorised by the Act (*g*). And under the Extraordinary Tithe Rent-charge Act, 1886 (*h*), money

[Extraordinary Tithe Rent-charge Act.]

(*a*) *Bostock* v. *Blakeney*, 2 B. C. C. 653; *Drake* v. *Trefusis*, 10 L. R. Ch. App. 364.

(*b*) *Dunne* v. *Dunne*, 3 Sm. & G. 22; *Brunskill* v. *Caird*, 16 L. R. Eq. 493. But the Court by a liberal construction of the Lands Clauses Consolidation Act, and the Leases and Sales of Settled Estates Act has assumed the jurisdiction of applying money stamped with a trust for purchase of real estate, in the improvement of estates settled to the uses of the estates directed to be purchased. See *Re Clitheroe's Trust*, W. N. 1869, p. 26; *Re Johnson's Trust*, 8 L. R. Eq. 348; *Re Incumbent of Whitfield*, 1 J. & H. 610; *Re Dummer's Will*, 2 De G. J. & S. 515; *Ex parte Rector of Claypole*, 16 L. R. Eq. 574; [*Re Speer's Trust*, 3 Ch. D. 262;] and see *Re Leigh's Estate*, 6 L. R. Ch. App. 887; *Re Newman's Settled Estates*, 9 L. R. Ch. App. 681; *Drake* v. *Trefusis*, 10 L. R. Ch. App. 366; *Re Hurle's Settled Estates*, 2 H. & M. 196. [But see *Re Venour's Settled Estates*, 2 Ch. D. 522, 526.]

(*c*) *Re Lord Hotham's Trusts*, 12 L. R. Eq. 76; *Re Curzon's Trust*, V. C. Malins, 8 May, 1874. But see *Brunskill* v. *Caird*, 16 L. R. Eq. 495; and *Re Nether Stowey Vicarage*, 17 L. R. Eq. 156.

(*d*) *Drake* v. *Trefusis*, 10 L. R. Ch. App. 364; [*Re Leslie's Settlement Trusts*, 2 Ch. D. 185; *Re Lytton's Settled Estates*, W. N. 1884, p. 193; *Re Stock's Devised Estates*, 42 L. T. N.S. 46; and see *Donaldson* v. *Donaldson*, 3 Ch. D. 743; *Vine* v. *Raleigh*, (1891) 2 Ch. (C. A.) 13.]

(*e*) *Re Leslie's Settlement Trusts, ubi sup.* [As to improvements under the Settled Land Act, see *post*, Chap. xxii.]

[(*f*) *Conway* v. *Fenton*, 40 Ch. D. 512.]

[(*g*) See *post*, Chap. xxii.]

[(*h*) 49 & 50 Vict. c. 54, sec. 6 (1).]

applicable to the purchase of land to be settled to or on any uses or trusts, is applicable in or towards the redemption of an "extraordinary charge" (*a*), or a rent-charge under the Act on land settled to or on the like uses or trusts.]

Estates in possession.

22. When the trust is to purchase an estate "*in possession*," it would not be competent to trustees to buy an *estate in reversion;* but, as already observed, under a power to purchase "hereditaments in fee simple in possession," trustees may buy ground-rents reserved upon building leases for ninety-nine years (*b*). But where the leases are of short duration, and the ground-rents are low as compared with the rental of the property when it falls into possession, the purchase of the ground-rents would be for the advantage of the remaindermen at the expense of the tenant for life.

Fund in Court.

23. Where the trust fund is in Court, it is still the duty of the trustees to watch the administration, and see that the purchase is a proper one, unless all the beneficiaries, whether under disability or not, are before the Court, and then the *cestuis que trust* by themselves or their guardians can look after their own interests, and the trustees are exonerated (*c*).

Costs.

24. The *costs* of the purchase are to be considered as part of it, and will come out of the same fund. The trustees, therefore, should provide for the costs, as well as for the purchase-money, though if this were not done, they would still have a lien for the costs properly incurred upon the estate purchased (*d*).

Whether trust to be disclosed.

25. The trustees, where the money is not under administration by the Court, need not *disclose the trust* to the vendor, either in the contract or in the conveyance. If they do so, it will embarrass the vendor by obliging him to see that the purchase-money is properly applied in pursuance of the trust.

Declaration of trust.

26. Where the legal estate is required to be vested in the *trustees*, they should, contemporaneously with the completion of the purchase, execute a formal declaration of trust, either by indorsement on the conveyance or by a separate instrument with notice of it indorsed on the conveyance, as otherwise the survivor would have it in his power to deal with the property as his own. Where notice of the trust to the vendor cannot be avoided, the declaration of trust may be embodied in the conveyance itself. This to some extent lengthens the conveyance, and the vendor

[(*a*) See preamble to Act.]
(*b*) *Re Peyton's Settlement*, 7 L. R. Eq. 463.
(*c*) *Davis* v. *Combermere*, 9 Jur. 76.
(*d*) *Gwyther* v. *Allen*, 1 Hare, 505.

might in strictness claim the extra costs; but such a claim is very seldom, if ever, heard of in practice.

Consequences of no declaration of trust.

27. *A declaration of trust*, or some notice tantamount to it, not only obviates fraud on the part of the trustee, but is also desirable on another account. If the estate purchased be not car-marked at the time as subject to the trust, serious questions might afterwards arise between the *cestuis que trust* and the representatives of the trustee, who are the persons entitled to the property, viz., whether the estate was purchased with the trust fund or from the trustee's private resources, and the evidence upon this issue might entail infinite expense (*a*).

[Trustee providing part of purchase-money.]

[28. Where an estate is purchased by trustees, but, the trust funds being insufficient to provide the whole purchase-money, one of the trustees provides the sum necessary to complete the purchase, the trust estate is entitled to a first charge upon the estate for the amount of the trust fund, and subject to such charge the trustee is entitled to be indemnified out of the estate in respect of the sum provided by him, and subject to such indemnity the real estate belongs to the trust (*b*).]

Whether the settlement should be in the conveyance.

29. Where the legal estate is not required to be vested in the trustees, but is to be limited *to the use of the beneficiaries*, the first question is, whether the limitations should be inserted in the conveyance itself, or whether the conveyance should be to the trustees, and a settlement executed subsequently. The answer must depend on the particular circumstances of each case, and whether the vendor will or not offer any objection, though it is conceived that on the purchaser undertaking to pay any extra costs to be thereby occasioned, the vendor could not object.

Whether to be referential.

30. Another practical question is, whether the limitations of the settlement to which the new purchase is to be subjected should be set out at length, or be *incorporated by reference*. In either case the trustees must be careful to ascertain the facts, as for instance, whether the owners of the successive estates have in any and what way dealt with their respective interests.

Form of referential settlement.

31. If it be proposed to settle the property by *referential* words, caution must be used so as to preserve the rights of the beneficiaries intact. Suppose, for instance, the trustees of a marriage settlement of real estate had disposed of it under a power of sale and had laid out the proceeds in the purchase of another estate, and then granted the new property to A. and his

(*a*) See *Mathias* v. *Mathias*, 3 Sm. & G. 552; *Price* v. *Blakemore*, 6 Beav. 507, and see *post*, Chap. xxx. s. 2.

[(*b*) *Re Pumfrey*, 22 Ch. D. 255.]

heirs "to the uses and upon the trusts," &c., of the original settlement. If in this case a term of years was limited by the original settlement to trustees, who have subsequently died, no new term will be created, or if any tenant for life or remainderman had sold his interest, he would, nevertheless, take the like estate again, and the purchaser could have only an equity. It is impossible to provide *à priori* any form that would adapt itself to all cases; but the following, which was settled by two eminent conveyancers, in a case where part of the settled estates had been sold and the proceeds re-invested, may be usefully inserted. The *habendum* was "to such uses as under and by virtue of the said indenture of settlement are now subsisting in the thereby settled hereditaments (now remaining unsold), and so that the said hereby assured hereditaments shall upon the execution of these presents be vested in the persons in whom the said thereby settled hereditaments (now remaining unsold) are now vested, and for the same estates and interests as are now vested in those persons respectively in the same hereditaments under or in consequence of that indenture, and shall be subject to the same trusts, powers and provisions as the said thereby settled hereditaments (now remaining unsold) are now subject to or affected by, under or in consequence of the same indenture, and so as to give effect to, but so as not to multiply or increase, any charge subsisting under that indenture or thereby authorised to be created."

Directions for settlement.

32. It has hitherto been assumed that the directions for the limitations in the settlement are clear in themselves, but it often happens that the trustees are involved in considerable perplexity from the ambiguity of the language in which the directions are given. We have to some extent anticipated this subject in a former page, under the general head of "executory trusts" (which comprise trusts for purchase and settlement) (*a*), but some further observations may here be introduced, with reference to the particular branch of the executory trusts now under consideration.

Impeachment for waste.

33. When trustees have to settle the estate upon a person for life with remainders over or in strict settlement, the question at once suggests itself whether the tenant for life is or not to be made *impeachable for waste*. The *primâ facie* rule appears to be that he shall (*b*), but there are important exceptions. Thus, where a larger estate than for life is given in the first instance, but it is afterwards cut down by directions for a strict settlement,

(*a*) See *ante*, p. 118.

(*b*) *Davenport* v. *Davenport*, 1 H. & M. 775; *Stanley* v. *Coulthurst*, 10 L. R. Eq. 259.

the Court does not consider itself justified in reducing the interest first taken beyond the clear intention, but limits a life estate without impeachment for waste (*a*). Again, where a testator directed a settlement to be made on A. and the heirs of his body (which would have left him tenant in tail), and then added that "it was never to be in the power of A. to dock the entail during his life," A. was declared to be tenant for life without impeachment of waste (*b*). And the like construction prevailed where a testator constituted A. "his heir," but desired that it should "be secured for the benefit of A.'s family" (*c*). Again, where a testator directed the property to be "closely entailed," the Court cut it down to a tenancy for life with remainder to the issue, but exempted the tenant for life from impeachment for waste (*d*).

"To be strictly settled."

34. In another case, where the direction was that the estate should be "*strictly settled*," the limitation to the tenant for life was without impeachment for waste (*e*), and V. C. Wood observed, with reference to this decision, that it was sustainable on the ground that the term "strict settlement" without more was understood in accordance with the common form of such instruments to imply estates for life without impeachment of waste (*f*).

Concurrence of all the *cestuis que trust*.

35. If the parties beneficially interested are under no disability and can agree together as to the disposition of the fund before investment or of the estate after investment, the trustees will be bound to obey their joint wishes, and must deal with the property in the manner directed by their joint order.

(*a*) *Davenport* v. *Davenport*, 1 H. & M. 779, *per* V. C. Wood; *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. H. L. 543.

(*b*) *Leonard* v. *Sussex*, 2 Vern. 526. See 1 H. & M. 778.

(*c*) *White* v. *Briggs*, 15 Sim. 17 & 300.

(*d*) *Woolmore* v. *Burrows*, 1 Sim. 512. See 1 H. & M. 778.

(*e*) *Bankes* v. *Le Despencer*, 10 Sim. 576; 11 Sim. 508; and see *Loch* v. *Bagley*, 4 L. R. Eq. 122.

(*f*) *Davenport* v. *Davenport*, 1 H. & M. 779.

CHAPTER XX.

DUTIES OF TRUSTEES FOR PAYMENT OF DEBTS.

UNDER this head we shall treat,—*First*, Of the *validity* of a trust for payment of debts; *Secondly*, What creditor deeds are *revocable*; and *Thirdly*, Of the *duties* of trustees for payment of debts.

SECTION I.

OF THE VALIDITY OF THE TRUST.

1. A TRUST for payment of debts may be created either by *will* or by act *inter vivos*.

Validity of a trust for payment of debts.

2. A trust created by *will* for payment of debts out of *personal estate* is so far a nullity, that the executor is bound, at all events, to provide for the payment of debts out of the assets in a due course of administration, and would not be justified in the breach of this legal obligation by pleading any expression of intention on the part of the testator. It is only as respects any *surplus* personal estate after payment of debts that the executor ought to regulate his administration by the directions of the will. A devise, however, of *real estate* for payment of debts is in all cases unimpeachable, for the statutes that have avoided devises as against specialty creditors (*a*), and now as against simple contract creditors (*b*), have expressly excepted devises for payment of debts.

Trust created by act *inter vivos* attended with fraud.

3. As to trusts created by act *inter vivos*, a trust for payment of debts will in all cases be void, if vitiated by *actual fraud*, as if the debtor by an understanding between him and his trustees be left in possession of the estate so as to obtain a fictitious credit (*c*).

(*a*) 11 G. 4. & 1 W. 4. c. 47; see *post*, Chap. xxvii., s. 12.

(*b*) 3 & 4 W. 4. c. 104.

(*c*) *Twyne's case*, 3 Rep. 80 a; *Wilson* v. *Day*, 2 Burr. 827; *Hungerford* v. *Earle*, 2 Vern. 261; *Tarback* v. *Mar-*

Person not a trader might create trust for payment of debts.

4. Under the old bankruptcy laws, a broad distinction was made between non-traders and traders. If the settlor was *not a trader* he was not amenable to the bankrupt laws, and therefore was at perfect liberty to dispose either of the whole (*a*) or of *part* of his property (*b*), for payment of *all* (*c*), or *any number* of his creditors (*d*). The argument formerly urged for the invalidity of such a trust was that 13 Eliz. c. 5 (*e*) avoided "all alienations contrived of *fraud*, to delay creditors and others of their just debts," &c. But with respect to a trust for the satisfaction of creditors *generally*—"How," said Le Blanc, J., "can it be fraudulent for a person not the object of the bankrupt laws to make the same provision voluntarily for the benefit of all his creditors which the law compels to be done in the case of a bankrupt trader?" (*f*); and if the settlor direct the payment of *particular* debts only, "It is neither illegal nor immoral," said Lord Kenyon, "to prefer one set of creditors to another" (*g*). Nor did the creation of such a trust fall within the scope of the Act; for "it is not every feoffment, judgment, &c.," said Lord Ellenborough, "which will have the *effect* of delaying or hindering creditors of their debts, &c., that is therefore fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors: every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, &c., must be *devised of malice, fraud*, or the like, to bring it within the statute: the Act was meant to prevent deeds, &c., fraudulent in the *concoction*, and

bury, 2 Vern. 510; *Law* v. *Skinner*, W. Bl. 996; and see *Worseley* v. *De Mattos*, 1 Burr. 467; *Stone* v. *Grantham*, 2 Buls. 218; *Pickstock* v. *Lyster*, 3 M. & S. 371; *Dutton* v. *Morrison*, 17 Ves. 197.

(*a*) *Ingliss* v. *Grant*, 5 T. R. 530; *Nunn* v. *Wilsmore*, 8 T. R. 528, *per* Lord Kenyon; *Pickstock* v. *Lyster*, 3 M. & S. 371; *Leonard* v. *Baker*, 1 M. & S. 251; see *Meux* v. *Howell*, 4 East, 1. As to what property will pass by general words in a creditors' deed and whether the trustees can disclaim any part which is a *damnosa possessio*, see *How* v. *Kennett*, 3 Ad. & Ell. 659; *Carter* v. *Warne*, Moo. & Ma. 479; *West* v. *Steward*, 14 M. & W. 47.

(*b*) *Estwick* v. *Caillaud*, 5 T. R. 420; *Goss* v. *Neale*, 5 Taunt. 19; see *Meux* v. *Howell*, 4 East, 1.

(*c*) *Meux* v. *Howell*, 4 East. 1; *Ingliss* v. *Grant*, 5 T. R. 530; *Pickstock* v. *Lyster*, 3 M. & S. 371; *Leonard* v. *Baker*, 1 M. & S. 251.

(*d*) *Estwick* v. *Caillaud*, 5 T. R. 420; *Nunn* v. *Wilsmore*, 8 T. R. 528, *per* Lord Kenyon; *Goss* v. *Neale*, 5 Taunt. 19; *Wood* v. *Dixie*, 7 Q. B. 892.

(*e*) Perpetuated 29 Eliz. c. 5, [repealed with the usual saving by 42 & 43 Vict. c. 59.]

(*f*) *Meux* v. *Howell*, 4 East, 9.

(*g*) *Estwick* v. *Caillaud*, 5 T. R. 424; [*Alton* v. *Harrison*, 4 L. R. Ch. App. 622; *Boldero* v. *London and Westminster Discount Company*, 5 Ex. D. 47.]

not merely such as in their *effect* might delay or hinder other creditors" (*a*).

Fraudulent conveyance.

5. If the settlor was a *trader*, then by 12 & 13 Vict. c. 106, s. 67 (being a re-enactment of the previous statutes), it was declared that "any *fraudulent* conveyance, with intent to defeat or delay creditors, should be deemed an act of bankruptcy;" and it was adjudged fraudulent within the meaning of this clause, if a person assigned the *whole* of his property (*b*) (whether expressed to be the whole or not in the deed (*c*)), or all but a *colourable* part (*d*), or all the stock, without which he could not carry on his trade (*e*).

Grounds of the rule.

6. It was immaterial whether the trust was for any *particular* creditor (*f*), or a *certain number* of them (*g*), or *all* the creditors at large (*h*), for by the assignment of his whole substance the bankrupt became utterly insolvent; and if the trust was for one or some only of his creditors, it was a fraud upon the rest, and if it was for all the creditors, it was a fraud upon the spirit of the bankruptcy laws, which require a bankrupt's estate to be under

(*a*) *Meux* v. *Howell*, 4 East, 13, 14; [and see *Spencer* v. *Slater*, 4 Q. B. D. 13.]

(*b*) *Nunn* v. *Wilsmore*, 8 T. R. 528, *per* Lord Kenyon; *Alderson* v. *Temple*, 4 Burr. 2240, *per* Lord Mansfield; *Hooper* v. *Smith*, 1 W. Bl. 441, *per eundem*; *Wilson* v. *Day*, 2 Burr. 827; *Rust* v. *Cooper*, Cowp. 632, *per* Lord Mansfield; *Leake* v. *Young*, 5 Ell. & Bl. 955; *Bowker* v. *Burdekin*, 12 M. & W. 128; *Johnson* v. *Fesenmeyer*, 25 Beav. 88; *Smith* v. *Cannan*, 2 Ell. & Bl. 35. But see the recent case of *Ex parte Gass*, 2 Ir. R. Eq. 284, in which it was held (though the decision rested on other grounds), that the question of fraud is one of fact, and therefore if under the peculiar circumstances the Court is satisfied that the conveyance of the bankrupt's *whole* property was *bonâ fide*, and with a view to pay his creditors rather than to defeat them, the deed will be supported.

(*c*) See *Dutton* v. *Morrison*, 17 Ves. 193; *Lindon* v. *Sharp*, 6 Man. & Gr. 905. But the assignment of all his property at a certain place is not an act of bankruptcy, unless it be proved that he had no other property; *Chase* v. *Goble*, 2 Man. & G. 930.

(*d*) *Law* v. *Skinner*, 2 W. Bl. 996; *Hooper* v. *Smith*, 1 W. Bl. 442, *per* Lord Mansfield; *Wilson* v. *Day*, 2 Burr. 832, *per eundem*; *Alderson* v. *Temple*, 4 Burr. 2240, *per eundem*; *Estwick* v. *Caillaud*, 5 T. R. 424, *per* Lord Kenyon; *Gayner's case*, cited 1 Burr. 477; *Compton* v. *Bedford*, 1 W. Bl. 368; *Johnson* v. *Fesenmeyer*, 25 Beav. 88; *Ex parte Foxley*, 3 L. R. Ch. App. 515.

(*e*) *Hooper* v. *Smith*, 1 W. Bl. 442; *Law* v. *Skinner*, 2 W. Bl. 996; *Siebert* v. *Spooner*, 1 M. & W. 714; *Porter* v. *Walker*, 1 Man. & Gr. 686; *Ex parte Bailey*, 3 De G. M. & G. 534; *Ex parte Taylor*, 5 De G. M. & G. 392; *Lacon* v. *Liffen*, 4 Giff. 75; and see *Ex parte Hawker*, 7 L. R. Ch. App. 214.

(*f*) *Wilson* v. *Day*, 2 Burr. 827; *Hassell* v. *Simpson*, 1 B. C. C. 99; *S. C.* Doug. 89, note; *Hooper* v. *Smith*, 1 W. Bl. 442, *per* Lord Mansfield; *Worseley* v. *De Mattos*, 1 Burr. 467; *Newton* v. *Chantler*, 7 East, 138.

(*g*) *Ex parte Foord*, cited *Worseley* v. *De Mattos*, 1 Burr. 477; *Alderson* v. *Temple*, 4 Burr. 2240, *per* Lord Mansfield; *Butcher* v. *Easto*, Doug. 282; *Devon* v. *Watts*, Doug. 86; *Hooper* v. *Smith*, 1 W. Bl. 442, *per* Lord Mansfield.

(*h*) *Kettle* v. *Hammond*, 1 Cooke's B. L. 108, 3rd edit.; *Eckhardt* v. *Wilson*, 8 T. R. 140; *Tappenden* v. *Burgess*, 4 East, 230; *Dutton* v. *Morrison*, 17 Ves. 199, *per* Lord Eldon; *Simpson* v. *Sikes*, 6 M. & S. 312.

the management of certain commissioners and assignees appointed as prescribed by the legislature—not of persons nominated by the debtor himself, and so more likely to further his views than promote the interest of the creditors (*a*).

Where deed could be supported.

7. But in order to avoid the deed, there must have been in existence a debt due at the time of its execution (*b*); and the assignment, though void as against creditors and the assignees in bankruptcy (*c*), was good as between the parties themselves (*d*). And assignments for valuable consideration at the full price, where the purchaser was not party or privy to the fraudulent designs of the vendor (*e*), or for less than the full price, if the transaction was *bonâ fide* (*f*), and mortgages made *bonâ fide* for fresh advances (*g*), or to secure payment of old debts and further advances combined (*h*), were not acts of bankruptcy and could not be impeached; and a conveyance and assignment by a trader *bonâ fide* of all his property substantially to trustees upon trust to convert into money and hold the proceeds upon trust for the settlor, or his appointees, was not an act of bankruptcy (*i*).

What concomitant circumstances would not vary the rule.

8. A fraudulent deed was an act of bankruptcy, notwithstanding a proviso declaring it void *if the trustees thought fit* (*j*), or *if all the creditors should not execute* (*the acts of the trustees to be good in the meantime*) (*k*); or *if all the creditors to a certain amount should not execute by such a time, or a commission of bankruptcy should issue* (*l*). So it was an act of bankruptcy, though the *trustees* at the time of the execution of the deed did not intend to act upon it (for the fraud was to be referred to the *animus* of the trader) (*m*); and though the trustees induced the debtor to execute it, with the object of making it an act of bankruptcy (*n*); and though the debtor himself meant it to be taken as an act of bankruptcy (*o*).

(*a*) See *Dutton* v. *Morrison*, 17 Ves. 199; *Worseley* v. *De Mattos*, 1 Burr. 476; *Simpson* v. *Sikes*, 6 M. & S. 312.

(*b*) *Ex parte Taylor*, 5 De G. M. & G. 392; *Ex parte Thomas*, De Gex, 612; *Ex parte Louch*, De Gex, 463; *Oswald* v. *Thompson*, 2 Exch. 215.

(*c*) *Doe* v. *Ball*, 11 M. & W. 531.

(*d*) *Bessey* v. *Windham*, 6 Q. B. 166.

(*e*) *Baxter* v. *Pritchard*, 1 Ad. & Ell. 456; *Rose* v. *Haycock*, Ib. 460; *Smith* v. *Hurst*, 10 Hare, 30.

(*f*) *Lee* v. *Hart*, 10 Exch. 555.

(*g*) *Bittlestone* v. *Cooke*, 6 Ell. & Bl. 296; *Hutton* v. *Cruttwell*, 1 Ell. & Bl. 15; *Harris* v. *Rickett*, 4 H. & N. 1; *Re Colemere*, 1 L. R. Ch. App. 128.

(*h*) *Whitmore* v. *Dowling*, 2 Foster & Finlason, 134.

(*i*) *Greenwood* v. *Churchill*, 1 M. & K. 546; and see *Berney* v. *Davison*, 1 Brod. & B. 408; 4 Moore, 126.

(*j*) *Tappenden* v. *Burgess*, 4 East, 230.

(*k*) *Back* v. *Gooch*, 4 Camp. 232; *S. C.* Holt, 13.

(*l*) *Dutton* v. *Morrison*, 17 Ves. 193.

(*m*) *Tappenden* v. *Burgess*, 4 East, 230.

(*n*) Id.

(*o*) *Simpson* v. *Sikes*, 6 M. & S. 295.

No act of bankruptcy, if deed could not be enforced.

9. But if A., B., and C. agreed to execute an assignment as a joint transaction, and A. executed, but B. and C. refused, then, as the assignment of A. was made on the footing and faith of B. and C.'s concurrence, and therefore could not be enforced against A. individually and solely, it was no act of bankruptcy (*a*).

Assignment executed abroad.

10. An assignment executed abroad was at one time held to be no act of bankruptcy in England (*b*); but in this respect the law has been altered by statute (*c*).

Creditors concurring or acquiescing could not treat it as an act of bankruptcy.

11. If any creditors either *concurred* in the assignment (*d*), or subsequently *acquiesced* in it (*e*), they could not afterwards treat it as an act of bankruptcy, for it was not fraudulent as to them. And a trust deed, which as concurred or acquiesced in by all the creditors could not have been impeached under a fiat sued out by a creditor, could not be impeached under the bankrupt's own fiat (*f*).

Trader might assign *part* in trust for his creditors.

12. If a person assigned *part* only of his property in trust for creditors, then, if the transaction was *fair* and *bonâ fide*, and in the ordinary course of business, or upon the pressure of the creditors, it was not open to objection (*g*); but if the settlor contemplated bankruptcy (*h*), or even thought it probable, though not inevitable (*i*), and wished to give an undue preference to certain creditors over others, it was *fraudulent*, and constituted an act of bankruptcy.

Unless he contemplated bankruptcy.

(*a*) *Dutton* v. *Morrison*, 17 Ves. 193, see 202; and see *Bowker* v *Burdekin*, 11 M. & W. 128.

(*b*) *Norden* v. *James*, 2 Dick. 533; *Ingliss* v. *Grant*, 5 T. R. 530.

(*c*) 6 G. 4. c. 16, s. 3, repealed and re-enacted by 12 & 13 Vict. c. 106, s. 67, re-enacted in effect by 32 & 33 Vict. c. 71, s. 6; [46 & 47 Vict. c. 52, s. 4.]

(*d*) *Eckhardt* v. *Wilson*, 8 T. R. 142, *per Cur.*; *Bamford* v. *Baron*, 2 T. R. 594, note (*a*); *Tappenden* v. *Burgess*, 4 East, 230, *per* Lord Ellenborough; *Ex parte Cawkwell*, 1 Rose, 313.

(*e*) *Ex parte Crawford*, 1 Chris. B. L. 97, 140; *Ex parte Low*, 1 G. & J. 84, *per* Lord Eldon; *Ex parte Cawkwell*, 1 Rose, 313; *Ex parte Shaw*, 1 Mad. 598; *Back* v. *Gooch*, 4 Camp. 432; *S. C.* Holt, 13.

(*f*) *Ex parte Philpot*, De Gex, 346; *Ex parte Louch*, Id. 463; *Ex parte Thomas*, Id. 612.

(*g*) *Hale* v. *Allnutt*, 18 C. B. 505; *Wheelwright* v. *Jackson*, 5 Taunt. 109; *Hartshorn* v. *Slodden*, 2 B. & P. 582; *Fidgeon* v. *Sharp*, 5 Taunt. 539; *Small* v. *Oudley*, 2 P. W. 427; *Cock* v. *Goodfellow*, 10 Mod. 489; *Compton* v. *Bedford*, 1 W. Bl. 362, *per* Lord Mansfield; *Hooper* v. *Smith*, 1 W. Bl. 441; *Alderson* v. *Temple*, 4 Burr. 2240, *per* Lord Mansfield; *Wilson* v. *Day*, 2 Burr. 830, *per eundem*; Ib. 831, *per* Foster and Wilmot; *Jacob* v. *Shepherd*, cited *Worseley* v. *De Mattos*, 1 Burr. 478; *Harman* v. *Fisher*, Cowp. 123, *per* Lord Mansfield; *Rust* v. *Cooper*, Cowp. 634, *per eundem*; *Ex parte Scudamore*, 3 Ves. 85; and see *Estwick* v. *Caillaud*, 5 T. R. 424; *Newton* v. *Chantler*, 7 East, 144; *Johnson* v. *Fesenmeyer*, 25 Beav. 88; *Ex parte Gass*, 2 Ir. R. Eq. 284.

(*h*) *Linton* v. *Bartlet*, 3 Wils. 47; *Morgan* v. *Horseman*, 3 Taunt. 241; *Alderson* v. *Temple*, 3 Burr. 2238; *Round* v. *Byde*, 1 Cooke, B. L. 114, 3rd ed.; *Devon* v. *Watts*, Doug. 86; *Pulling* v. *Tucker*, 4 B. & Ald. 382; *Harman* v. *Fisher*, Cowp. 117.

(*i*) *Poland* v. *Glyn*, 2 D. & R. 310; *Guthrie* v. *Crossley*, 2 C. & P. 301.

Assent or acquiescence.

13. Although the deed was void for any reason at law, yet it might be supported in equity as to creditors who had assented to it, or acquiesced in it, though without actual execution (*a*).

Where trust valid, the terms must be strictly observed.

14. On the other hand, a creditor was not bound by the arrangement but might recover his whole debt, if the terms of the composition were not strictly and literally fulfilled; for *cujus est dare ejus est disponere*, and the creditor has a right to prescribe the conditions of his indulgence (*b*).

[Resulting trust of surplus.]

[15. The question whether, under a trust deed in favour of creditors, there is a resulting trust for the settlor is one of intention. In a recent case where the business and property of a firm were assigned to trustees upon trust to carry on the business, or sell and dispose of the assets, and pay and divide the clear residue of the profits and moneys among the creditors in rateable proportions, it was held by the House of Lords (reversing the decision of the Court of Appeal) that by the form of the deed there was no resulting trust of any possible surplus in favour of the assignors (*c*).

[Bankruptcy Act, 1883.]

16. By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, which repealed 12 & 13 Vict. c. 106, and the subsequent Bankruptcy Act of 1861), the law of bankruptcy was put upon a new footing. But this Act has itself been repealed by the Bankruptcy Act, 1883 (*d*), which has again introduced a new law of bankruptcy. All persons, whether *traders or otherwise*, are now amenable to the bankruptcy laws. By the 4th section of the late Act the following acts (amongst others) are made acts of bankruptcy, viz.:—

[Acts of bankruptcy.]

1. That the debtor has in England or elsewhere made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

2. That the debtor has in England or elsewhere made a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof.

3. That the debtor has in England or elsewhere made any conveyance or transfer of his property or any part thereof, or created any charge thereon which would under that or any other

(*a*) *Spottiswoode* v. *Stockdale*, G. Coop. 102; *Re Baber's Trust*, 10 L. R. Eq. 554.

(*b*) *Sewell* v. *Musson*, 1 Vern. 210; *Mackenzie* v. *Mackenzie*, 16 Ves. 374, *per* Lord Eldon; *Leigh* v. *Barry*, 3 Atk. 583, *per* Lord Hardwicke; *Ex parte Bennett*, 2 Atk. 527, *per eundem*; and see *Fuller* v. *Lance*, 7 Vin. Ab. 136.

[(*c*) *Cooke* v. *Smith*, 45 Ch. Div. 38; *S. C.* in D. P. unreported.]

[(*d*) 46 & 47 Vict. c. 52.]

Act be void as a fraudulent preference if he were adjudged bankrupt (*a*).

[Limitation of time.]

But by the 6th section a creditor is not to be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy has occurred within *three months* before the presentation of the petition for adjudication. Until the expiration, therefore, of these three months the trustees of a creditors' deed must forbear to act, or their proceedings may be overridden by a subsequent adjudication of bankruptcy. However, the trustees may begin the exercise of their office at an earlier day if they can only satisfy themselves either that all the creditors have concurred or acquiesced in the deed, or that such as have not cannot either collectively or individually prove a debt or debts in the requisite amount to support an adjudication of bankruptcy.

If the trustees of a creditors' deed take possession of the debtor's property and carry on his business under the provisions of the deed, and the debtor is subsequently adjudicated a bankrupt on the act of bankruptcy committed by the execution of the deed, the trustee in the bankruptcy must elect whether he will treat the trustee of the deed as a trespasser or as his agent (*b*).]

Now that the distinction between traders and non-traders has substantially been abolished, what before was a fraudulent conveyance as to traders only, will be a fraudulent conveyance as to non-traders also (*c*).

SECTION II.

WHAT CREDITORS' DEEDS ARE REVOCABLE.

Irrevocable trusts.

1. THE existence of a debt is always a sufficient consideration to support an assurance as valid and irrevocable as against the grantor (*d*); indeed the assurance will almost always assume the form either of a conveyance in satisfaction or part satisfaction of

[(*a*) As to what constitutes a fraudulent preference under the Act, see sect. 48.]

[(*b*) *Ex parte Vaughan*, 14 Q. B. D. 25.]

(*c*) *In re Wood*, 7 L. R. Ch. App. 302.

(*d*) See *Rice* v. *Rice*, 2 Drew. 84. But a conveyance by way of security from a debtor to his creditor, where there is no pressure, may be a fraudulent preference within the meaning of the Bankruptcy Acts; *Goodricke* v. *Taylor*, 2 H. & M. 380; and, if the debtor's whole property be included, an act of bankruptcy; *Ex parte Trevor*, 1 Ch. D. 297; [and see 46 & 47 Vict. c. 52, s. 48.]

the debt (in which case the extinction or partial extinction of the debt forms the consideration), or of a security accompanied with a forbearance to sue (*a*). Thus if A. be indebted to B., and convey an estate to him by way of security, the deed, though no money passed at the time, and there was no previous arrangement, cannot be revoked by A., but B. may insist on the benefit of it (*b*). And if the creditor be not a party to the deed, yet if, by arrangement between him and the debtor, an estate is vested in a trustee for securing the debt, he can enforce the trust (*c*). Even where a debtor entered into an arrangement with three of his creditors, and in pursuance thereof, by a deed between himself of the first part, the three creditors of the second part, and his other creditors of the third part, conveyed all his real and personal estate to the three creditors, in trust for themselves and the other creditors, it was held that the intention was to make the creditors *cestuis que trust*, and that the deed was irrevocable; and no distinction was taken between the three creditors and the other creditors, although the latter apparently had not been in communication with the debtor previous to the deed, and had not executed it until some time afterwards (*d*).

Revocable trusts.

2. On the other hand, if a debtor, without communication with his creditors, and, indeed, only from motives of personal convenience, as on going abroad (*e*), vest an estate in trustees upon trust to pay his debts, the trustees are mere *mandatories*, and the deed confers no right upon the creditors who are neither parties nor privies, and the debtor may at any time, at his pleasure, revoke or vary the trusts, or call for the re-transfer of the property (*f*). And if two persons have different interests in the same estate, and they, by arrangement between themselves, but without communication with any creditor, convey the property to trustees, upon trust to pay the debts of either party, here, though each may enforce the trust as against the other, yet the

(*a*) It has been suggested, however, that a *mere agreement* to give a mortgage for a bygone debt, unaccompanied by any express stipulation as to forbearance, cannot be enforced. See *Crofts* v. *Feuge*, 4 Ir. Ch. Rep. 316; *Woodroffe* v. *Johnson*, 4 Ir. Ch. Rep. 319.

(*b*) *Siggers* v. *Evans*, 5 Ell. & Bl. 367; *Montefiore* v. *Browne*, 7 H. L. Cas. 241; *Morris* v. *Venables*, 15 W. R. 2.

(*c*) *Wilding* v. *Richards*, 1 Coll. 661.

(*d*) *Mackinnon* v. *Stewart*, 1 Sim. N. S. 76.

(*e*) *Cornthwaite* v. *Frith*, 4 De G. & Sm. 552.

(*f*) *Walwyn* v. *Coutts*, 3 Sim. 14; 3 Mer. 707; *Smith* v. *Keating*, 6 C. B. 136; *Acton* v. *Woodgate*, 2 M. & K. 492; *Henriques* v. *Bensusan*, 20 W. R. 350; *Browne* v. *Cavendish*, 1 Jon. & Lat. 606; [*Johns* v. *James*, 8 Ch. Div. 744; *Re Sanders' Trusts*, 47 L. J. N.S. Ch. 667;] and see *Synnot* v. *Simpson*, 5 H. L. Cas. 121.

deed is revocable by both, and the creditor, as he neither required the security, nor was an object of bounty, cannot, while the deed remains revocable, compel the execution of the trust in his own favour (*a*). And *à fortiori*, this is the case if the payment of the debt is to be made only on the request of the settlor (*b*). But, of course, the trust cannot be revoked by the settlor, so as to defeat or prejudice what the trustees may have done previously in the due execution of the trust (*c*).

Garrard *v.* Lauderdale.

3. In *Garrard* v. *Lauderdale*, the Duke of York, by indenture between himself of the first part, trustees of the second part, and the creditors of the third part, conveyed certain property to trustees upon trust for his creditors, and upon the execution of the deed a circular to that effect was sent to each of the creditors. Here there was ground for contending that, as the creditors had been induced by the notice to forbear suing the settlor, they had acquired a right to the execution of the trust, but Sir L. Shadwell, observing that the receipt of the circular was not admitted, and that, if received, yet the creditors had not refrained from suing, as they had proved in an administration suit against the Duke's estate, decided that the creditors had no equity to enforce the trust (*d*), and the decree, on appeal to Lord Brougham, was affirmed (*e*). The authority, however, of this case has, on several occasions, been questioned (*f*); and Lord St. Leonards observed he should be sorry to have it understood that a man may create a trust for creditors, communicate it to them, and obtain from them the benefit of their lying by until perhaps the legal right to sue was lost, and then insist that the trust was wholly within his power (*g*). There can be little doubt that upon the general principles of equity the settlor, by giving notice to the trustees, and by subsequent conduct, may confer on the creditors a right which they did not originally possess (*h*); and indeed it has now

(*a*) *Gibbs* v. *Glamis*, 11 Sim. 584; *Simmonds* v. *Palles*, 2 Jon. & Lat. 489; and see *Synnot* v. *Simpson*, 5 H. L. Cas. 121.

(*b*) *Evans* v. *Bagwell*, 2 Conn. & Laws. 612.

(*c*) *Wilding* v. *Richards*, 1 Coll. 655, see 659; and see *Kirwan* v. *Daniel*, 5 Hare, 493.

(*d*) 3 Sim. 1, 13.

(*e*) 2 R. & M. 451; and see *Cornthwaite* v. *Frith*, 4 De G. & Sm. 552; *Stone* v. *Van Heythuysen*, Kay, 727.

(*f*) See *Acton* v. *Woodgate*, 2 M. & D. 495; *Kirwan* v. *Daniel*, 5 Hare, 499; *Simmonds* v. *Palles*, 2 Jon. & Lat. 495, 504; *Siggers* v. *Evans*, 5 Ell. & Bl. 367. [But see *Johns* v. *James*, 8 Ch. Div. 744, where the Court of Appeal approved of and followed *Garrard* v. *Lauderdale*; *Montefiore* v. *Browne*, 7 H. L. Cas. 241; *Henderson* v. *Rothschild*, 33 Ch. D. 459.]

(*g*) *Brown* v. *Cavendish*, 1 Jon. & Lat. 635; 7 Ir. Eq. Rep. 388.

(*h*) Perhaps the old case of *Langton* v. *Tracy*, 2 Ch. Rep. 30, was decided on this principle, for it appears that Tracy, the trustee, declared to

been decided that if property be assigned to a trustee, and he takes possession of it, and communicates with certain of the creditors, who express their satisfaction, the trust is irrevocable (*a*).

[Where ultimate trust irrevocable.]

[The doctrine of *Garrard* v. *Lauderdale* was held not to apply where the deed contained an ultimate trust for the wife and children of the settlor (*b*).]

Trustee one of the creditors.

4. If the trustee be himself a creditor, the debt forms a sufficient consideration on behalf of the creditor, and the deed is irrevocable (*c*); and in one case, where property was vested in a trustee for creditors, and the trustee was a *surety* for some of the debts, it was held that, though the trust was revocable as to the general creditors, yet the trustee himself was not bound to reconvey the estate until the suretyship was satisfied (*d*).

Nature of the revocable trust.

5. It does not clearly appear from the authorities what is the precise nature of a *revocable* trust of this kind. The instrument is sometimes called a *deed of agency*, and if so, the trust must be considered at an end at the death of the settlor, and the property, so far as it has not been applied, must be administered as part of the settlor's assets (*e*). The trust is not regarded as revocable only during the life of the settlor, so as to give a vested interest to the creditor after his death, for it has been held that the creditor has no more equity to enforce the trust after a settlor's death than in his lifetime (*f*).

Voluntary trust.

6. Suppose there is no fraud, but the trust deed is a mere *voluntary* settlement not founded on any arrangement with the creditors, but for the mere convenience of the debtor himself, so that it is revocable by the debtor at any time until communicated to some creditor (*g*)—in that case can a *creditor*, taking out execution, levy his debt upon the property subject to the trust? It

the creditors that he would pay the debts, and that some of the debts were actually paid under the deed. The creditors may also have been privies, though not parties, to the execution of the trust, for it is stated that the settlor executed the deed to avoid prosecution against him by his creditors.

(*a*) *Harland* v. *Binks*, 15 Q. B. 713; *Nicholson* v. *Tutin*, 2 K. & J. 18; and see *Synnot* v. *Simpson*, 5 H. L. Cas. 121; *Cosser* v. *Radford*, 1 De G. J. & S. 585; [*John* v. *James*, 8 Ch. Div. 744.]

[(*b*) *Godfrey* v. *Poole*, 13 App. Cas. 497.]

(*c*) *Siggers* v. *Evans*, 5 Ell. & Bl. 367. [See *Johns* v. *James*, 8 Ch. D. 744.]

(*d*) *Wilding* v. *Richards*, 1 Coll. 655; and see *Gurney* v. *Oranmore*, 4 Ir. Ch. Rep. 470; *S. C.* 5 Ir. Ch. Rep. 436.

(*e*) *Wilding* v. *Richards*, 1 Coll. 655.

(*f*) *Garrard* v. *Lauderdale*, 3 Sim. 1; and see *Synnot* v. *Simpson*, 5 H. L. Cas. 139.

(*g*) *Walwyn* v. *Coutts*, 3 Mer. 707; *S. C.* 3 Sim. 14; *Garrard* v. *Lauderdale*, 3 Sim. 1; *Acton* v. *Woodgate*, 2 M. & K. 492; *Kirwan* v. *Daniel*, 5 Hare, 500; *Harland* v. *Binks*, 15 Q. B. 713.

seems, though the deed is *voluntary*, yet it is not to be considered as fraudulent within the statute 13 Eliz. c. 5, and if so, the creditor cannot reach the property at *law* (*a*). However, the deed might perhaps be held to be invalid as against the creditor in a Court of equity (*b*).

[7. It has now been decided that the doctrine of revocability does not apply to provisions in favour of creditors or mortgagees which do not come into operation until after the death of the settlor (*c*).] [Post obit trusts.]

8. The Courts at the present day consider the doctrine under which these deeds have been held revocable to have been carried far enough, and have expressed a disinclination to extend it (*d*). Doctrine not likely to be extended.

SECTION III.

OF THE DUTIES OF TRUSTEES FOR PAYMENT OF DEBTS.

Upon this subject we shall consider, *First, What debts* are to be paid; *Secondly,* In what order as regards *priority;* and *Thirdly,* What *interest* is to be allowed. Duties of trustees.

First. What debts are within the scope of the trust.

1. If the trust be created by *deed,* then, unless a contrary intention be expressed, the debts only at the *date* of the deed will be intended (*e*); but if the provision be contained in a will, the direction will include all debts at the testator's death; unless he specially restrict his meaning to the debts at the making of his *will* (*f*). Debts to be paid are *primâ facie* those at date of deed or death of testator.

2. Where a settlor by deed conveyed all his real and personal property upon trust to pay "all debts then owing by him, and which *affected the estates* thereby conveyed;" the trust, as the settlor had no *judgment* debts at the time, was extended to *bond* debts, but not to *simple contract* debts (*g*). But this distinction "Debts affecting the estate."

(*a*) *Pickstock* v. *Lyster,* 3 M. & S. 371; *Estwick* v. *Caillaud,* 5 T. R. 420. But see *Owen* v. *Body,* 5 Ad. & Ell. 28.

(*b*) See *Mackinnon* v. *Stewart,* 1 Sim. N. S. 90, 91; *Smith* v. *Hurst,* 1 Coll. 705.

[(*c*) *Re Fitzgerald's Settlement,* 37 Ch. Div. 18, 25;] and see *Synnot* v. *Simpson,* 5 H. L. Cas. 141.

(*d*) *Wilding* v. *Richards,* 1 Coll. 659; *Kirwan* v. *Daniel,* 5 Hare, 499; *Simmonds* v. *Palles,* 2 Jon. & Lat. 495, 504; *Brown* v. *Cavendish,* 1 Jon. & Lat. 635; *Evans* v. *Bagwell,* 2 Conn. & Laws. 616.

(*e*) *Purefoy* v. *Purefoy,* 1 Vern. 28.

(*f*) *Loddington* v. *Kime,* 3 Lev. 433.

(*g*) *Douglas* v. *Allen,* 1 Conn. & Laws. 367; 2 Dru. & War. 213.

was taken upon a deed dated before the Acts making real estates assets for payment of simple contract debts.

Father providing for debts of son.

In another case a testator directed his trustees to apply 1000*l.* in releasing his son from his liabilities, should the testator not have done so in his lifetime. The son was an uncertificated bankrupt, and the Court considering that debts subsequently to the testator's death were not contemplated, discharged the debts up to that period out of the 1000*l.*, and gave the surplus to the testator's residuary legatee (*a*).

Debts barred by the Statute of Limitations.

3. A general direction for payment of debts will not *revive* a debt barred by the Statute of Limitations (*b*), though the trustee or executor may have advertised for *all* creditors to come in and prove their debts (*c*); and, if a debt might with due diligence have been established, but there has been *laches* which under ordinary circumstances would be a bar to relief, the mere fact of the creation and existence of a trust for payment of debts will not justify the *laches* and enable the claimant to obtain relief (*d*). But a will may be so specially worded as to create a trust for creditors generally, notwithstanding any bar from the Statute of Limitations, for the debts still subsist though the remedy is gone (*e*); and if there be a debt in fact not barred at the date of the deed, or at the death of the testator, the statute will not run afterwards (*f*); for it is not to be inferred that a man abandons his debt because he does not enforce payment at law when he has a trustee to pay him (*g*). Besides, unless delayed of necessity, the trustee ought to discharge the debt at once, and the universal rule is, that the *cestui que trust* ought not to suffer for the *laches* of the trustee (*h*). If a testator create a trust for payment of the debts of *another person deceased*, the debts to be

(*a*) *Re Landon's Will*, W. N. 1871, p. 240.

(*b*) *Burke* v. *Jones*, 2 V. & B. 275, where the previous cases are collected; *Hargreaves* v. *Michell*, 6 Mad. 326; *O'Connor* v. *Haslam*, 5 H. L. Cas. 170.

(*c*) *Jones* v. *Scott*, 1 R. & M. 255; 4 Cl. & Fin. 382, *nom. Scott* v. *Jones* (overruling *Andrews* v. *Brown*, Pr. Ch. 385); and see *O'Connor* v. *Haslam*, 5 H. L. Cas. 177; [*Re Stephens*, 43 Ch. D. 39, 44.]

(*d*) *Harcourt* v. *White*, 28 Beav. 303.

(*e*) *Williamson* v. *Taylor*, 3 Y. & C. 208; [and see *Re Hepburn*, 14 Q. B. D. 394, 399.]

(*f*) *Hughes* v. *Wynne*, T. & R. 307; *Crallan* v. *Oulton*, 3 Beav. 1; *Hargreaves* v. *Michell*, 6 Mad. 326; *Executors of Fergus* v. *Gore*, 1 Sch. & Lef. 107; and see *Morse* v. *Langham*, cited *Burke* v. *Jones*, 2 V. & B. 286; *O'Connor* v. *Haslam*, 5 H. L. Cas. 178; [and as to the right of a trustee, not retaining trust property nor having converted it to his own use, to plead the Statute of Limitations under the Trustee Act, 1888 (51 & 52 Vict. c. 59) s. 8, *vide post* Chap. xxx. s. 3.]

(*g*) *Hughes* v. *Wynne*, T. & R. 309, *per Cur.*

(*h*) See *Executors of Fergus* v. *Gore*, 1 Sch. & Lef. 110.

paid are those which were not barred by the Statute of Limitations at the death of the person so deceased (*a*).

[A devise of real estate upon trust to pay debts does not prevent the operation of the Statute of Limitations when the testator leaves no real estate to support the trust (*b*). [Where no real estate to support trust.]

Where real and personal estate are given together upon trust for sale and conversion and payment of debts thereout, the period of limitation as to the real estate will be twelve years (*c*).] [Blended fund.]

4. If a person who has been a bankrupt direct payment of twenty shillings in the pound upon the debts proved in the bankruptcy, the creditors are legatees, and pay *legacy duty*, but there is *no lapse* though a creditor die in the testator's lifetime (*d*). Legacy duty.

5. Where a testatrix had devised an estate to trustees *upon trust to sell and pay debts*, but no part of the produce of sale had been set apart for that purpose, the right of the creditor was held by the late V. C. of England not to be within the exception of the 25th section of the Statute of Limitations, 3 & 4 W. 4. c. 27, but to fall under the 40th section; but that inasmuch as the debt had been acknowledged by the surviving trustee, the case was taken out of the statute (*e*). However, the opinion of the Vice-Chancellor that the case was not within the 25th section would not, it is thought, now prevail, but the right of the creditor would subsist until adverse possession had run against his trustee (*f*). Statute of Limitations.

6. The rule that the creation of a trust keeps alive a debt not barred at the testator's death does not apply to a trust declared of *personal estate* by will, for the personalty vests in the executor upon trust for the creditors by act of law, so that the words of the will are nugatory (*g*). As regards testator's personalty.

7. The terms of the trust will extend to the repayment of a sum of money borrowed by the settlor when an *infant* for the purchase of necessaries (*h*). Debt contracted by infant for necessaries.

8. Shall a *mortgagee* who has a covenant for payment of his Case of a mortgagee with covenant for payment.

(*a*) *O'Connor* v. *Haslam*, 5 H. L. Cas. 170.

[(*b*) *Re Hepburn*, 14 Q. B. D. 394.]

[(*c*) *Re Stephens*, 43 Ch. D. 39.]

(*d*) *Turner* v. *Martin*, 7 De G. M. & G. 429; *Re Sowerby's Trust*, 2 K. & J. 630; *Philips* v. *Philips*, 3 Hare, 281.

(*e*) *Lord St. John* v. *Boughton*, 9 Sim. 219.

(*f*) As to the Statutes of Limitation, and the modifications introduced by recent legislation, see *post*, Chap. xxx.

(*g*) *Jones* v. *Scott*, 1 R. & M. 255; reversed, 4 Cl. & Fin. 382, *sub nom.* *Scott* v. *Jones*; *Freake* v. *Cranefeldt*, 3 M. & Cr. 499; *Evans* v. *Tweedy*, 1 Beav. 55; *Crallan* v. *Oulton*, 3 Beav. 1; [*Re Hepburn*, 14 Q. B. D. 394.] N. B. In *Moore* v. *Petchell*, 22 Beav. 172, the doctrine established by *Jones* v. *Scott*, appears to have escaped notice.

(*h*) *Marlow* v. *Pitfield*, 1 P. W. 558.

debt be allowed to prove and receive a dividend upon the whole amount of his debt *pari passu* with the other creditors, or shall he prove only for the excess of the debt beyond the value of the security, or what rule is to govern the case? In bankruptcy, the mortgagee proves only for the excess of the mortgage debt over the value of the security, so that he must first dispose of the estate (with the concurrence, if he has no power of sale, of the trustee in bankruptcy) [or assess the value of it,] and then prove for the difference. In the administration of assets in Courts of equity, a mortgagee [was until recently] allowed to prove for his whole debt without being put on terms as to his security (*a*); [but by the Judicature Act, 1875 (*b*), the rule in equity has in insolvent estates been assimilated to that in bankruptcy.] A trust deed for creditors usually provides for the case of persons having specific liens, and ingrafts the principle established in bankruptcy. If there be no such clause, and if the deed provide that the creditor shall release his debt and all securities for the same, the mortgagee, by executing the deed, binds himself to the other creditors, notwithstanding any private arrangement with the debtor to the contrary, that he will not take advantage of his specific lien, but will bring it into the common stock and prove for his whole debt, and accept a dividend *pari passu* with the rest (*c*). "The moment," observed Lord Lyndhurst, "a creditor releases his debt, which he does by executing a deed of this kind, there is, of course, an end of any lien he may have for it" (*d*). But though the word "release" be used in the deed, it will not necessarily operate as an absolute and unconditional release, if the whole contents of the instrument, when taken together, show that such was not the intention (*e*).

Trust for creditors who come in within certain time.

9. It was held in *Dunch* v. *Kent* (*f*) that where there is a trust for payment of such creditors as shall *come in within a year*, a

(*a*) See *Greenwood* v. *Taylor*, 1 R. & M. 185; *Mason* v. *Bogg*, 2 M. & Cr. 433; *Rome* v. *Young*, 4 Y. & C. 204; *Hanman* v. *Riley*, 9 Hare, App. xli.; *Ex parte Middleton*, 3 De G. J. & Sm. 201. The rule in equity was also held to apply in liquidations of joint stock companies, under the Companies' Act, 1862, *Kellock's case*, 3 L. R. Ch. App. 769. [By 38 & 39 Vict. c. 77, s. 10, the rule in bankruptcy has been adopted both in administrations of insolvent estates in Courts of Equity and in liquidations under the Companies Acts, 1862 & 1867, of joint stock companies. By the Bankruptcy Acts, 1883, s. 125, and 1890, s. 21, the estate of a person dying insolvent can now be administered in bankruptcy.]

[(*b*) 38 & 39 Vict. c. 77, s. 10.]

(*c*) *Cullingworth* v. *Loyd*, 2 Beav. 385; *Buck* v. *Shippam*, 1 Ph. 694; 14 Sim. 239.

(*d*) *Buck* v. *Shippam*, 1 Ph. 697.

(*e*) *Squire* v. *Ford*, 9 Hare, 47.

(*f*) 1 Vern. 260.

creditor who delays beyond the year is not therefore precluded from taking advantage of the trust; and in *Raworth* v. *Parker* (*a*), V. C. Wood, after observing that there was no *modern* authority in which relief had been given after the time fixed for the execution of the deed had expired, added, that if it were to be held that creditors are not admissible after the prescribed period, *Dunch* v. *Kent* must be overruled. And in a more recent case, where the trust was for the benefit of creditors who should execute or accede within three months, the Vice-Chancellor held, and the decision was affirmed by the Lord-Chancellor on appeal, that a creditor who had not acceded within the prescribed time might claim the benefit of the trust (*b*).

Adoption of deeds.

10. It is not necessary that a creditor, to entitle himself to the benefit of the deed, should execute it, but it will be sufficient if he assent to it, or acquiesce in it, or act upon its provisions, and comply with its terms (*c*). But the creditor must do some act to testify his acceptance of the deed, and not merely stand by and remain passive (*d*).

Disputed debt.

11. If the trustees permit a person to sign the deed as creditor in a certain sum specified in the schedule, they cannot afterwards contest the debt (*e*). But where there has been fraud, forgery, or perjury by the creditor, the trustees can apply to the Court to have the execution by the creditor set aside (*f*).

Trustee cannot arbitrarily admit a creditor who has repudiated the deed.

12. A creditor who repudiates the deed by his acts, as by suing the debtor contrary to the provisions of the deed, will not be allowed afterwards (more particularly after a long lapse of time) to retrace his steps and take the benefit of the deed; and though the trustees should admit him to sign the deed, the other creditors will not be bound by the act of the trustees (*g*).

(*a*) 2 K. & J. 170, 171; and see *Collins* v. *Reece*, 1 Coll. 675; *Jolly* v. *Wallis*, 3 Esp. 228; *Spottiswoode* v. *Stockdale*, G. Coop. 102; *Johnson* v. *Kershaw*, 1 De G. & Sm. 260.

(*b*) *Whitmore* v. *Turquand*, 1 J. & H. 444; 3 De G. F. & J. 107. V. C. Wood rested his judgment, not on the authority of *Dunch* v. *Kent*, but upon general reasoning, and thought that the decision in that case might be accounted for on special grounds; but the L. C. in affirming the judgment of the V. C. said that he considered the doctrine of the Court, since *Dunch* v. *Kent*, to have been that a creditor might come in after the time prescribed, and that the time was not of the *essence* of the deed, and that, in his opinion, the view of *Dunch* v. *Kent* originally taken in *Raworth* v. *Parker* by V. C. Wood was the correct one.

(*c*) *Field* v. *Lord Donoughmore*, 1 Dru. & War. 227; *Biron* v. *Mount*, 24 Beav. 642; *Spottiswoode* v. *Stockdale*, G. Coop. 102; *Jolly* v. *Wallis*, 3 Esp. 228.

(*d*) *Biron* v. *Mount*, 24 Beav. 642.

(*e*) *Lancaster* v. *Elce*, 31 Beav. 325.

(*f*) *Lancaster* v. *Elce*, 31 Beav. 328, *per* M. R.

(*g*) *Field* v. *Donoughmore*, 1 Dru. & War. 227; reversing the decision of Lord Plunket, 2 Dru. & Walsh, 630; [*Re Meredith*, 29 Ch. D. 745.]

Discretion in trustees to admit creditors' claims.

13. A *discretion* is sometimes given to the trustees to admit or exclude such creditors as they shall think proper. The Court will endeavour, if possible, to withdraw the rights of the creditors from the caprice of the trustees (*a*); but if the settlement clearly give such a discretionary power, and the trustees are willing to exercise it, and no fraud be found, the Court cannot interfere to compel the admission of any particular creditor (*b*).

Relief in equity.

14. If the trustees have power of enlarging the time and advertise to that effect, but do not exercise the power, and so exclude a person who desires to come in, but could not do so before the day named in the deed, the creditor will be relieved in equity (*c*).

Resumption by trustees of possession after parting with it.

15. If there be trustees for payment of debts and legacies, and subject thereto upon trust for A. for life with remainder over, and the Court has taken an account of debts and legacies, and declared A. entitled to the possession, who is put into possession accordingly, it is not competent for the trustees afterwards to make an admission of some further debt, and to resume the possession in order to discharge it (*d*).

Secret agreements.

16. If the debtor agree behind the back of the general creditors, to give an extra benefit to one particular creditor, such agreement is a fraud upon the general creditors, and illegal and void (*e*).

[A creditors' deed, or composition deed which some creditors have been induced to execute by means of a secret bargain for an additional payment to them, is void as against any creditor who was not aware of the bargain when he executed the deed (*f*), even though the payment be made at the expense of a third party, and the secret bargain be made after the execution of the deed by the creditor who challenges it, provided the bargain be made with the debtor's knowledge (*g*).]

[Deeds of Arrangement Act, 1887.]

[17. By the Deeds of Arrangement Act, 1887 (*h*), the expression "deed of arrangement" is to include "any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally

(*a*) See *Nunn* v. *Wilsmore*, 8 T. R. 521; *Cosser* v. *Radford*, 1 De G. J. & S. 585.

(*b*) *Wain* v. *Egmont*, 3 M. & K. 445; *Drever* v. *Mawdesley*, 16 Sim. 511.

(*c*) *Raworth* v. *Parker*, 2 K. & J. 163. See *ante*, p. 575.

(*d*) *Underwood* v. *Hatton*, 5 Beav. 36.

(*e*) *Mare* v. *Sandford*, 1 Giff. 288; [*Cocksholt* v. *Bennett*, 2 T. R. 763.]

[(*f*) *Dauglish* v. *Tennent*, 2 L. R. Q. B. 49.]

[(*g*) *Ex parte Milner*, 15 Q. B. Div. 605; *Knight* v. *Hunt*, 5 Bing. 432.]

[(*h*) 50 & 51 Vict. c. 57, s. 4.]

(otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say, an assignment of property (*a*)—a deed of or agreement for a composition," and certain other instruments in cases where creditors of a debtor obtain any control over his property or business. A deed of arrangement is to be void, unless registered within seven clear days after the first execution thereof by the debtor or any creditor, where the execution takes place in England or Ireland (*b*). The Act prescribes the manner of registration, and constitutes the Registrar of Bills of Sale in England and Ireland respectively registrar for the purposes of the Act (*c*); and in England, the Bills of Sale Department of the Central Office of the Supreme Court of Judicature is the office for registration. Under this Act Rules of Court have been made for the purpose of carrying the Act into effect.]

Secondly. As to the order of payment.

Creditors paid before legatees.

1. Where the trust is created by *will*, the direction generally is for payment of "debts and legacies." As regards the administration of assets, creditors take precedence of legatees; but here, as both take under the will, and the testator has made no distinction, it seems upon strict principle, as was formerly held, that creditors and legatees ought to be paid *pari passu* (*d*). However, there can be little doubt that the testator, although he may not have explicitly declared it, meant the creditors to precede, and the Courts accordingly (rather straining a point, that a man might not "sin in his grave") have now indisputably established that creditors shall have the priority (*e*).

All creditors to be paid *pari passu*.

2. As amongst the creditors themselves, the Court acts upon the well-known principle that "equality is equity," and, therefore, whether the trust be created by deed (*f*) or will (*g*), the specialty debts in the absence of express directions to the contrary

[(*a*) The meaning of this expression is defined by the Bankruptcy Act, 1883, s. 168.]

[(*b*) Sec. 5.]

[(*c*) Sec. 8.]

(*d*) *Hixon* v. *Wytham*, 1 Ch. Ca. 248; *Gosling* v. *Dorney*, 1 Vern. 482; *Anon.* 2 Vern. 133; *Powell's case*, Nels. 202; *Wolestoncroft* v. *Long*, 1 Ch. Ca. 32; and see *Walker* v. *Meager*, 2 P. W. 552.

(*e*) *Greaves* v. *Powell*, 2 Vern. 248; 302, Raithby's ed.; *Bradgate* v. *Ridlington*, Mose. 56; 1 Eq. Ca. Ab. 141, pl. 3; *Walker* v. *Meager*, 2 P. W. 550; *Martin* v. *Hooper*, Rep. *t.* Hardwicke, by Ridg. 209; *Whitton* v. *Lloyd*, 1 Ch. Ca. 275; *Foly's case*, 2 Freem. 49; *Kidney* v. *Coussmaker*, 12 Ves. 154, *per* Sir W. Grant; *Peter* v. *Bruen*, cited 2 P. W. 551; *Lloyd* v. *Williams*, 2 Atk. 111, *per* Lord Hardwicke.

(*f*) *Wolestoncroft* v. *Long*, 1 Ch. Ca. 32; *Hamilton* v. *Houghton*, 2 Bligh, 187, *per* Lord Eldon; *Child* v. *Stephens*, 1 Vern. 101.

(*g*) *Wolestoncroft* v. *Long*, 1 Ch. Ca. 32; *Anon.* 2 Ch. Ca. 54.

will have no advantage over simple contract debts, but all will be paid in rateable proportions; and, of course, the trustees will not be allowed to break in upon the rule of equality by first discharging their own debts (*a*).

Specialty creditors.

3. It was formerly ruled, that where a testator *charged* his freehold estates with debts, and the estate subject to the charge, descended to the *heir*, the specialty creditor had precedence, for it was argued that he had his remedy at law against the heir independently of the will, and therefore ought not to be put on a level with those taking under the will (*b*). The answer is, that the specialty creditor has no *lien* upon the estate, but can only recover the debt from the heir personally to the extent of the assets descended. If the estate be subject to the charge the heir takes not beneficially but only as trustee, and then there are no legal assets in consideration of equity, and the bond creditor may be enjoined from pursuing his legal right. And on these grounds it was decided that specialty debts are not entitled to a preference (*c*).

Case of trustee being also executor.

4. It was also thought at one time, that if the estate charged with the debts was to be administered by the *executor*, the testator must have meant that the executor should, as in his executorial capacity, observe the *legal* priorities (*d*); however, there was no reason, in fact, why the characters of trustee and executor should not be united in the same person without confusion, and so it has since been determined (*e*). But where the trust was expressly to pay the settlor's debts "according to their priority, nature, and specialty," a bond debt with interest was payable before a simple contract debt (*f*). But now, since 32 and 33 Vict. c. 46, all debts of persons who may have died on or after 1st January, 1870, are payable *pari passu*.

[Hinde Palmer's Act.]

Unclaimed dividends.

5. If there be a remnant of *unclaimed dividends* left in the hands of the trustees, it does not belong to the trustees for their

(*a*) *Anon.* 2 Ch. Ca. 54.

(*b*) *Fremoult* v. *Dedire*, 1 P. W. 429; *Young* v. *Dennett*, 2 Dick. 452; *Blatch* v. *Wilder*, 1 Atk. 420; *Allan* v. *Heber*, Str. 1270; *S. C.* 1 W. Bl. 22; and see *Plunket* v. *Penson*, 2 Atk. 290; [*Delany* v. *Delany*, 15 L. R. Ir. 55.]

(*c*) *Shiphard* v. *Lutwidge*, 8 Ves. 26; *Pope* v. *Gwyn*, cited Ib. 28, note; *Bailey* v. *Ekins*, 7 Ves. 319; *Batson* v. *Lindegreen*, 2 B. C. C. 94; *Hargrave* v. *Tindal*, cited *Newton* v. *Bennet*, 1 B. C. C. 136, note.

(*d*) *Girling* v. *Lee*, 1 Vern. 63; *Cutterback* v. *Smith*, Prec. Ch. 127; *Bickham* v. *Freeman*, Ib. 136; *Masham* v. *Harding*, Bunb. 339; *Foly's case*, 2 Freem. 49; [*Delany* v. *Delany*, 15 L. R. Ir. 55.]

(*e*) *Prowse* v. *Abingdon*, 1 Atk. 482; *Newton* v. *Bennet*, 1 B. C. C. 135; *Silk* v. *Prime*, Ib. 138, note; *S. C.* 1 Dick. 384; *Lewin* v. *Okeley*, 2 Atk. 50; *Barker* v. *Boucher*, 1 B. C. C. 140, note.

(*f*) *Passingham* v. *Selby*, 2 Coll. 405.

own benefit, but will be divisible amongst the unpaid creditors who do claim (*a*).

Thirdly. As to allowance of interest.

Interest not allowed on simple contract debts.

1. Whether the trust be created by deed (*b*), or will (*c*), and though the fund has been making interest (*d*), the trustees will not be justified in paying interest upon *simple contract debts* not carrying interest; and *à fortiori*, this is the case where interest is expressly directed as to some particular debts (*e*). Where the trust was *by deed*, but the creditors had not been made parties, Lord Eldon observed, "The mere direction to pay a debt does not infer either contract or trust to pay interest upon debts by simple contract. As to *contract*, the creditors did not execute the deed, and there was nothing to prevent their suing the debtor after the execution; and no *consideration* was given to the debtor by charging the land and discharging the person" (*f*). Even where the debts did in their nature carry interest, and the direction in a will was to pay "the debts owing by the testatrix's brother at the time of his death," but forty years had elapsed since the death of the brother, so that the interest if allowed would have amounted to more than double the principal, the Court thought the direction could not have been intended to include interest as well as principal (*g*).

The trust deed does not make the debts specialties.

2. It was once suggested by Lord Abinger that "if a man execute a trust of a term for the benefit of his creditors, the deed makes them mortgages *if they execute it*, and so gives them a right to interest" (*h*); and it was held in some old authorities, that even in *a deed to which the creditors were not parties*, or in a trust created by *will* for payment of debts, the creditors were to be regarded as mortgagees and were entitled to interest (*i*); but the

(*a*) *Wild* v. *Banning*, 12 Jur. N. S. 464.

(*b*) *Hamilton* v. *Houghton*, 2 Bligh, 169, see 186; *Car* v. *Burlington*, 1 P. W. 228, as corrected in Cox's ed.; *Barwell* v. *Parker*, 2 Ves. 364; *Shirley* v. *Ferrers*, 1 B. C. C. 41; and see *Stewart* v. *Noble*, Vern. & Scriv. 536; *Creuze* v. *Hunter*, 2 Ves. jun. 165; *S. C.* 4 B. C. C. 319.

(*c*) *Lloyd* v. *Williams*, 2 Atk. 108; *Stewart* v. *Noble*, Vern. & Scriv. 528; *Dolman* v. *Pritman*, 3 Ch. Rep. 64; Nels. 136; Freem. 133; *Bath* v. *Bradford*, 2 Ves. 588, *per* Lord Hardwicke; and see *Tait* v. *Northwick*, 4 Ves. 816. *Bothomly* v. *Fairfax*, 1 P. W. 334, note; *Maxwell* v. *Wettenhall*, 2 P. W. 26, ed. by Cox, are overruled.

(*d*) *Shirley* v. *Ferrers*, 1 B. C. C. 41; but see *Pearce* v. *Slocombe*, 3 Y. & C. 84.

(*e*) *Jenkins* v. *Perry*, 3 Y. & C. 178.

(*f*) *Hamilton* v. *Houghton*, 2 Bligh, 186; and see *Barwell* v. *Parker*, 2 Ves. 364; *Bath* v. *Bradford*, Ib. 588.

(*g*) *Askew* v. *Thompson*, 4 K. & J. 620.

(*h*) *Jenkins* v. *Perry*, 3 Y. & C. 183.

(*i*) *Maxwell* v. *Wettenhall*, 2 P. W. 27; *Car* v. *Burlington*, 1 P. W. 229.

doctrine in the latter cases has long since been overthrown, and it is apprehended that the distinction taken by the Chief Baron cannot at the present day be supported (*a*). Again, it was said by Lord Hardwicke that "if a man *by deed* in his life creates a trust for payment of his debts, annexes a schedule of some debts, and creates a trust term for the payment, as that is in the nature of a *specialty*, it will make these, though simple contract debts, carry interest" (*b*). But this dictum also is not in conformity with the law as now established and cannot be maintained (*c*).

Pearce *v.* Slocombe.

3. But where A. and B. assigned their *joint property* to C., D., and E. upon trust, in the first place to pay the *joint* debts at the expiration of a year from the date of the assignment, and then as to a moiety to pay the *separate* debts of A., and at the end of a year sufficient assets were realized to have discharged the joint debts, but the money, instead of being so applied, was invested in the funds and the interest accumulated, it was held, that as the fund applicable to the payment of the joint debts had been making interest from the time the debts should have been paid, the joint creditors, though on simple contract, were entitled to interest at 4 per cent. before the separate creditors were paid their principal. The separate creditors would otherwise try to impede the general settlement, in order that, in the meantime, they might enjoy the interest from the joint creditor's fund (*d*).

Creditors may stipulate for interest.

4. The creditors may stipulate for payment of interest, or the settlor, if so minded, may insert such a direction (*e*). But a trust for payment of specialty and simple contract debts and *all interest thereof*, will not amount to such a direction, but the words will be taken to have reference to the debts carrying interest of their own nature (*f*).

Specialty debts.

5. *Specialty* debts, though actually released by a creditors' deed, will carry interest up to the *time of payment*. It might be urged, indeed, that as regards specialty debts the amount of the debt is the principal and interest; and therefore in a trust for payment of debts interest as well as principal must be taken into calculation to ascertain what the debt is at the date of the deed or the

(*a*) *Barwell* v. *Parker*, 2 Ves. 364. It must be borne in mind, however, that the practice of the Court in the Chancery Division gives simple contract creditors a right to interest from the date of the decree out of any *surplus* assets after paying all debts, and the interest of such as by law carry interest; see Rules of Supreme Court, Ord. 55, R. 63.

(*b*) *Barwell* v. *Parker*, 2 Ves. 364.

(*c*) *Stone* v. *Van Heythuysen*, Kay, 721; *Clowes* v. *Waters*, 16 Jur. 632.

(*d*) *Pearce* v. *Slocombe*, 3 Y. & C. 84.

(*e*) See *Bath* v. *Bradford*, 2 Ves. 588; *Barwell* v. *Parker*, Ib. 364; *Stewart* v. *Noble*, Vern. & Scriv. 536.

(*f*) *Tait* v. *Northwick*, 4 Ves. 816.

death of the testator; but that interest ought not to run beyond the date of the trust deed or the death of the testator, for that principal and interest together are then regarded as one sum, not as a debt but the *claim* of a *cestui que trust.* And some principle of this kind appears to have been acted upon in the case of *Car* v. *Burlington* (*a*), where a person vested estates in trustees upon trust to pay all such debts as he should owe at his death, and the Court directed the master to calculate interest on such of the debts as carried interest *up to the death of the settlor;* but the Master was not to carry on any interest on any security beyond the settlor's decease, but in case there were assets to pay the simple contract debts as well as the specialty debts, the question of ulterior interest was reserved. At the present day, however, the rule is to consider the specialty debt as subsisting up to the time of payment, *i.e.*, to calculate interest on *the principal* not only up to the date of the deed or the death of the testator, but up to the day of payment (*b*).

Bond creditors not entitled to interest beyond the penalty.

6. Bond creditors, it must be observed, will in no case be entitled to receive more for principal and interest than the amount of the penalty (*c*).

(*a*) 1 P. W. 228, as corrected in Cox's ed. from Reg. Lib.

(*b*) *Bateman* v. *Margerison*, 16 Beav. 477.

(*c*) *Hughes* v. *Wynne*, 1 M. & K. 20; *Anon.* 1 Salk. 154; *Clowes* v. *Waters*, 16 Jur. 632.

CHAPTER XXI.

THE DUTIES OF TRUSTEES OF CHARITIES.

1. CHARITIES may either be established by charter, as *eleemosynary corporations*, or may be placed under the management of *individual trustees*.

Charities by charter.

2. Before entering upon the duties of trustees for charities, it may be proper to introduce a few preliminary remarks upon the subject of the Court's (*a*) *jurisdiction* over charities established by *charter*.

Visitor.

3. On the institution of such a charity a *visitatorial* jurisdiction arises of common right to the founder (whether the Crown or a private person), or to those whom the founder has substituted in the place of himself (*b*); and the office of visitor is *to hear and determine all differences of the members of the society amongst themselves, and generally to superintend the internal government of the body, and to see that all rules and orders of the corporation are observed* (*c*). The visitor must take as his guide the statutes originally propounded by the founder (*d*); but so long as he does not exceed his proper province, his decision is final, and cannot be questioned by way of appeal (*e*).

Jurisdiction of the Court over corporate bodies.

4. With this *visitatorial* power the Court has nothing to do: it is only as respects the administration of the corporate *property* that equity assumes to itself any right of interference (*f*).

[(*a*) By 36 & 37 Vict. c. 66, s. 34, causes and matters for the execution of Charitable Trusts, are to be assigned to the Chancery Division of the High Court of Justice.]

(*b*) *Eden* v. *Foster*, 2 P. W. 326, resolved; *Attorney-General* v. *Gaunt*, 3 Sw. 148.

(*c*) See *Philips* v. *Bury*, Skin. 478; *Attorney-General* v. *Crook*, 1 Keen, 126; *Attorney-General* v. *Archbishop of York*, 2 R. & M. 468; *Re Birmingham School*, Gilb. Eq. Rep. 180, 181.

(*d*) *Green* v. *Rutherford*, 1 Ves. 469, *per* Sir J. Strange; Id. 472, *per* Lord Hardwicke.

(*e*) *St. John's College, Cambridge* v. *Todington*, 1 Burr. 200, *per* Lord Mansfield; *Attorney-General* v. *Lock*, 3 Atk. 165, *per* Lord Hardwicke; *Attorney-General* v. *The Master of Catherine Hall, Cambridge*, Jac. 392, *per* Lord Eldon.

(*f*) See the observations of Lord Commissioner Eyre in *Attorney-General* v. *The Governors of the Foundling*

Informal election.

Mal-administration.

5. Upon the ground of this distinction between the visitatorial power and the management of the revenue, an information for the *removal of governors or other corporators*, as having been irregularly appointed, would be dismissed with costs (*a*); but wherever the administration of the *property* by the governors can be shown to have a tendency to pervert the end of the institution, the Court will immediately interpose, and put a stop to such wrongful application (*b*).

How property newly given is affected by the visitatorial power.

6. An estate newly bestowed upon an old corporation is not to be regarded in the same light as property with which the charity was originally endowed. The visitatorial power is *forum domesticum*—the private jurisdiction of the founder; and the new gift will not be made subject to it, unless the will of the donor be either actually expressed to that effect, or is to be collected by necessary implication (*c*). If a legal or equitable interest be given to a body corporate, and *no special purpose* be declared, the donor has plainly implied that the estate shall be under the general statutes and rules of the society, and be regulated in the same manner as the rest of their property (*d*): but if a *particular and special trust* be annexed to the gift, *that* excludes the visitatorial power of the original founder; and the Court, viewing the corporation in the light of an ordinary trustee, will determine all the same questions as would have fallen under its jurisdiction had the administration of the fund been intrusted to the hands of individuals (*e*).

Hospital, 2 Ves. jun. 47. But Chief Baron Richards once observed, he had been of counsel in the *Foundling Hospital case*, and he remembered some of the first men of the bar were not satisfied with the decision; *In re Chertsey Market*, 6 Price, 272. See also the observations of Lord Hardwicke in *Attorney-General* v. *Lock*, 3 Atk. 165; and see upon this subject generally *Ex parte Berkhampstead Free School*, 2 V. & B. 138; *The poor of Chelmsford* v. *Mildmay*, Duke, 83; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 499; *Eden* v. *Foster*, 2 P. W. 326; *Attorney-General* v. *Dixie*, 13 Ves. 533, 539; *Attorney-General* v. *Corporation of Bedford*, 2 Ves. 505; 5 Sim. 578; *Attorney-General* v. *Browne's Hospital*, 17 Sim. 137; *Attorney-General* v. *Dedham School*, 23 Beav. 350; *Daugars* v. *Rivaz*, 28 Beav. 233.

(*a*) *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 491, see 498; *Whiston* v. *Dean and Chapter of Rochester*, 7 Hare, 532; *Attorney-General* v. *Dixie*, 13 Ves. 519; *Attorney-General* v. *Middleton*, 2 Ves. 327, see 330; *Attorney-General* v. *Dulwich College*, 4 Beav. 255; *Attorney-General* v. *Magdalen College, Oxford*, 10 Beav. 402; *Attorney-General* v. *Corporation of Bedford*, Id. 505; *In re Bedford Charity*, 5 Sim. 578.

(*b*) See *Attorney-General* v. *St. Cross Hospital*, 17 Beav. 435; *Attorney-General* v. *The Governors of the Foundling Hospital*, 2 Ves. jun. 48; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 499.

(*c*) *Green* v. *Rutherforth*, 1 Ves. sen. 472, *per* Lord Hardwicke.

(*d*) Id. 473, *per eundem*; *Ex parte Inge*, 2 R. & M. 596, *per* Lord Brougham; *Attorney-General* v. *Clare Hall*, 3 Atk. 675, *per* Lord Hardwicke.

(*e*) *Green* v. *Rutherforth*, 1 Ves. sen. 462.

Private foundation with a charter.

7. Where a private person founds a charity, and then the Crown grants a charter, the presumption is that the Crown meant to carry out the founder's intentions, and the jurisdiction of the Court which existed before will be continued (*a*).

Cases where the visitatorial power may be exercised by the Lord Chancellor.

8. Even the *visitatorial* power may, under particular circumstances and in a special manner, be exercised by the Lord Chancellor; for the Crown may be visitor by the terms of the foundation; and, if the heir of the founder cannot be discovered (*b*), or become lunatic (*c*), the visitatorial power, rather than that the corporation should not be visited at all, will result to the Crown. And while in *civil* corporations the Crown is visitor through [the High Court of Justice (*d*)]; (for corporate bodies which respect the public policy of the country and the administration of justice, are necessarily better regulated under the superintendence of a Court of law:) yet, as regards *eleemosynary* corporations, the Crown's visitatorial power is committed to the Lord Chancellor, as in matters of charity the more appropriate supervisor (*e*). And the mode of application to the Lord Chancellor in these cases is by petition to the Great Seal (*f*).

We now proceed to the consideration of the *duties* of trustees of charities.

Fund must be applied to the charity prescribed.

9. It is of course imposed upon the trustees, whether individuals or a corporation, not to convert the charity fund to other uses than according to the intent of the founder or donor; so long as those uses are capable of execution (*g*). Thus if the gift be to find a preacher in Dale, it would be a breach of trust to provide

(*a*) *Attorney-General* v. *Dedham School*, 23 Beav. 350.

(*b*) *Ex parte Wrangham*, 2 Ves. jun. 609; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 498, *per* Sir W. Grant; *Attorney-General* v. *Black*, 11 Ves. 191; *Case of Queen's College, Cambridge*, Jac. 1.

(*c*) *Attorney-General* v. *Dixie*, 13 Ves. 519, see 533.

[(*d*) This visitatorial power was formerly exercised through the Court of Queen's Bench, but by 36 & 37 Vict. c. 66, the jurisdiction of the Court of Queen's Bench was transferred to the High Court of Justice, and by s. 34 of that Act, matters which were formerly within the exclusive cognizance of the Court of Queen's Bench have been assigned to the Queen's Bench Division of the Court.]

(*e*) *King* v. *St. Catherine's Hall*, 4 T. R. 233, see 244; and see *Ex parte Wrangham*, 2 Ves. jun. 619. [By 36 & 37 Vict. c. 66, s. 17, the visitatorial jurisdiction of the Lord Chancellor is reserved to him and is not transferred to the High Court of Justice or the Court of Appeal.]

(*f*) See the cases cited in notes (*b*) and (*c*); and *Ex parte Inge*, 2 R. & M. 594; *Re Queen's College, Cambridge*, 5 Russ. 54; *Re University College, Oxford*, 2 Ph. 521.

(*g*) See *Attorney-General* v. *Sherborne School*, 18 Beav. 256; *Attorney-General* v. *Calvert*, 23 Beav. 248; *Attorney-General* v. *Corporation of Rochester*, 5 De G. M. & G. 797; *In re Stafford Charities*, 25 Beav. 28; *Attorney-General* v *Boucherett*, 25 Beav. 116; *Attorney-General* v. *Gould*, 28 Beav. 485; *Ward* v. *Hipwell*, 3 Giff. 547.

one in Sale; if it be to find a preacher, it would be a breach of trust to apply it to the poor (*a*): if the trust be for the poor of O., it would be a breach of trust to extend it to other parishes (*b*): if the trust be to repair a chapel, the rents must not be mixed up with the poor-rate for parochial purposes (*c*): if a fund be raised for erecting a hospital, it cannot be diverted to lighting, paving, and cleansing the town (*d*).

Chapel for school.

10. A chapel was granted to the trustees of a *school* for the use and benefit of the said school, and though the inhabitants of the hamlet had been long accustomed to attend divine service in the chapel, it was held that, as the chapel was for the exclusive benefit of the school, the trustees had no power to apply the revenues of the charity towards enlarging the chapel for the better accommodation of the inhabitants (*e*).

Chapel pulled down.

11. The trustees for maintaining a *chapel* had pulled down the edifice, converted the burial ground to profane purposes, carried the bell to the market-place, put the pews in the parish church, and employed the stones of the chapel for repairing a bridge. Sir T. Plumer said, "It was an enormous breach of trust, and such as could not have been expected in a Christian country;" and directed an inquiry what emoluments had come to the hands of the trustees on account of the breach of trust, and what would be the expense of restoring the chapel to the state in which it stood at the time of its destruction (*f*).

Charity in aid of rates.

12. A fund in aid and relief of "*poor citizens* who often were grievously burdened by the imposts and taxes of the city" was held not to be applicable to the payment of rates and other expenses of the city that would otherwise have been raised by public levies and impositions; nor to be distributable to such of the poor as received parish relief, for that would be so much in aid of the ratepayers; but ought to have been administered for the exclusive benefit of the poor (*g*).

Poor of a parish.

13. Where a trust is created for the "*poor of a parish*," it was for a long time doubted what class of persons was entitled to the

(*a*) Duke, 116; *Attorney-General* v. *Newbury Corporation*, C. P. Coop. Cases, 1837–38, 72; *Attorney-General* v. *Goldsmith's Company*, Ib. 292; and see *Wivelescom case*, Duke, 94.

(*b*) *Attorney-General* v. *Brandreth*, 1 Y. & C. C. C. 200.

(*c*) *Attorney-General* v. *Vivian*, 1 Russ. 226, see 237.

(*d*) *Attorney-General* v. *Kell*, 2 Beav. 575.

(*e*) *Attorney-General* v. *Earl of Mansfield*, 2 Russ. 501.

(*f*) *Ex parte Greenhouse*, 1 Mad. 92; reversed on technical grounds, 1 Bligh, N. S. 17.

(*g*) *Attorney-General* v. *Corporation of Exeter*, 2 Russ. 45; *S. C.* 3 Russ. 395; and see *Attorney-General* v. *Wilkinson*, 1 Beav. 372; *Attorney-General* v. *Bovill*, 1 Ph. 762; *Attorney-General* v. *Blizard*, 21 Beav. 233.

benefit. Lord Eldon thought, that the fund should be administered without reference to parochial relief; for assistance might be given to a pauper without exonerating the rich from their usual contribution to the rates—to the relief, which the law had provided, further relief might be added, which the parish was not bound to afford (*a*): besides, the appropriation of the fund to the poor not in receipt of parochial relief might still have the effect of conferring a benefit on the rich; for persons who could not otherwise have maintained themselves might, by means of the charity, be prevented from seeking assistance from the rate (*b*). However, it has been determined in several cases, and seems, therefore, to be now settled, that the charity must be confined to those *not in receipt of parochial relief* (*c*) (1).

(*a*) *Attorney-General* v. *Corporation of Exeter*, 2 Russ. 51—54.

(*b*) See *S. C.* 3 Russ. 397.

(*c*) *Attorney-General*, v. *Corporation of Exeter*, 2 Russ. 47; *S. C.* 3 Russ. 359; *Attorney-General* v. *Wilkinson*, 1 Beav. 372; *Attorney-General* v. *Bovill*, M. R. 1 July, 1839. But see *Attorney-General* v. *Bovill*, 1 Ph. 768, where Lord Cottenham is reported to have said, "I am inclined to think that the right course is, to administer the charity, and leave to chance to what extent it may operate to the relief of the poor-rates." The decree, however, seems in the main to be in accordance with the previous decisions; and see *Attorney-General* v. *Blizard*, 21 Beav. 233.

59 G. 3. c. 12.

(1) As to *parish property*; by the effect of the decisions on 59 Geo. 3. c. 12, s. 17, all hereditaments belonging to the parish at the time of the Act, or subsequently acquired, whether for a chattel (*Alderman* v. *Neate*, 4 M. & W. 704) or freehold interest, and though originally conveyed to express trustees for parish purposes, if it be unknown or uncertain in whom the legal estate is vested (*Doe* v. *Hiley*, 10 B. & C. 885; and see *Churchwardens of Deptford* v. *Sketchley*, 8 Q. B. 394), or generally where it is unascertained in whom the legal estate is outstanding, but the parish have exercised all the rights of ownership, and the property belongs to them in the popular sense (*Doe* v. *Terry*, 4 Ad. & Ell. 274; *Doe* v. *Cockell*, Ib. 478), are now transferred to the churchwardens and overseers of the parish, not indeed as a corporation and having a common seal (*Ex parte Annesley*, 2 Y. & C. 350), but as persons taking, by parliamentary succession, in the nature of a corporation (*Smith* v. *Adkins*, 8 M. & W. 362).

The Act does not extend to *copyholds* (*Attorney-General* v. *Lewin*, 8 Sim. 366; *In re Paddington Charities*, Ib. 629), nor to freeholds of which the trusts are not exclusively for the parish, but also embrace other objects (*Allason* v. *Stark*, 9 Ad. & Ell. 255; *Attorney-General* v. *Lewin*, 8 Sim. 366; *In re Paddington Charities*, Ib. 629); nor to lands vested in existing trustees, and who are actually in discharge of their duties in that character (*Churchwardens of Deptford* v. *Sketchley*, 8 Q. B. 394, overruling *Rumball* v. *Munt*, Ib. 382; and see *Gouldsworth* v. *Knight*, 11 M. & W. 337). However, though *all* the trusts must be for the parish, they may be directed to some special trust, if exclusively parochial, as a trust for aiding the church-rates (*Doe* v. *Hiley*, 10 B. & C. 855; *Doe* v. *Terry*, 4 Ad. & Ell. 274; and see *Allason* v. *Stark*, 9 Ad. & Ell. 266, 267; *Doe* v. *Cockell*, 4 Ad. & Ell. 478), or furnishing a poor-house (*Alderman* v. *Neate*, 4 M. & W. 704), or for the relief of the poor of the parish, whether the objects of the charity be or be not held to include those in the receipt of parochial relief; for if non-recipients only of parochial relief are to be admitted, the parish is still benefited by keeping that class of poor, by means of the charity, off the parish books (*Ex parte Annesley*, 2 Y. & C. 350; *Churchwardens of Deptford* v. *Sketchley*, 8 Q. B. 394).

Trust for maintaining "the worship of God."

14. If land or money be given for maintaining *"the worship of God"* (*a*), or the promotion of *"Godly learning"* (*b*), and nothing more is said, the Court will execute the trust in favour of the established form of religion; and dissenters cannot be appointed trustees (*c*). But though the *trustees* of a Church of England school must be members of the Established Church, it does not follow that the children of dissenters are not to be admitted into the *school*, or even that the *master* may not be a dissenter, though the latter appointment could only be justified by peculiar circumstances (*d*). If it be clearly expressed upon the deed or will that the purpose of the settlor is to promote the maintenance of *dissenting* doctrines, the Court, provided such doctrines be not contrary to law, will execute the intention (*e*).

Numerous contributors.

15. Where a fund has been raised for the purpose of founding a chapel or any other charity, and the contributors were so numerous as to preclude the possibility of their all concurring in any instrument declaring the trust, and a declaration of trust was made by the persons in whom the property was vested at or about the time when the sums were raised, that declaration may reasonably be taken *primâ facie* as a correct exposition of the minds of the contributors (*f*).

The trust originally intended will be preserved.

16. Where an institution exists for the purpose of religious worship, and it cannot be discovered from the instrument declaring the trust what form or species of religious worship was in the intention of the settlors, the Court will then inquire what has been the *usage* of the congregation; and, if such usage do not contravene public policy, will be guided by it as evidence of the intention in the administration of the trust. And by 7 & 8 Vict. c. 45, s. 2, if the instrument of trust do not in express terms, or by reference to some book or other document, define the religious doctrines, twenty-five years' usage immediately preceding any suit is made conclusive evidence thereof (*g*). But if the purpose of the settlors appear clearly upon the instrument, the Court, in that case, though the usage of the congregation may have run in a different

(*a*) *Attorney-General* v. *Pearson*, 3 Mer. 409.

(*b*) *Re Ilminster School*, 2 De G. & J. 535.

(*c*) *Re Stafford Charities*, 25 Beav. 28; *Re Ilminster School*, 2 De G. & J. 535; *S. C. nom. Baker* v. *Lee*, in D. P. 8 H. L. Cas. 495; *Attorney-General* v. *Clifton*, 32 Beav. 596.

(*d*) *Attorney-General* v. *Clifton*, 32 Beav. 596.

(*e*) *Attorney-General* v. *Pearson*, 3 Mer. 409, *per* Lord Eldon; see *S. C.* 7 Sim. 290.

(*f*) *Attorney-General* v. *Clapham*, 4 De G. M. & G. 626.

(*g*) See *Attorney-General* v. *Hutton*, Drur. 530; [*Attorney-General* v. *Anderson*, 57 L. J. Ch. 543, 546.] As to Roman Catholic Charities, see 23 & 24 Vict. c. 134, s. 5.

channel, cannot change the nature of the original institution: it is not competent for the majority of the congregation, or for the managers of the property, to say, "We have altered our opinions: the chapel in future shall be for the benefit of persons of the same persuasion as ourselves" (*a*).

Appointment of new trustees.

17. If the deed of endowment neither provide for the succession of *trustees* nor the election of the *minister*, an inquiry will be directed, who, according to the nature of the establishment, are entitled to propose trustees, and to elect the minister (*b*); and if the election of the minister properly belong to the congregation, the majority is for that purpose the congregation (*c*). The appointment of the minister cannot, in such a case, belong to the heir of the surviving trustee, who may not be of the same persuasion, but, it might happen, a Roman Catholic or Jew (*d*).

Notices.

For the valid election of a minister due notice of the meeting for the purpose must be given, and no persons must take part in the proceedings who are not entitled to attend (*e*).

Minister of a meeting-house.

18. A minister in possession of a meeting-house is tenant at will to the trustees, and his estate is determinable by demand of possession without any previous notice (*f*) But this merely tries the *legal* right without affecting the question whether in *equity* the minister was properly deprived (*g*), and if the minister be in possession, and preaching the doctrines that were intended by the founders, it is the practice of a Court of Equity to continue him until the case can be heard, whether he was duly elected or not (for the first point is to have the service performed), and the Court will pay him his salary (*h*). If a minister be

(*a*) *Attorney-General* v. *Pearson*, 3 Mer. 400, *per* Lord Eldon; *Foley* v. *Wontner*, 2 J. & W. 247, *per eundem*; *Craigdallie* v. *Aikman*, 1 Dow's P. C. 1; *Milligan* v. *Mitchell*, 3 M. & Cr. 73; *Broom* v. *Summers*, 11 Sim. 353; *Attorney-General* v. *Murdoch*, 7 Hare, 445; 1 De G. M. & G. 86; *Attorney-General* v. *Munro*, 2 De G. & Sm. 122; *Attorney-General* v. *Corporation of Rochester*, 5 De G. M. & G. 797; [*Attorney-General* v. *Anderson*, 57 L. J. Ch. 543, 550.]

(*b*) *Davis* v. *Jenkins*, 3 V. & B. 151, see 159; and see *Leslie* v. *Birnie*, 2 Russ. 114. The 13 & 14 Vict. c. 28, seems to confer a power of appointing new trustees, for the *special purposes of that Act*, where there is no power or the power has lapsed. [The Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19, s. 3), enacts that the power of appointing new trustees conferred by the Conveyancing Act, 1881, or any other statutory power for the same purpose for the time being in force, shall apply to all land acquired and held on trust for any purpose to which the 13 & 14 Vict. c. 28, or the 32 & 33 Vict. c. 26, or the Act of 1890 applies.]

(*c*) *Davis* v. *Jenkins*, 3 V. & B. 155; and see *Leslie* v. *Birnie*, 2 Russ. 114.

(*d*) *Davis* v. *Jenkins*, 3 V. & B. 155.

(*e*) *Perry* v. *Shipway*, 4 De G. & J. 353, see 360.

(*f*) *Doe* v. *Jones*, 10 B. & C. 718; *Doe* v. *M'Kaeg*, 10 B. & C. 721; *Perry* v. *Shipway*, 1 Giff. 10; and see *Brown* v. *Dawson*, 12 Ad. & Ell. 624. See *post*, p. 592.

(*g*) See *Doe* v. *Jones*, 10 B. & C. 721.

(*h*) *Foley* v. *Wontner*, 2 J. & W.

removable by the decision of the congregation regularly convened at a meeting, the charges intended to be brought against the minister must be specified in the notice calling the meeting, and the minister himself must be apprised of the nature of the charges (*a*).

Minister may be removable at pleasure.

19. It is the policy of the Established Church by giving the minister an estate for life in his office to render him in some degree independent of the congregation; but if it be the usage amongst any particular class of dissenters to appoint their ministers for limited periods, or to make them removable at pleasure, though a Court of Equity might not struggle hard in support of such a plan, there is no principle upon which the Court would not be bound to give it effect (*b*). And, accordingly, where a decided majority of the congregation passed a resolution for the removal of their pastor, the Court granted an injunction against his officiating (*c*).

Original intention cannot be defeated by bye-laws.

20. To every corporation there belongs of common right the power of establishing *bye-laws* for the government of their own body; but this privilege cannot authorize the enactment of any rules or regulations that would tend to pervert or destroy the directions of the original founder and the objects of the charity (*d*). And so a clause in a deed investing the trustees, or the major part of them, with the power of making orders from time to time upon matters relating to a meeting-house would not enable them to convert the meeting-house, whenever they thought proper, into a meeting-house of a different description, and for teaching different doctrines from those of the persons who founded it, and by whom it was to be attended (*e*).

Mistake.

21. It is not the custom of the Court to remove objects of a charity who have been elected under a *mistake*, where the election was *bonâ fide* and without any fraud or corruption (*f*).

Act of Parliament necessary for the purpose of changing the trust.

22. The charity funds cannot be diverted into a *different* channel without the authority of Parliament (*g*), either directly by a special Act, or indirectly through the Charity Commissioners,

247, *per* Lord Eldon. By 32 & 33 Vict. c. 110, s. 15, the powers of the Charity Commissioners, as to the appointment and removal of trustees, are extended to "buildings registered as places of meeting for religious worship."

(*a*) *Dean* v. *Bennett*, 6 L. R. Ch. App. 489; [and see *Fisher* v. *Jackson*, (1891) 2 Ch. 84.]

(*b*) *Attorney-General* v. *Pearson*, 3 Mer. 402, 403, *per* Lord Eldon.

(*c*) *Cooper* v. *Gordon*, 8 L. R. Eq. 249.

(*d*) *Eden* v. *Foster*, 2 P. W. 327, resolved.

(*e*) *Attorney-General* v. *Pearson*, 3 Mer. 411, *per* Lord Eldon.

(*f*) *Re Storie's University Gift*, 2 De G. F. & J. 529, see 531, 540.

(*g*) *Attorney-General* v. *Market Bosworth School*, 35 Beav. 305.

who are now empowered to approve, provisionally, of a scheme varying from the original endowment, with a view to submit it to Parliament for its sanction (*a*).

Expenses of an Act.

23. Formerly trustees, before applying to the legislature, were in the habit of procuring the sanction of the Court of Chancery for their greater security; for if they took such a step upon the mere suggestion of their own minds, and failed in obtaining the contemplated Act, they were not allowed the costs and expenses incurred in the proceeding (*b*); but if the application to Parliament was attended with success, the trustees were then allowed their costs, though the sanction of the Lord Chancellor had not been previously obtained; for the Court could not with propriety pronounce those measures to be imprudent which the legislature itself had enacted as prudent (*c*).

Letter may be broken and yet the spirit preserved.

24. The management of the trust may contravene the *letter* of the founder's will, and yet, on a favourable construction, be conformable to the intention.

Free grammar school.

It was the opinion of Lord Eldon (*d*) and Sir T. Plumer (*e*), that if the wish of the founder was to establish a *free grammar school*, the Chancellor, though he felt perfectly convinced that a free grammar school (that is, a school for teaching the learned languages) could be of little or no use, would yet be bound to apply the revenue as the donor had directed, and could not substitute a school for teaching English and writing and arithmetic. But it has since been held by Lord Lyndhurst (*f*), Sir John Leach (*g*), Lord Langdale (*h*), and Lord Cottenham (*i*), that the Court has jurisdiction to extend the application of the charity fund to purposes beyond the *literal* intention, and that *writing and arithmetic* may be well introduced into a scheme for the establishment or better regulation of a free grammar school.

Free school.

And this may of course be done in the case not of a *free grammar school*, but of a *free school* (*j*).

(*a*) 16 & 17 Vict. c. 137, ss. 54–60. [And see 37 & 38 Vict. c. 87, which transfers the powers of the late Endowed Schools Commissioners to the Charity Commissioners.]

(*b*) *Attorney-General* v. *Earl of Mansfield*, 2 Russ. 519, *per* Lord Eldon.

(*c*) Ib. *per eundem*.

(*d*) *Attorney-General* v. *Whiteley*, 11 Ves. 241; *Attorney-General* v. *Earl of Mansfield*, 2 Russ. 501.

(*e*) *Attorney-General* v. *Dean of Christchurch*, Jac. 474.

(*f*) *Attorney-General* v. *Haberdashers' Company*, 3 Russ. 530.

(*g*) *Attorney-General* v. *Dixie*, 2 M. & K. 432; *Attorney-General* v. *Gascoigne*, Id. 652.

(*h*) *Attorney-General* v. *Caius College*, 2 Keen, 150; *Attorney-General* v. *Ladyman*, C. P. Coop. Cases, 1737–38, 180.

(*i*) *Attorney-General* v. *Stamford*, 1 Ph. 745.

(*j*) *Attorney-General* v. *Jackson*, 2 Keen, 541.

By 3 & 4 Vict. c. 77, the system of education in any *grammar school* is extended to other useful branches of literature and science, in addition to or in lieu of the Greek and Latin languages, or such other instruction as may be required by the terms of the foundation, or the existing statutes. 3 & 4 Vict. c. 77.

25. By the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), the Commissioners appointed by Her Majesty to inquire into Schools were empowered, by sect. 9, "in such manner as might render any educational endowment most conducive to the advancement of education, to *alter* and *add* to any existing, and to make any *new* trusts, directions, and provisions in lieu of any existing trusts, directions, and provisions." But by sect. 14, the Act was not to apply to charities created less than fifty years before the commencement of the Act, unless the governing body of the endowment assented to the new scheme. By 37 & 38 Vict. c. 87, the powers of the Endowed Schools Commissioners have been transferred to the Charity Commissioners, and certain amendments of the law have been introduced (*a*). 32 & 33 Vict. c. 56.

[26. By the City of London Parochial Charities Act, 1883 (*b*), the Charity Commissioners are empowered "to inquire into the nature, tenure, and value of all the property and endowments" of certain parochial charities of the City of London, and to prepare schemes for "the future application and management of the charity property and endowments." But by sect. 21, no scheme is to affect any endowment originally given to charitable uses less than fifty years before the commencement of the Act, unless the governing body assent to the scheme. By sect. 39, power is given to the Commissioners to direct the sale of any part of the charity property upon such terms and conditions, and to such purchasers, as they may think fit; and the trustees for the time being of such property are thereupon to effect such sale. By sect. 48, a new corporate governing body to be called "The Trustees of the London Parochial Charities" is to be established, with perpetual succession and a common seal.] [London Parochial Charities Act.]

[(*a*) As to what educational endowments are within the Act, see *Attorney-General* v. *Christ's Hospital*, 15 App. Cas. 172.]

[(*b*) 46 & 47 Vict. c. 36; as to what is "charity property" within the meaning of the enactment, see *Re St. Botolph Parish Estates*, 35 Ch. D. 142; *Re St. Bride's Parish Estates*, 35 Ch. D. 147 n.; *Re St. Stephen, Coleman Street*, 39 Ch. D. 492; *Re St. Nicholas Acons*, 60 L. T. N.S. 532; and as to what is a "vested interest;" *Re St. John the Evangelist*, 59 L. T. N.S. 617; *Re St. Alphage, London Wall*, 59 L. T. N.S. 614; *Re St. Edmund, King and Martyr*, 60 L. T. N.S. 622, where Kay, J., said that it would be a breach of trust for the trustees of a charity to appoint a clerk with a freehold office.]

Ejectment of person ceasing to be schoolmaster.

27. A schoolmaster or other officer of the trustees, whose appointment has been cancelled or whose office has otherwise ceased, and who in defiance of the trustees continues to hold over the premises given up to him, cannot, as he was lawfully put in possession, be treated on the footing of a trespasser on another's lawful possession, so as to be removable with as little force as may be necessary; but can be ejected in a summary way by application to two justices of the peace under the provisions of 23 & 24 Vict. c. 136, s. 13.

"Finding a master."

28. Where the trustees were directed to apply the rents "towards the necessary *finding a master*, and for the pains of such master," and the trustees applied part of the revenue towards *rebuilding and repairing* the school-room and school-house, it was held to be a good execution of the trust, because a school-room and house were necessary, and if these were not provided by the trustees they must have been provided by the master himself, and so it was in effect applied for the pains of the master (*a*).

"Relief of poor."

29. So a trust "for the *relief of the poor*," has been construed to authorize an application of the funds to the building of a *school-house*, and the *education of the poor* of the parish (*b*).

Repairing and rebuilding.

30. So where an estate had been given to trustees for the *repair* of a church and chapel of ease thereto belonging, and the parish had taken down the chapel to erect a new one on a different site, it was determined that the trustees had not exceeded the line of their duty in expending the accumulated rents upon the *rebuilding* of the chapel; but it was held that the *rents* only, and not the *corpus* of the estate, could be so applied; and the Court had great doubt whether anything could be laid out upon the *fitting-up* of the chapel (*c*). But where there was a large surplus fund and the objects of the charity were sufficiently provided for, the Court in a special case made repairs and improvements out of the *capital*, without any direction for recouping the capital out of the income (*d*).

[Augmentation of salaries.]

[In regard to "reparations" of buildings for a charitable purpose the law is very wide, and it has been frequently laid down that the word "reparation" is not to be confined to the repairs of the old building, but may in a proper case be extended

(*a*) *Attorney-General* v. *Mayor of Stamford*, 2 Sw. 592.

(*b*) *Wilkinson* v. *Malin*, 2 Tyr. 544, see 570.

(*c*) *Attorney-General* v. *Foyster*, 1 Anst. 116. See *post*, p. 643.

(*d*) *Re Willenhall Chapel*, 2 Dr. & Sm. 467.

to the erection of a new building (*a*). Where the trust was for the reparations, ornaments, and other necessary occasions of a parish church, a scheme was sanctioned by which the trustees were allowed to provide for the cost of a spire to a new parish church, as being within the words "necessary occasions" (*b*).]

Augmentation of salaries.

31. Where the direction of the founder was that the master of a school should receive 50*l.* a year, and the usher 30*l.*, and the trustees had raised the salaries respectively to 80*l.* and 60*l.*, as the will did not contain any prohibition against increasing the salaries, and it could not be supposed that the trustees were not under any circumstances to alter the amount, the Court refused to compel the trustees to refund the augmentations (*c*).

Reduction of salaries.

32. And, *vice versâ*, if a fund be given, not for the purposes of individual benefit, but for the discharge of certain duties, as for the support of a schoolmaster, and the fund increases to such an extent as to yield more than a reasonable compensation for the duties to be performed, the Court will not allow the surplus to be expended unnecessarily, but will order it to be applied for the promotion of some other charitable purpose (*d*).

Loans.

33. Legacies had been left by several different testators (between the years 1545 and 1666) for the purpose of being lent out in sums varying from 5*l.* to 200*l.* without interest; and Sir J. Leach was of opinion, that, regard being had to the alteration in the value of money, it was not inconsistent with the intention of the testators to raise the loans to sums varying from 100*l.* to 500*l.* (*e*).

"Parishioners."

34. Where the trust was to elect children, who or whose parents were *parishioners* of a certain parish, to Christ's Hospital, it was held by V. C. Malins that the word "parishioner" must be taken in an honest and *bonâ fide* sense, and could not be applied to a person who had taken a small house temporarily for the mere purpose of obtaining a qualification, and had been rated to the parish collusively, and that where a disqualified candidate was elected after notice to the electors of such disqualification, the votes were thrown away, and the opposing candidate, though he had a minority of votes, was duly elected (*f*). But on

[(*a*) *Re Palatine Estate Charity*, 39 Ch. D. 54, *per* Stirling, J., citing *Attorney-General* v. *Wax Chandlers' Company*, 6 L. R. H. L. 1.]

[(*b*) *S. C.*]

(*c*) *Attorney-General* v. *Dean of Christchurch*, 2 Russ. 321.

(*d*) *Attorney-General* v. *Master of Brentwood School*, 1 M. & K. 376, 394.

(*e*) *Attorney-General* v. *Mercers' Company*, 2 M. & K. 654; and see *Attorney-General* v. *Holland*, 2 Y. & C. 683; *Morden College case*, cited Ib. 701, 702.

(*f*) *Etherington* v. *Wilson*, 20 L. R. Eq. 606.

appeal Lord Justice James observed, that if the law allowed a man to be qualified, he was qualified however his qualification might have been gained—that men constantly acquired qualifications for voting in counties by buying a 40*s.* freehold for the sole purpose of giving themselves votes, and the decree of the Court below was reversed (*a*).

Retainer of the charity fund.

35. It need scarcely be remarked that a trustee would be guilty of a gross breach of trust, should he keep the charity fund in his hands, and not apply it, as it becomes payable, to the objects of the trust (*b*).

Alienation of the charity estate.

36. Trustees of charities could not as a general rule, even before the restrictions recently imposed, have made an absolute disposition of the charity estate: they could not, for instance, have parted with *lands* to a purchaser, and have substituted instead the reservation of a *rent* (*c*). And as the trustees could not have aliened absolutely, so they could not have accomplished the same end indirectly by demising for long terms of years as for 999 years (*d*); or for terms of ordinary duration, with covenants for perpetual renewal (*e*): or by granting reversionary terms (*f*).

Where allowable.

37. But there was no positive rule that in *no* instance could an absolute disposition be made, for then the Court itself could not have authorized such an act—a jurisdiction which, it is acknowledged, has from time to time been exercised in special cases. "I do not doubt," observed Sir J. Wigram, "the existence of this power in the Court: the trustees have the power to sell at law, they can convey the legal estate, but it is only a Court of equity that can recall the property, and if that Court should sanction a sale it would be bound to protect the purchaser" (*g*). The true principle was, that an absolute disposition was then only to be considered a breach of trust when the proceeding was inconsistent with a provident administration of the estate for the benefit of the charity (*h*). And the transaction was strongly

(*a*) 1 Ch. Div. 160.

(*b*) Duke, 116.

(*c*) *Attorney-General* v. *Kerr*, 2 Beav. 420; *Blackston* v. *Hemsworth Hospital*, Duke, 49; *Attorney-General* v. *Brettingham*, 3 Beav. 91; and see *Attorney-General* v. *Buller*, Jac. 412; *Attorney-General* v. *Magdalen College*, 18 Beav. 223.

(*d*) *Attorney-General* v. *Green*, 6 Ves. 452; *Attorney-General* v. *Pargeter*, 6 Beav. 150.

(*e*) *Lydiatt* v. *Foach*, 2 Vern. 410; *Attorney-General* v. *Brooke*, 18 Ves. 326.

(*f*) See *Attorney-General* v. *Kerr*, 2 Beav. 420.

(*g*) *Attorney-General* v. *Mayor of Newark*, 1 Hare 400; and see *Re Ashton Charity*, 22 Beav. 288; *Anon. case*, cited *Attorney-General* v. *Warren*, 2 Sw. 300, 302.

(*h*) See *Attorney-General* v. *Warren*, 2 Swans. 302; *S. C.* Wils. 411; *Attorney-General* v. *Hungerford*, 8 Bl. 437; *S. C.* 2 Cl. & Fin. 357; *Attorney-*

assumed to be improvident as against a purchaser until he had established the contrary (*a*).

Recent charity Acts.

38. Now under the provisions of the recent Acts, the Charity Commissioners are empowered on application made to them to authorize the *sale* or *exchange* of any part of the charity property (*b*), and the trustees are restricted from any sale, mortgage or charge, *without the consent* of the Commissioners (*c*). But this does not interfere with the powers of trustees of charities to sell under *railway* and other *public Acts*, where the legislature has made proper provision for the due application of the purchase-monies (*d*).

Sales to railway companies.

Power of trustees to pass the legal estate.

39. By another Act, "a majority of two-thirds of the trustees of any charity assembled at a meeting of their body duly constituted, and *having power to determine on any sale, exchange, partition, mortgage, lease, or other disposition* of any property of the charity," are empowered to pass the *legal estate* for giving effect to such disposition (*e*).

Re-investment of sale monies.

40. Where a sale or exchange is effected under the Charity Acts, the purchase or exchange monies may be laid out with the consent of the Commissioners in the purchase of other lands *without* a *licence in mortmain* (*f*). But the Act is silent as to the requirement of 9 G. 2. c. 36 (repealed but substantially re-enacted by 51 & 52 Vict. c. 42), and the conveyance should therefore be by deed attested by two witnesses, and enrolled in the Central Office of the Supreme Court within six calendar months (*g*).

[When the statutory requirements (*i.e.* of 9 Geo. 2. c. 36, s. 3) are not complied with, the deed is not only voidable but absolutely void, not merely as to the charitable trusts sought

General v. *Kerr*, 2 Beav. 428; *Attorney-General* v. *South Sea Company*, 4 Beav. 543; *Attorney-General* v. *Newark*, 1 Hare, 395; *Parke's Charity*, 12 Sim. 329; *Re Suir Island Female Charity School*, 3 Jon. & Lat. 171.

(*a*) *Attorney-General* v. *Brettingham*, 3 Beav. 91.

(*b*) 16 & 17 Vict. c. 137, s. 24; 18 & 19 Vict. c. 124, s. 32; see 23 & 24 Vict. c. 136, s. 16. The 16 & 17 Vict. c. 137, s. 21, authorizes improvements with the sanction of the Charity Commissioners; and the 23 & 24 Vict. c. 136, s. 15, authorizes the application of charity monies to "any other purpose or object" which the Commissioners may think beneficial, and which is not inconsistent with the foundation.

(*c*) 18 & 19 Vict. c. 124, s. 29. [The power of the Commissioners to authorize a sale of land falling under the provisions of the Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), is not affected by that Act, *Parish of Sutton to Church*, 26 Ch. D. 173; and see the Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 13 (2).]

(*d*) See the language of 18 & 19 Vict. c. 124, s. 29.

(*e*) 23 & 24 Vict. c. 136, s. 16; and see the still later enactment of 32 & 33 Vict. c. 110, s. 12, *post*, p. 602.

(*f*) 18 & 19 Vict. c. 124, s. 35.

(*g*) As to these requirements, see *ante*, p. 97.

to be created, but as to the legal estate expressed to be conveyed (*a*).]

Investment of accumulations in land.

41. Where there are *accumulations* from a charity estate, the Court, considering the purchase of *land* with personal estate belonging to charity to be opposed to the general policy of the law, will not as a general rule sanction such an investment (*b*). But there is nothing *illegal* in such an investment, if accompanied with the required formalities; and therefore should a highly beneficial purchase offer itself, the trustees would, it is conceived, run no risk in so investing the accumulations (*c*). Indeed the Court itself has made such orders where the purchase of the land was not the main object, but incidental to a general scheme, as for the enlargement of a school (*d*). But in every case where by conveyance *inter vivos* land *comes into mortmain for the first time*, such conveyance must be by deed executed in the presence of at least two witnesses, and inrolled within six calendar months from the execution (*e*). Even where the land of a charity, whether vested in the corporation or in trustees, is taken by a public company, and the purchase-money is laid out under the direction of the Court in the purchase of other lands upon the like trusts, the deed must be *inrolled* (*f*).

Inrolment.

Loans of charity money on mortgage.

42. Trustees of a charity may lend the trust fund upon a *mortgage* of real estate, though a legal condition is expressly reserved, and though after default an equity of redemption arises by the rules of equity, the statute (*g*), which avoids conveyances to a charity containing any reservation or condition for the benefit of the grantor, being held not to apply to such a case (*h*). But of course care should be taken that the mortgage is by indenture attested by two witnesses, and inrolled. The Court itself on one occasion, when its attention had been directed to the question, authorized the trustees of a charity to lend on mortgage (*i*).

33 & 34 Vict. c. 34.

43. Now by 33 & 34 Vict. c. 34, corporations and trustees

[(*a*) *Churcher* v. *Martin*, 42 Ch. D. 312.]

(*b*) *Attorney-General* v. *Wilson*, 2 Keen, 680.

(*c*) See *Vaughan* v. *Farrer*, 2 Ves. 188.

(*d*) *Attorney-General* v. *Mansfield*, 14 Sim. 601; *Honnor's Trust*, V. C. Kindersley, May 3, 1853.

(*e*) But see *Attorney-General* v. *Day*, 1 Ves. sen. 222.

(*f*) *Re Christ's Hospital*, V.C. Wood, 12 W. R. 669.

[(*g*) 9 Geo. 2. c. 36, repealed but substantially re-enacted by 51 & 52 Vict. c. 42.]

(*h*) *Doe d. Graham* v. *Hawkins*, 2 Q. B. 212.

(*i*) *Attorney-General* v. *Gibson, Ex parte Lushington, Re Lady Prior's Charity*, July 21, 1853, M. R. The mortgage was for 50,000*l.* upon an estate in Northamptonshire.

holding monies in trust for any *public or charitable purpose*, may invest them on any real security authorized by, or consistent with, the trust, and the requirements of the Mortmain Act are dispensed with. But upon foreclosure or release of the equity of redemption, the land is to be held upon trust to be converted into money, and to be sold accordingly.

[44. By the Compulsory Church Rate Abolition Act, 1868, a body of trustees may be appointed in any parish for the purpose of accepting by bequest, donation, contract or otherwise, and of holding any contributions which may be given to them for ecclesiastical purposes in the parish. The trustees are to consist of the incumbent and two house-holders or owners or occupiers of land in the parish, one to be chosen by the patron and the other by the Bishop of the diocese; and the trustees so appointed are to be a body corporate with perpetual succession and a common seal (*a*).] [Church trustees.]

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45. Trustees of charities cannot grant *leases* to or in trust for *one of themselves*, for no trustee can be a tenant to himself, and the Court will charge him with an occupation rack-rent (*b*). Where two trustees were expressly authorized by the will to grant a lease to themselves, or either of them, with the consent of the tenant for life, and one of them took a lease with such consent accordingly, which was fair and proper, but it was found in effect that the relative characters of trustee and lessee were inconsistent, and led to inconveniences, the Court removed the trustee at the instance of the *cestuis que trust*, on the ground of the repugnant characters in this particular case of trustee and tenant; and though the trustee offered to surrender the lease, the Court, as it was beneficial to the *cestuis que trust*, held him to it, and dismissed him from the trust (*c*). Lease to a trustee.

46. Trustees should be cautious how they grant leases to their own *relations*, for that circumstance is calculated to excite a suspicion, which, if confirmed by any other fact, it might require a strong case to remove (*d*). Relations.

47. So a lease should not contain any covenant for the private advantage of the trustee; as where a corporation directed the insertion of a covenant that the lessee should grind at the corporation

[(*a*) 31 & 32 Vict. c. 109, s. 9.]

(*b*) *Attorney-General* v. *Dixie*, 13 Ves. 519, see 534; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 491, see 500.

(*c*) *Passingham* v. *Sherborn*, 9 Beav. 424.

(*d*) *Ferraby* v. *Hobson*, 2 Ph. 261, *per* Lord Cottenham; and see *Ex parte Skinner*, 2 Mer. 457.

mill, in a suit for the establishment of the charity the corporation were, for this instance of misbehaviour, disallowed their costs (*a*).

Fines or rack-rent.

48. Where trustees have a power given to them in general terms to grant leases, it is said that they may take *fines* or reserve *rents* as, according to the circumstances of the case, may be most beneficial to the charity (*b*). If the trust estate held on lease increase in value upon the outlay of the *tenant*, the trustee is not called upon immediately to raise the tenant's rent, for such a practice would obviously prevent any improvement of the property (*c*). Nor if the value of the estate increase from the rise of agricultural produce will the trustee be personally liable, because he neglects for a few months to raise the rent; but if he wilfully continues the old rent when clearly a much higher rent can be obtained, he may be held responsible (*d*).

Adequate consideration.

49. In granting leases of charity lands care must be taken that the lease be for an adequate consideration, and if this be not observed, the Court will interfere and order the lease to be cancelled, and with the lease will also cancel the covenants (*e*).

Leases at an under-value.

50. The lease may be annulled on the mere ground of *under-value* (*f*); but it must be an under-value satisfactorily proved and considerable in amount: it is not enough to show that a little more might have been got for the estate than has been actually obtained; still less is it sufficient to infer the underletting from the value of the property at some subsequent period (*g*).

"Rent not to be raised."

51. Even where it was ordained at the creation of the trust, that no lease should be made for above twenty-one years, and *the rent should not be raised*, it was held that the trustee would not be justified in granting leases from time to time at no more than the original reservation: that as the times alter and the price of provisions rises, the rent ought to be raised in proportion (*h*). The direction for leasing under the true value is no

(*a*) *Attorney-General* v. *Mayor of Stamford*, 2 Sw. 592, 593.

(*b*) *Attorney-General* v. *Mayor of Stamford*, 2 Sw. 592. See now p. 602, *infra*.

(*c*) *Ferraby* v. *Hobson*, 2 Ph. 258, *per* Lord Cottenham.

(*d*) See *Ferraby* v. *Hobson*, 2 Ph. 255.

(*e*) *Attorney-General* v. *Morgan*, 2 Russ. 306.

(*f*) *East* v. *Ryal*, 2 P. W. 284; *Attorney-General* v. *Lord Gower*, 9 Mod. 224, see 229; *Attorney-General* v. *Magwood*, 18 Ves. 315; *Attorney-General* v. *Dixie*, 13 Ves. 519; *Poor of Yervel* v. *Sutton*, Duke, 43; *Eltham Parish* v. *Warreyn*, Duke, 67; *Wright* v. *Newport Pond School*, Duke, 46; *Rowe* v. *Almsmen of Tavistock*, Duke, 42; *Crouch* v. *Citizens of Worcester*, Duke, 33; *Attorney-General* v. *Foord*, 6 Beav. 288.

(*g*) *Attorney-General* v. *Cross*, 3 Mer. 541, *per* Sir W. Grant.

(*h*) *Watson* v. *Hinsworth Hospital*, 2 Vern. 596; and see *Lydiatt* v. *Foach*, Id. 410; *Attorney-General* v. *Master*

part of the charity, and in fact is *void in itself for perpetuity* (*a*).

Under-value must be fraudulent to render the lease impeachable.

52. In considering the question of value it must be remembered that the case of a charity estate is one in which of all others, the *security* of the rent is the first point to be regarded, and therefore the inadequacy of the amount reserved is less a badge of fraud in this than it would be in almost any other instance (*b*). And Lord Eldon desired it might not be considered to be his opinion that a tenant who had got a lease of charity lands at too low a rate with reference to the actual value was therefore to be turned out, if it appeared he had himself acted fairly and honestly. The only ground for so dealing with him would be some *evidence* or *presumption* of collusion or corruption of motive (*c*).

Compensation for the under-value.

53. When leases are set aside for under-value and the Court awards a *compensation* to the charity for the loss which has been sustained by the charity through the collusion of the trustees and the tenant, the burden will fall upon the trustees or the tenant according to the circumstances of the case (*d*). For whatever length of time renewals of leases of *charity* lands upon payment of fines certain may have been granted, and though in pursuance of a scheme settled by the Courts, the tenants have gained no right, and cannot insist upon any further renewals (*e*). But if money has been laid out in improvements upon the faith of renewals, and the lessees have not been recouped their outlay by any subsequent enjoyment of the property, the Court, in the charity scheme, will have regard to their claims (*f*).

Unreasonable extent of the lease.

54. A lease of charity lands may also be invalidated on the ground of the *unreasonable extent of the term*. The duration of the lease should be such only as is consistent with the fair and provident management of the estate (*g*). It was therefore always a direct violation of duty to grant a lease for one thousand years (*h*), not only on the ground before noticed that such a

of Catherine Hall, Cambridge, Jac. 381; *Attorney-General* v. *St. John's Hospital*, 1 L. R. Ch. App. 92.

(*a*) *Hope* v. *Corporation of Gloucester*, 7 De G. M. & G. 647; *Attorney-General* v. *Greenhill*, 33 Beav. 193.

(*b*) *Ex parte Skinner*, 2 Mer. 457, *per* Lord Eldon.

(*c*) *Ex parte Skinner*, 2 Mer. 457.

(*d*) See Duke, 116; *Poor of Yervel* v. *Sutton*, Id. 45; *Attorney-General* v. *Mayor of Stamford*, 2 Sw. 592, *per Cur.*; *Attorney-General* v. *Dixie*, 13 Ves. 540; *Rowe* v. *Almsmen of Tuvistock*, Duke, 42.

(*e*) *Attorney-General* v. *St. John's Hospital*, 1 L. R. Ch. App. 92.

(*f*) *S. C.*

(*g*) See *Attorney-General* v. *Owen*, 10 Ves. 560; *Attorney-General* v. *Brooke*, 18 Ves. 326; *Attorney-General* v. *Griffith*, 13 Ves. 575.

(*h*) *Attorney-General* v. *Green*, 6 Ves. 452; *Attorney-General* v. *Cross*,

demise would in effect be an absolute alienation, but also on the principle that no private proprietor would choose to debar himself from profiting by the progressive improvement of the property. Sir Thomas Plumer observed, "The compensation which the trustees receive may be adequate at the date of the contract, but they are precluded for one thousand years from any advantage of *increased* value. It is true they are secured from *diminution*, and in some instances to guard against fluctuation may be as much the interest of one party as the other; but that would be an answer to all cases in which the trustees have made an alienation at a fixed rent. At the same time," continued his Honour, "it is just to say, that these principles seem not to have been acted upon at so early a period as 1670. In many cases in Duke's collection the Court acted on inadequacy of value, in none on mere extent of term" (*a*).

Husbandry leases.

55. *Husbandry* or *farm* leases should not be granted for a term certain exceeding *twenty-one years* (*b*). But neither is this rule to be taken as absolutely inflexible; and where the alienation is for any longer period, as for ninety-nine years, the Court will put it upon those who are dealing *for* and *with* the charity estate to show the reasonableness of such a transaction, for *primâ facie* it is unreasonable: there is no instance of a power in a marriage settlement to lease for ninety-nine years, except with reference to very particular circumstances; the ordinary husbandry lease is for twenty-one years (*c*).

Leases determinable upon lives.

56. In *Attorney-General* v. *Cross* (*d*), the trustees had been in the habit of granting leases for ninety-nine years, *determinable on lives*, in consideration of fines and the reservation of a small rent, a mode of letting very general in the county where the lands were situate, and which was proved to have been adopted by the founder himself. A bill was filed to set aside

3 Mer. 540; *Attorney-General* v. *Dixie*, 13 Ves. 531; *Attorney-General* v. *Brooke*, 18 Ves. 326.

(*a*) *Attorney-General* v. *Warren*, 2 Sw. 304. But see *Poor of Yervel* v. *Sutton*, Duke, 43, resolution 2; *Rowe* v. *Almsmen of Tavistock*, Id. 42; *Wright* v. *Newport Pond School*, Id. 46; *Crouch* v. *Citizens of Worcester*, Id. 33.

(*b*) See *Attorney-General* v. *Owen*, 10 Ves. 560; *Attorney-General* v. *Backhouse*, 17 Ves. 291; *Rowe* v. *Almsmen of Tavistock*, Duke, 42; *Wright* v. *Newport Pond School*, Id. 46; *Poor of Yervel* v. *Sutton*, Id. 43, resolution 2; *Attorney-General* v. *Pargeter*, 6 Beav. 150.

(*c*) *Attorney-General* v. *Owen*, 10 Ves. 560, *per* Lord Eldon; and see *Attorney-General* v. *Griffith*, 13 Ves. 575; *Attorney-General* v. *Backhouse*, 17 Ves. 291; *Attorney-General* v. *Brooke*, 18 Ves. 326; *Attorney-General* v. *Lord Hotham*, T. & R. 216; *Attorney-General* v. *Kerr*, 2 Beav. 421; *Attorney-General* v. *Hall*, 16 Beav. 388.

(*d*) 3 Mer. 524; see pp. 530, 539.

such a lease, but Sir W. Grant said, "I am not aware of any principle or authority on which it can be held that such a lease is on the very face of it a breach of trust. The legislature has, both in enabling and disabling statutes, considered *leases for three lives as on a footing with leases for twenty-one years absolute.* So have the founders of charities, who prohibited the letting on lease for more than three lives, or twenty-one years." And his Honour dismissed the bill, and allowed the trustees their costs out of the charity estate.

Leases for lives.

57. In a later case, where charity lands had for two hundred years been let for lives upon a fine or foregift at a small reserved rent, Lord Langdale said there was no principle that a lease of a charitable estate for lives was, on the face of it, a breach of trust; and as there appeared no other ground of invalidating the leases, he refused to set them aside (*a*).

Building leases.

58. *Building* leases should be for a term not exceeding sixty, or ninety, or ninety-nine years (*b*). If granted for a longer period, it would be thrown upon the parties to show the reasonableness of the prolonged term from the particular circumstances of the case.

Founder's intention.

59. What has been said as to the proper duration of leases is of course only applicable where the founder himself has not otherwise given directions, for in general the will of the settlor, where explicit, must be strictly followed; as if the terms of the endowment be that the charity estates shall be *let only for twenty-one years,* the trustees, though satisfied that leases for ninety-nine years would be more beneficial, could not make such a deviation from the directions of the trust *without the sanction of the Court.* It was said on one occasion, with reference to such variations from the founder's intention, that the Court itself could not give a good title to the lessee, but that it required the authority of an Act of Parliament (*c*). It is plain, however, that there is a wide distinction between a deviation from the founder's intention as to the *objects* of the charity, and a deviation from the directions as to *management,* which were no doubt originally meant to be governed by circumstances.

Improvements by lessees.

60. When there has been no actual fraud, and the lessee or assignee of the lease is ejected after having laid out money in

(*a*) *Attorney-General* v. *Crook,* 1 Keen, 121, see 126.

(*b*) See *Attorney-General* v. *Owen,* 10 Ves. 560; *Attorney-General* v. *Backhouse,* 17 Ves. 291; *Attorney-General* v. *Foord,* 6 Beav. 290.

(*c*) *Attorney-General* v. *Mayor of Rochester,* 2 Sim. 34.

the permanent improvement of the property, the Court will direct an inquiry to what extent the charity estate has been benefited, and will allow the holder of the lease the amount of the benefit found (*a*).

Late Acts.

61. By the Charitable Trusts Acts the Charity Commissioners are empowered to authorize the grant by charity trustees of *building, repairing, improving, mining or other leases* (*b*), and the trustees are restricted from granting *without* the sanction of the Commissioners "any lease *in reversion* after more than *three years* of any existing term, or for any *term of life*, or in consideration wholly or in part of *any fine*, or for *any term of years exceeding twenty-one years*" (*c*). [A lease for more than twenty-one years made without the required consent does not enure for any purpose, but is absolutely void (*d*).

[Agricultural Holdings Act.]

62. The powers conferred by the Agricultural Holdings (England) Act, 1883, on a landlord in respect of charging the land are not to be exercised by trustees for ecclesiastical or charitable purposes, except with the previous approval in writing of the Charity Commissioners (*e*).]

Power of majority to pass legal estate.

63. By 32 & 33 Vict. c. 110, s. 12, it is enacted that "where the trustees or persons acting in the administration of any *charity* have power to determine on any sale, exchange, partition, mortgage, lease, or other disposition of any property of the charity, *a majority of those trustees or persons who are present at a meeting of their body duly constituted*, and vote on the question, shall have and be deemed *to have always had* full power to execute and do all such assurances, acts, and things as may be requisite for carrying any such sale, exchange, partition, mortgage, lease, or disposition into effect; and all such assurances, acts and things shall have the same effect as if they were respectively executed and done by all such trustees or persons for the time being, and by the official trustee of charity lands" (*f*). The majority, therefore, in those cases of charity can bind the estate not only in equity but at law also, and that, whether the

(*a*) *Attorney-General* v. *Day*, V.C. Knight Bruce, March 9, 1847; and see *Attorney-General* v. *Green*, 6 Ves. 452; *Attorney-General* v. *Kerr*, 1 Beav. 420; *Swan* v. *Swan*, 8 Price, 518; *Attorney-General* v. *Balliol College*, 9 Mod. 411; *Savage* v. *Taylor*, Forr. 234; *Shine* v. *Gough*, 1 B. & B. 444.

(*b*) 16 & 17 Vict. c. 137, ss. 21, 26; 18 & 19 Vict. c. 124, s. 39.

(*c*) 18 & 19 Vict. c. 124, s. 29.

[(*d*) *Bishop of Bangor* v. *Parry*, (1891) 2 Q. B. 277.]

[(*e*) 46 & 47 Vict. c. 61, s. 40.]

(*f*) And see the nearly similar enactment of 23 & 24 Vict. c. 136, s. 16, and *ante*, p. 595.

legal estate be vested in the trustees or other the persons aforesaid, or in the official trustee of charity lands.

Charities may be incorporated.

64. By "The Charitable Trustees Incorporation Act, 1872" (35 & 36 Vict. c. 24), it is enacted by s. 1, that from the date of the Act the trustees or trustee for the time being of any charity, may apply to the Charity Commissioners for a *certificate of registration*, and the Commissioners may grant such certificate subject to such conditions and directions as they may think fit as to the qualifications and number of the trustees, their tenure or avoidance of office, and the mode of appointing new trustees, and the custody and use of the common seal, and thereupon the trustees shall become *a body corporate, by the name described in the certificate*, and may sue and be sued in their corporate name, and hold, acquire, convey, assign, and demise any present or future property of the charity as the trustees might have done before the incorporation. But the Act is not to extend, modify, or control the Act of 9th Geo. II. c. 36.

By section 2, the certificate of incorporation is to vest in the body corporate *all the real and personal estate* belonging to the charity, or held in trust for it; and persons in whose names any stocks, funds, or securities are standing in trust for the charity, are to transfer the same into the name of the body corporate; but, if such property be *copyhold*, liable to the payment of a fine or heriot on the death or alienation of the tenant, the lord of the manor shall receive a corresponding fine or heriot on the granting of the certificate, and a like fine or heriot at the expiration of every subsequent period of *forty years*. But the certificate is not to vest in the body corporate any stocks, funds, or securities held by the *official trustees* of charitable funds, which are not to be transferable except under an order of the Commissioners, and by ordinary transfer or assignment.

By the 4th section, the Commissioners are to see that *proper trustees* have been appointed before they grant the certificate, and after the grant the *trusteeship is to be duly kept up*, and a return of the names of the trustees is to be made at the expiration of every five years.

By the 5th section, the *trustees* of the charity, notwithstanding their incorporation, shall *continue chargeable* for such property as shall come to their hands, and be answerable for their own acts, receipts, neglects, and defaults, and for the due administration of the charity.

By the 10th section, *donations and dispositions* in favour of

the charity by deed, will, or otherwise, shall take effect as if the same had been made to the charity by its corporate name.

By the 11th section, *contracts by the trustees* of a charity which would have been valid and binding if no incorporation had taken place, shall be valid and binding though not made under the seal of the body corporate.

Exempted charities.

65. It should be noticed that the *Universities* and the *Colleges* thereof, and various other bodies of a charitable description, and charitable institutions wholly maintained by *voluntary contributions* (which expression is used in contradistinction to the term *endowments* (*a*)), are excepted from the operation of the *Charitable Trusts Acts* (*b*).

Roman Catholic charities.

66. Charities the funds of which are applicable exclusively for the benefit of *Roman Catholics* were originally exempted for a period of two years, which was afterwards repeatedly extended, and by the latest of these Acts was extended to July 1st, 1860 (*c*). Roman Catholic charities have therefore now fallen within the operation of the Charitable Trusts Acts.

[Mortmain and Charitable Uses Act, 1891.]

[67. By the Mortmain and Charitable Uses Act, 1891 (*d*), the definition of "land" contained in the Act of 1888 (*e*) is varied by excluding therefrom "money secured on land or other personal estate arising from or connected with land;" and it is provided that land may be assured by will to or for the benefit of any charitable use, but such land, notwithstanding anything in the will contained to the contrary, is to be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners. If the limited time expires without completion of the sale, provision is made for sale by the order of the Charity Commissioners (*f*). Personal estate directed to be laid out in land for the benefit of a charity, may be held as though there had been no such direction (*g*), and the Court, or judge in chambers, or Charity Commissioners may sanction the retention or acquisition of land which is required for actual occupation for the purposes of the charity, and not as an investment (*h*).]

[Land may be given by will to charity.]

[Such land to be sold within a year from the testator's death.]

(*a*) See *Governors for Relief of Widows, &c., of Clergymen* v. *Sutton*, 27 Beav. 651.

(*b*) 16 & 17 Vict. c. 137, s. 62; 18 & 19 Vict. c. 124, s. 47.

(*c*) 19 & 20 Vict. c. 76; 20 & 21 Vict. c. 76; 21 & 22 Vict. c. 51; 22 & 23 Vict. c. 50; see 23 & 24 Vict. c. 134.

[(*d*) 54 & 55 Vict. c. 73, s. 3.]

[(*e*) 51 & 52 Vict. c. 42, *ante*, p. 97.]

[(*f*) Sect. 6.]

[(*g*) Sect. 7.]

[(*h*) Sect. 8.]

CHAPTER XXII.

OF TRUSTEES UNDER THE SETTLED LAND ACTS.

UNDER the Settled Land Act, 1882 (*a*), fundamental changes have been introduced in dealing with and disposing of Settled Estates, the powers which under the old law were usually given to the trustees of the settlement, and in some cases much more extensive powers, having been conferred on tenants for life and other limited owners. With a view, probably, to the protection of the remaindermen (though such protection has not been satisfactorily provided for), a class of trustees has been called into existence whose duties arise under the Act; but these duties are, with a few exceptions, to which attention will be drawn, principally of a ministerial nature, and do not involve the exercise of discretion. In the present chapter we propose to treat of the position and duties of these trustees; but incidentally to this it will be necessary to refer to the principal provisions of the Act, and to glance at the important changes which have been introduced by it.

[Definition of settlement.]

1. The term "settlement" is defined by sect. 2 of the Act, which provides (*b*) that "*any* deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other *instrument, or* any number of *instruments*, whether made or passed before or after, or partly before and partly after, the commencement of this Act, *under* or by virtue of *which* instrument or instruments *any land or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession,* creates or is for the purposes of this Act a settlement." It is further provided

(*a*) 45 & 46 Vict. c. 38; amended by the Settled Land Acts, 1884, 1887, 1889, and 1890 (47 & 48 Vict. c. 18; 50 & 51 Vict. c. 30; 52 & 53 Vict. c. 36; 54 & 55 Vict. c. 69), all which Acts may (see sec. 2 of the Act of 1890) be cited as the Settled Land Acts, 1882 to 1890.

(*b*) Sub-s. 1.

that an estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor, or descending to the testator's heir, is for the purposes of the Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement (*a*), and that the determination of the question whether land is settled land for the purposes of the Act is governed by the state of facts and the limitations of the settlement at the time of the settlement taking effect (*b*).

From this definition it will be seen that a single "settlement" may be created by several instruments, and it has been held that a settlement of land and a subsequent will devising other land to the uses of the settlement, and bequeathing money to be invested in the purchase of land to be settled to the same uses, constitute together one settlement (*c*). And where four estates were settled on the same tenant for life with remainders to three different sets of uses, one estate being subjected to a long term of years for payment off of incumbrances on all four estates, and, subject to the term, being divided into moieties which were respectively subjected to the same uses as two of the other estates, it was held that one of the last two estates, together with one of the moieties, constituted one settled estate notwithstanding the interposition of the term (*d*).

[Derivative settlement.]

Where, however, there is an original settlement complete in itself, and derivative settlements have afterwards been made by persons who take interests which have not yet fallen into possession under the original settlement, the original settlement alone is the settlement for the purposes of the Act (*e*), but by the Settled Land Act, 1890 (*f*), it is specially provided that every instrument whereby a tenant for life, in consideration of marriage, or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement; and the enactment is to apply and have effect with respect to every disposition before as well as after the passing of the Act, unless inconsistent with the nature or terms of the disposition.

[Settled Land Act, 1890.]

(*a*) 45 & 46 Vict. c. 38, s. 2, sub-s. 2; see *Re Atherton*, W. N. 1891, p. 85, *post*, p. 611, note (*b*).

(*b*) Sub-s. 4.

(*c*) *Re Mundy's Settled Estates*, (1891) 1 Ch. (C. A.) 399.

(*d*) *Re Lord Stamford's Settled Estate*, 43 Ch. D. 84.

(*e*) *Re Knowles' Settled Estates*, 27 Ch. D. 707.

(*f*) 53 & 54 Vict. c. 69, s. 4.

2. The trustees for the purposes of the Settled Land Act may either be nominated by the settlement itself, or appointed by the Court; and sect. 2 of the Act of 1882 (*a*), provides that "the persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for the purposes of the Act, are for the purposes of the Act trustees of the settlement." From this definition it appears that in the case of settlements created before the Act, trustees with a power of sale, or a power of consenting to or approving of a sale, if there are any such trustees, and they only, are "trustees of the settlement" within the meaning of the Act. But trustees to whom personal estate has been bequeathed upon trust to convert it and invest the proceeds in the purchase of real estate to be settled strictly, are not trustees of the settlement for the purposes of the Act (*b*). [Trustees of the settlement.]

Trustees with a power of sale exercisable with the consent of the tenant for life are within the Act (*c*). But in a case in Ireland it has been held that trustees with a power of sale exercisable with the consent of a person whose consent cannot be obtained, are not within the Act (*d*), but the soundness of this decision may fairly be questioned.

Where personal estate is settled so that the trustees have authority to vary the investments, and after-acquired real estate is settled by reference upon the same trusts, the trustees, having an implied power of sale, fall within the definition of trustees of the settlement for the purposes of the Act (*e*), and executors or trustees who, under a charge of debts, have an over-riding power to sell settled land, seem to be trustees for the purposes of the Act. [Implied power.] [Executors with charge of debts.]

Trustees with a power of sale of the settled real estate are trustees of the settlement for all the purposes of the Act, including the sale of heirlooms, to which the power of sale in the settlement does not extend (*f*). [As to heirlooms.]

In instruments since the Act it is usual and proper to appoint expressly trustees of the settlement for the purposes of the Act.

By the Settled Land Act, 1890 (*g*), where there are for the [Settled Land Act, 1890.]

(*a*) Sub-s. 8.
(*b*) *Burke* v. *Gore*, 13 L. R. Ir. 367.
(*c*) *Constable* v. *Constable*, 32 Ch. D. 233.
(*d*) *Re Johnstone's Settlement*, 17 L. R. Ir. 172.
(*e*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.
(*f*) *Constable* v. *Constable*, 32 Ch. D. 233.
(*g*) 53 & 54 Vict. c. 69, sec. 16. Before this Act trustees with a future

time being no trustees of the settlement within the meaning of or for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely, (1) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such power of sale, or, if there be no such persons, then (2) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not.

[Trustees of land comprised in the settlement and subject to the same limitations.]

[Trustees with future power of sale.]

3. Where there are no trustees of the settlement within the statutory definition, or where in any other case it is expedient for the purposes of the Act that new trustees of a settlement should be appointed, the Court may, if it thinks fit, on the application of the tenant for life, or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder or otherwise, or, in the case of an infant, of his testamentary or other guardian or next friend, appoint fit persons to be trustees under the settlement for the purposes of the Act (*a*).

[Appointment by the Court.]

The persons appointed by the Court, and the survivors and survivor of them, while continuing to be trustees or trustee, and until the appointment of new trustees the personal representatives or representative for the time being of the last surviving or continuing trustee, are for the purposes of the Act the trustees or trustee of the settlement (*b*).

[Survival of powers.]

The exercise of this power is in the discretion of the Court, and it has been laid down in a case in Ireland, that, upon an application under this section to appoint trustees, the Court should not only require to be satisfied of the fitness of the proposed trustees, but also that the purpose for which their appointment is asked is such as to render such appointment safe and beneficial to all parties interested. And where the application was with a view to having

[Discretion of Court.]

power of sale were held not to be trustees for the purposes of the Act; see *Wheelwright* v. *Walker*, 23 Ch. D. 752, 761; *Re Bryant and Barningham*, 44 Ch. Div. 218. In a case of *In re Cox and Yeadon*, noted 91 L. T. p. 241, it was held by Chitty, J., in chambers, that a tenant for life, who was also one of the trustees, with a power of sale not taking effect until the death of such tenant for life, could make a good title under sec. 16 of the Act of 1890.

(*a*) Sect. 38, sub-s. (1).

(*b*) Sect. 38, sub-s. (2).

a large fund taken out of Court and invested upon mortgage of lands in Ireland, it was refused (*a*).

Where a trustee who had been appointed by the Court was desirous of retiring on the ground of ill health the Court appointed a new trustee in his place (*b*), observing that it was very doubtful, to say the least, whether a valid appointment could be made by the continuing trustee under sect. 31 of the Conveyancing Act, 1881 (*c*).

[Application of Conveyancing Act as to appointment of trustees.]

It is, however, now provided by the Settled Land Act, 1890 (*d*), sect. 17, that all the powers and provisions contained in the Conveyancing and Law of Property Act, 1881, with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement, and this enactment applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the passing of the Act, and is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of the Act, otherwise than under the provisions of the Act of 1881.

[Application to Court by summons.]

The application to the Court should be by summons, which should be served on the trustees (if any), and also on the tenant for life, if he is not the applicant, but not on any other person unless the Judge so directs (*e*).

[Solicitor of tenant for life not appointed trustee.]

As the appointment of trustees is required to impose a check upon the extensive powers conferred upon the tenant for life, and sect. 44 contemplates the probability of there being differences between the trustees and the tenant for life, the Court will not appoint any member of the firm of solicitors who act for the tenant for life (*f*), and *à fortiori* will not appoint the actual

(*a*) *Burke* v. *Gore*, 13 L. R. Ir. 367; but the Court, as a general rule and in the absence of special circumstances, will make the appointment without going into any such question. As to the power of the Irish Land Commissioners to appoint trustees for the purposes of the Settled Land Act in certain cases, see 48 & 49 Vict. c. 73, s. 13. As to the appointment of trustees in Ireland when trustees have already been appointed in England, see *In re Maberly's Settled Estate*, 19 L. R. Ir. 341.

(*b*) *Re Wilcock*, 34 Ch. D. 508; and see *Re Kane's Trusts*, 21 L. R. Ir. 112.

(*c*) *Re Wilcock*, 34 Ch. D. 510; notwithstanding the opinion of Mr. Wolstenholme to the contrary, Settled Land Act, 2nd ed., p. 54; see 5th ed. p. 79.

(*d*) 53 & 54 Vict. c. 69.

(*e*) Rules of the Supreme Court under the Settled Land Act, 1882, RR. 2, 4 and 6.

(*f*) *Re Kemp's Settled Estates*, 24 Ch. D. 485; *Re J. Walker's Trusts*, 48 L. T. N.S. 632; 31 W. R. 716.

tenant for life, or any person who may become tenant for life (*a*), such as a tenant for life in remainder (*b*), to be a trustee of the settlement.

[Infant's share in unconverted realty.]

The share of an infant under the Statute of Distributions in realty which has been improperly allowed to remain unconverted, is settled land within the meaning of the Act (*c*), so as to enable the Court, under sect. 38, to appoint trustees to exercise the powers of the Act; but the order appointing the trustees will be made without prejudice to any question as to the interests of the infants (*d*).

[Tenant for life a lunatic.]

Where a tenant for life is a lunatic, and his committee applies, under sect. 62 of the Act, for an order enabling him to exercise the powers of the Act, and no trustees are in existence, new trustees must be appointed for the purposes of the Act, and be served with notice of the application (*e*).

[Payment of capital money to trustees.]

4. By sect. 39, sub-sect. (1), capital money arising under the Act is not to be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee. But subject thereto, by sub-sect. (2), the provisions of the act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

Where trustees have an implied power of sale over realty settled by reference to trusts of personal estate, and power is given by the settlement to the trustees *or trustee* to act and give receipts for moneys subject to the trusts of the settlement, the case falls within the exception of sect. 39, sub-sect. (1), and a single trustee may receive the purchase-money of the real estate arising from a sale by the tenant for life (*f*).

[Tenant for life.]

5. We will next advert to the position of the tenant for life, and the powers given by the Act to the tenant for life, under which term we shall include not only the person or persons beneficially entitled to the possession of the settled land, or the receipt of the income thereof for his life (*g*), but also the limited owners, who, under sect. 58, have the powers of a tenant for life under the Act.

(*a*) *Re Harrop's Trusts*, 24 Ch. D. 717.

(*b*) *Re Thompson's Will*, 21 L. R. Ir. 109.

(*c*) See sect. 59.

(*d*) *Re Wells*, 48 L. T. N.S. 859; 31 W. R. 764; but see *Re Greenville Estate*, 11 L. R. Ir. 138.

(*e*) *Re Taylor*, 52 L. J. N.S. Ch. 728; 31 W. R. 596; 49 L. T. N.S. 420.

(*f*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.

(*g*) See sect. 2, sub-ss. (5) and (10) (i).

It may here be remarked that by sect. 2, the tenant for life is defined to be "the person for the time being under a settlement beneficially entitled to possession (*a*) of settled land for his life" (*b*); and "if there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Act" (*c*); and a person who is "tenant for life within the foregoing definition is to be deemed such, notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent;" and, by sub-sect. (10), possession includes receipt of income. [Defined.]

6. By sect. 58, sub-sect. (1), the powers of a tenant for life are given to each of the following persons, when his estate or interest is in possession (*d*), namely:— [Persons having powers of tenant for life.]

(1) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, although the reversion is in the Crown, and so that the exercise by him of his powers shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services.

(2) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event.

(3) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers shall bind the Crown.

(*a*) The words "entitled to possession" mean entitled "in possession," as distinguished from entitled "in reversion;" *Re Atkinson*, 30 Ch. D. 605; 31 Ch. Div. 577.

(*b*) Where there is a trust for accumulation of rents during the life of the tenant for life, who is also heir-at-law, and as such entitled to the residue of the life estate after the expiration of the period limited by the Thellusson Act, the heir-at-law is tenant for life under the Settled Land Act; *Re Atherton*, W. N. (1891), p. 85.

(*c*) This must be compared with section 19, which provides that where the settled land comprises an undivided share, or, under the settlement the settled land has come to be held in undivided shares, the tenant for life may join or concur to any extent necessary or proper for any purpose of the Act, with any person entitled to or having power or right of disposition of or over another undivided share. Where two shares are comprised in the same settlement, and one has become vested in an owner in fee, the tenant for life of the other share cannot sell without the concurrence of such owner in fee; *Re Collinge's Settled Estates*, 36 Ch. D. 516. As to sales by trustees in such a case, see *post*, Chap. xxiii. s. 2, v.

(*d*) These words refer to possession as contrasted with reversion or remainder, not to personal possession as contrasted with possession by another person; *Re Morgan*, 24 Ch. D. 114, 116; *Re Jones*, 26 Ch. Div. 736, 741, 744.

(4) A tenant for years determinable on life, not holding merely under a lease at a rent.

(5) A tenant for the life of another, not holding merely under a lease at a rent.

(6) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose.

(7) A tenant in tail after possibility of issue extinct.

(8) A tenant by the curtesy (*a*).

(9) A person entitled (*b*) to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not (*c*), or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

[Tenant in fee with executory gift over.]

7. Under this sub-section it has been held that, where estates were devised to the use of trustees upon trust to pay the net income to the testator's wife, for the maintenance, education, and benefit of the testator's son until he should attain twenty-one, and without being liable to account to the trustees or to the son for the same, and upon the son's attaining twenty-one, then upon trust for him absolutely, but if he should die under twenty-one without leaving issue, then upon other trusts, the infant son had the powers of a tenant for life, as being within the meaning of clause (2) tenant in fee simple, with an executory limitation over in the event of his death under twenty-one without issue (*d*).

[Lease for years given to one for life.]

A gift of an estate, comprised in a lease for years, to a person during the remainder of the term, if he shall so long live, is not within either clause (4) or clause (6) of the sub-section, and the devisee cannot exercise the powers of a tenant for life under the Act (*e*).

[Tenant for life or years determinable.]

Again, under clause (6) it has been held that a person to whom an estate is devised "so long as he shall reside in my

(*a*) By sect. 8 of the Settled Land Act, 1884, the estate of a tenant by the curtesy is, for the purposes of the Act of 1882, to be deemed an estate arising under a settlement made by his wife.

(*b*) As to the meaning of the word "entitled," see *Re Horne's Settled Estates*, 39 Ch. Div. 84, 89.

(*c*) These words ought to receive a liberal construction; *Clarke* v. *Thornton*, 35 Ch. D. 307, at pp. 311, 312.

(*d*) *Re Morgan*, 24 Ch. D. 114.

(*e*) *Re Hazle's Settled Estates*, 26 Ch. D. 428; 29 Ch. Div. 78.

present dwelling-house or upon some part of my B. estate for not less than three months in each year after he shall become entitled to the actual possession thereof" is within the sub-section (*a*). But the sub-section does not include the case where the property is vested in trustees upon trust during the life of A. to apply the income for the benefit of A. and of his wife and children, or for the benefit of any one or more of them with a direction that, in case A. should assign his interest or do any act whereby he would, if absolutely entitled, be deprived of the enjoyment thereof, the trust in his favour should absolutely cease, and the income should thenceforth during his life be applied by the trustees either for the benefit of A. or for such other purposes and in such manner as the trustees should in their absolute discretion think fit (*b*).

[Person entitled to income of land.]

Where, subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of A., with remainders over, and the trustees were to enter into possession, and during the life of A. manage the property and pay all expenses and outgoings, and keep down the interest on charges, and pay an annuity, and then pay the ultimate residue of the rents and profits to A., and the income was insufficient after payment of the outgoings and interest to pay the annuity, it was held that A. came within clause (9), and had the powers of a tenant for life (*c*). So where estates were limited to trustees for a term of 1300 years, and subject thereto to A. for life, with remainders over in strict settlement, and the trusts of the term were to raise portions, to pay annuities, including an annuity to A., and to apply the residue as a sinking fund to pay off mortgage debts and other charges, and the trustees were, "during the continuance of the trusts," to enter into and hold possession of the rents and profits of the estate, and "not deliver the same to any person beneficially interested in any part thereof," and manage the estate as therein mentioned, and full powers of management were given to the trustees, and they were also given such other powers over the estate as were given to a tenant for life in possession by the Settled Land Act, 1882, it was held that A. was a tenant for life or a person having the powers of a tenant for life within the meaning of the Act, and that the trustees could not sell or

(*a*) *Re Paget's Settled Estates*, 30 Ch. D. 191.
(*b*) *Re Atkinson*, 30 Ch. D. 605; 31 Ch. D. 577.
(*c*) *Re Jones*, 24 Ch. D. 583; 26 Ch. Div. 736.

enfranchise without his consent, as required by sect. 56 of the Act (*a*).

[Tenant for life whose interest is only to arise *in futuro*.]

But the case is different where by the settlement there is a period of time fixed during which the person claiming to be tenant for life in possession or to exercise the powers of a tenant for life in possession, can have no right to put himself in possession of the estate, or to claim any part of the rents and profits of the estate, however large they may be. Where, therefore, residuary real estate was devised to trustees upon trust during twenty years to manage and improve the estate, and to accumulate or invest unapplied rents, and after the determination of the term to convey to uses under which the testator's son would become tenant for life, it was held that the son during the term could not exercise the powers of a tenant for life. (*b*)

[Trust for sale of life estate.]

Where the limitation was during the life of A. upon trust to sell the life estate and pay the proceeds after certain deductions to A. and B. as tenants in common, it was held that A. and B. could together exercise the powers of the Act (*c*).

[Infant absolutely entitled to be deemed tenant for life.]

It may here be observed that by section 59 of the Settled Land Act, 1882, "where a person who is in his own right seised of or entitled in possession to land, is an infant, then for the purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof."

[Dealings between tenant for life and the estate.]

8. By the Settled Land Act, 1890 (*d*), it is provided that where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction.

[Powers of tenant for life.]

9. Speaking in general terms, the Settled Land Act has not only given to the tenant for life all the powers of disposition of the settled land which were previously given in well-drawn settlements to the tenant for life, or to the trustees with his

(*a*) *Re Clitheroe Estate*, 28 Ch. D. 378; 31 Ch. Div. 135.

(*b*) *Re Strangeways*, 34 Ch. Div. 423.

(*c*) *Re Hale and Clarke*, 55 L. J. N.S. Ch. 550; 55 L. T. N.S. 151, *nom. Re Hale and Smyth.*

(*d*) 53 & 54 Vict. c. 69, sect. 12.

consent, but has also conferred on him larger and more extended powers, and has effected a complete revolution in the manner of dealing with settled estates, and in the mutual relations of the tenant for life and trustees. Thus the Act has given to the tenant for life an absolute power at his own discretion to sell, enfranchise and exchange the settled land, to grant building, mining, and other leases thereof, to concur in a partition, to accept surrenders of leases, to dedicate parts of the settled land for streets and open spaces, and other similar purposes, and various other powers, the details of which, and the conditions and restrictions upon and subject to which they are exercisable, do not fall within the purview of the present work.

[Cannot be assigned or released.]

10. These powers of the tenant for life are not capable of assignment or release, and do not pass to a person as being by operation of law or otherwise an assignee of a tenant for life, but remain exercisable by the tenant for life after and notwithstanding any assignment of his estate or interest; and a contract by the tenant for life not to exercise any of the powers is void. But the exercise of the powers will be without prejudice to the rights of the assignee for value of the tenant for life's estate or interest; and the assignee's rights are not to be affected without his consent, except that unless the assignee is in actual possession of the settled land or part thereof, his consent is not to be requisite for the making of leases by the tenant for life at the best rent, without fine, and in other respects in conformity with the Act (*a*).

[Provisions prohibiting exercise of powers are void.]

By sect. 51, any provision in a settlement tending or intended to prohibit or prevent the tenant for life from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising any power under the Act, is to be deemed to be void. A clause which defeats the estate of a tenant for life in case he fails to comply with a condition as to residence on the settled property is within this section (*b*). But in order to bring a case within the section there must be in the settlement "a limitation which, but for the attempted prohibition, would constitute a tenant for life capable

(*a*) Sect. 50. In this section "assignment" includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance, and "assignee" has a corresponding meaning. But an assignment by the tenant for life in consideration of marriage, or by way of any family arrangement, is not to be deemed an instrument vesting in any person any right as assignee for value within section 50; see sect. 4 of the Act of 1890, and *ante*, p. 606.

(*b*) *Re Paget's Settled Estates*, 30 Ch. D. 161; *Re Thompson*, 21 L. R. Ir. 109.

of exercising the powers of the Act" (*a*). The effect of the section is that "from the time at which a sale or disposition takes place the attempted fetter on the power of the tenant for life is removed;" but until sale or disposition the condition may be good, and the breach of it cause a forfeiture (*b*). By sect. 52, notwithstanding anything in a settlement, the exercise by the tenant for life of any power under the Act shall not occasion a forfeiture.

[Provision against forfeiture.]

11. By sect. 56, the powers conferred by the Act are not to affect prejudicially any powers subsisting under the settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees, and the powers given by the Act are cumulative, by which is understood that the powers of the settlement, and those under the Act, are co-existent, and that it is optional with the tenant for life to exercise the powers conferred by the Act, or, his consent to the exercise by the trustees of their powers being rendered necessary by sub-sect. (2), to allow the powers under the settlement to be exercised (*c*).

[Powers of the Act cumulative.]

12. One of the objects of the Act doubtless was to give the tenant for life, in his uncontrolled discretion, large and absolute powers of dealing with and disposing of the settled land, without requiring him to procure the consent of any person interested in remainder, or making him responsible to any one for the exercise of his discretion; subject only to this, that by sect. 53 the tenant for life, in exercising any power under the Act, is to have regard to the interests of all parties entitled under the settlement, and is, in relation to the exercise thereof by him, to be deemed in the position, and to have the duties and liabilities, of *a trustee* for those parties (*d*); and that under sect. 44, the trustees, if any difference arises between them and the tenant for life, may obtain the directions of the Court (*e*).

[Powers of tenant for life absolute.]

[But in exercising them he is in position of a trustee.]

In one of the first and most leading cases decided under the

(*a*) *Per* Cotton, L. J., *Re Atkinson*, 31 Ch. Div. 577, 581, in which case there was a discretionary trust to apply rents during the life of A. for him and others, and it was held that A. never became tenant for life within the Act.

(*b*) *Per* North, J., *Re Haynes*, 37 Ch. D. 306; see observations on this case, Wolstenholme, 5th ed. p. 281.

(*c*) As to the effect of the restriction in sub-sect. (2), on the powers of trustees, see Chap. xxiii. s. 2, v.; and see *Re Duke of Newcastle's Estates*, 24 Ch. D. 129; *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; *Re Barrs-Haden's Settled Estates*, W. N. 1883, p. 188.

(*d*) *Hatten* v. *Russell*, 38 Ch. D. 334, 342.

(*e*) The section, it has been said, is rather to be read as imposing the responsibilities of a trustee on the tenant for the life than as conferring on him the rights of a trustee. *Per* Stirling, J., *In re Llewellin*, 37 Ch. D. 317.

Act, Pearson, J., when adverting to the absolute power conferred upon the tenant for life of deciding whether or not a sale should take place, said, "there is nothing in the Act to enable the Court to restrain the tenant for life from selling, whether he desires to sell because he is in debt and wishes to increase his income, or whether, without being in debt, he thinks he can increase his income, or whether he desires to sell from mere unwillingness to take the trouble involved in the management of landed property; or whether he acts from worse motives, as from mere caprice or whim, or because he is desirous of doing that which he knows would be very disagreeable to those who expect to succeed him at his death. There is not, so far as I can see, any power, either in the Court or in trustees, to interfere with his power of sale" (*a*). But in the same case the same learned judge, when referring to the mode in which the sale was to be conducted, said that "a tenant for life, in selling under the Act, must sell as fairly as a trustee must sell for the tenant for life and for those in remainder;" and in another case (*b*), the present Lord Justice Kay, then Kay, J., said, "I think the meaning of this 53rd section is that, for the security of the remaindermen, as between the tenant for life and them, he, in the exercise of this power shall be treated as a trustee, and shall have all the liabilities of a trustee exercising a like power," and his lordship intimated that if a purchaser knew the tenant for life was exercising the power improperly, and that what he was doing would amount to a breach of trust, the purchaser had a perfect right to refuse to complete. And it has been said by Stirling, J., that it is the duty of the tenant for life, in exercising the discretion which is vested in him under the Act as to the application of capital money, to consider whether he is unduly prejudicing any of the parties by the proposed exercise of that discretion; but where it is a matter of doubt, in the absence of any reason for supposing that the discretion is unfairly exercised, then that discretion ought to prevail (*c*). And the general conclusion seems to be that the effect of the section is to make the tenant for life, in relation to the exercise of the powers of the Act, a trustee for all parties interested, and therefore subject to the same rules as any other

(*a*) *Wheelwright* v. *Walker*, 23 Ch. D. 752; and see *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; *Thomas* v. *Williams*, 24 Ch. D. 558.

(*b*) *Hatten* v. *Russell*, 38 Ch. D. 334, 345.

(*c*) *Re Lord Stamford's Settled Estates*, 43 Ch. D. 84, 95; and see *Re Earl of Radnor's Will*, 45 Ch. Div. 402, 418, 419.

trustee; and liable to the interference of the Court if the exercise of his discretion is affected by improper motives (*a*).

In a subsequent phase of the leading case already referred to, the remainderman having offered to purchase the estate for 7,500*l.*, and undertaken at the bar not to withdraw his offer, an injunction was granted by Kay, J., to restrain the tenant for life from selling for less than 7,500*l.*, and from entering into any contract (otherwise than by public auction), for sale of the estate, or any part thereof, without first communicating the offer to the remainderman, and giving him two clear days to make an advance on the price offered (*b*).

On the other hand, it has been said that the section is rather to be read as imposing the responsibilities of a trustee on the tenant for life than as conferring on him the rights of a trustee (*c*), and he is not necessarily entitled to costs on the footing of his being a trustee (*d*).

[Effect of judgment in action to execute trusts.]

The fact that a judgment has been given in a pending action for the execution of the trusts of a will or settlement of realty, will not prevent a tenant for life thereunder from exercising the powers of the Act without procuring the consent of the Court. To require such consent would be to impose a fetter on the free alienation by the tenant for life inconsistent with the spirit and terms of the Act (*e*).

[Notice to trustees.]

13. By sect. 45, sub-sect. (1), the tenant for life, when intending to make a sale, exchange, partition, lease (*f*), mortgage, or charge, is to give notice of his intention to each of the trustees of the settlement, and also to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by registered letter, posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same; and by sub-sect. (2), at the date

(*a*) *Re Duke of Marlborough's Settlement*, 30 Ch. D. 127; 32 Ch. Div. 1. As to the control of the Court over the exercise of powers, see *post*, Chap. xxiii. s. 2, iv.; and see *Re Mansel's Settled Estates*, W. N. 1884, p. 209; *Re Sebright's Settled Estates*, 33 Ch. D. 429.

(*b*) *Wheelwright* v. *Walker*, 48 L. T. N.S. 867; 31 W. R. 912.

(*c*) *Re Llewellin*, 37 Ch. D. 173, 325, *per* Stirling, J.

(*d*) *Sebright* v. *Thornton*, W. N. (1885), p. 176, where only one set of costs was allowed to the tenant for life and his mortgagees.

(*e*) *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531.

(*f*) Except a lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, which may now, under s. 7 of the Act of 1890, be made by a tenant for life without any notice being given, and notwithstanding that there are no trustees for the purposes of the Settled Land Acts.

of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement. Under this section it was held that a general notice of intention to sell or lease all or any part of the settled estate at any time or times as opportunity should occur, was insufficient (*a*); but by sect. 5 of the Settled Land Act, 1884 (*b*), it is now provided, by sub-sect. (1), that the notice required by sect. 45 of the Act of 1882 of intention to make a sale, exchange, partition, or lease, may be notice of a general intention in that behalf; but by sub-sect. (2), the tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected or in progress, or immediately intended; and the section applies, by sub-sect. (4), to a notice given before, as well as to a notice given after, the passing of the Act; provided, by sub-sect. (5), that no objection to such notice was taken before the passing of the Act.

[General notice sufficient.]

It is to be observed that the Act of 1884 does not extend to the case of notice of intention to make a mortgage or charge; and such a notice, to be valid, must specify the particular mortgage or charge contemplated at the time when the notice is given (*c*).

[Except as to a mortgage or charge.]

The committee of a lunatic tenant for life cannot give a legal notice under the Act, unless he has previously obtained the sanction of the Court of Lunacy thereto (*d*).

[Committee of lunatic.]

The giving of the notice, unless waived, is a condition precedent to the exercise of the powers (*e*). But under the Act of 1884 any trustee, by writing under his hand, may waive notice, either in any particular case or generally, and may accept less than one month's notice (*f*). And it is conceived that the waiver of notice, or acceptance of shorter notice, if signed by all the trustees, will extend as well to the notice to be given to the trustees' solicitor under the Act of 1882, as to the notice to be given to the trustees themselves.

[Waiver of notice.]

14. Where trustees are appointed by a settlement with such powers as to make them, under sect. 2 of the Act of 1882, trustees of the settlement for the purposes of the Act, and the

[Where notice to sole trustee sufficient.]

(*a*) *Re Ray's Settled Estates*, 25 Ch. D. 464.

(*b*) 47 & 48 Vict. c. 18.

(*c*) *Re Ray's Settled Estates*, 25 Ch. D. 464.

(*d*) *Re Ray's Settled Estates*, *ubi supra*; and see 53 & 54 Vict. c. 5, s. 120.

(*e*) *Per* Chitty, J., *Re Countess of Dudley's Contract*, 35 Ch. D. 338, at p. 341.

(*f*) 47 & 48 Vict. c. 18, s. 5 (3).

powers are made by the settlement exercisable by the trustees or *trustee* for the time being, it will be sufficient to give notice, under sect. 45, to a sole surviving or continuing trustee: and the number of trustees need not, for the purposes of the notice, be completed (*a*).

[Purchaser need not inquire as to notice.]

15. By sect. 45, sub-sect. (3), a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any notice required by that section. As, however, under the Act of 1882 at least a month's notice to the trustees was imperative, it was necessary for any person dealing with the tenant for life to see that there had been, for at least that period, before any dealing took place, proper trustees to whom notice could have been given (*b*); but a notice to the trustees of an intention to sell, given less than a month before the contract, but more than a month before the day fixed for completion, has been held to be a sufficient compliance with the Act (*c*). Now, under the Act of 1884 (*d*), it will be sufficient if the trustees, although more recently appointed, by writing under their hands, either waive notice altogether or accept a shorter notice, and it has been held that the non-existence of trustees for the purposes of the Act is not a defect in the tenant for life's title, but rather a defect of conveyance (*e*), and that it is therefore sufficient for the protection of a purchaser if, by the time he comes to complete, there are trustees in existence and the required notice has been given.

[Notice by registered letter.]

If a shorter notice is accepted, it may still be sent by registered letter, as provided by the Act of 1882.

It is conceived that it is not essential to the validity of the notice that it should be sent by a registered letter, but that that is only a convenient mode authorized by the Act of serving the notice.

[Duties of trustees on receipt of notice.]

16. We come now to consider what are the duties of trustees of the settlement under the Act after they have received a notice of an intended dealing by the tenant for life, and it is somewhat remarkable that, having regard to the importance attached by the Act to the service on the trustees of notice of any intended dealing by the tenant for life with the settled land, the Act should be silent as to what the trustees on their part ought to do

(*a*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.

(*b*) *Re Bentley*, 54 L. J. N.S. Ch. 782.

(*c*) *Duke of Marlborough* v. *Sartoris*, 32 Ch. D. 616.

(*d*) 47 & 48 Vict. c. 18, s. 5.

(*e*) *Hatton* v. *Russell*, 38 Ch. D. 334.

in the interest of the remaindermen when they receive a notice. No doubt if it comes to their knowledge that the tenant for life is contemplating or attempting to commit a fraud—as, for instance, by selling or leasing the property at a gross undervalue under some secret arrangement by which he is to derive a personal benefit, it would be their duty to come to the Court and ask for an injunction to restrain the sale or lease (*a*). Or if they disapproved of the sale and considered it improvident, it might be their duty to apply to the Court for directions under sect. 44 (*b*). But if the dealing is not on the face of it fraudulent or improper, there is no obligation on the trustees to inquire into or take any steps in the matter; and in any case they are, by sect. 42, expressly protected from any liability for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing as they might make, bring, take, or do.

On the whole, it seems that the protection afforded to the remaindermen against an improper exercise by the tenant for life of his powers by the appointment of trustees of the settlement, coupled with notice to them under sect. 45, is of a very shadowy nature, and in the majority of cases is of no practical value.

[Where consent of trustees necessary to exercise of powers.]

17. There are however some powers which the tenant for life can only put in force either with the consent of the trustees or under an order of the Court, and as to these the trustees before giving their consent must exercise their discretion on behalf of all persons interested. Thus under sect. 10 of the Settled Land Act, 1890 (repealing but re-enacting with variations sect. 15 of the Act of 1882), the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, cannot be sold, exchanged, or leased by the tenant for life without such consent or order (*c*),

[Sale of mansion house.]

(*a*) See *Wheelwright* v. *Walker*, 23 Ch. D. 752, 762.

(*b*) *Hatten* v. *Russell*, 38 Ch. D. 334, 344.

(*c*) The section further provides that where a house is usually occupied as a farmhouse, or where the site of any house, and the pleasure grounds and park and lands (if any) usually occupied therewith, do not altogether exceed 25 acres in extent, the house is not to be deemed a principal mansion house within the meaning of the section. The Court will sanction a sale even though the testator has expressly directed that the mansion house is to be kept up as a place of residence for the person for the time being entitled to the possession thereof under his will, and that the heirlooms shall at all times be kept in the mansion house, if a proper case for sale is made out, but the sale will not be sanctioned without proper directions being given for the disposal of the heirlooms. They may, however, be sold under sect. 37, if the

[Timber.] and under sect. 35, a tenant for life impeachable for waste in respect of timber, can, on obtaining such consent or order, cut and sell timber ripe and fit for cutting.

[Improvements.] So again sect. 25, enumerates the various improvements which fall under the description of improvements authorized by the Act (*a*), but by sect. 26, sub-sect. (1), where the tenant for life is

tenant for life so desires and the Court approves, *Re Brown's Will*, 27 Ch. D. 179. But where the tenant for life has mortgaged his life interest to its full value, the Court will not, unless the mortgagees consent, sanction a projected sale without full information as to the circumstances and advisability of the proposed sale, *Re Sebright's Settled Estates*, 33 Ch. Div. 429. And the leaning of the Court against a sale is as strong as, or stronger than, in the analogous case of heirlooms; *Re Marquis of Ailesbury's Settled Estates*, W. N. 1891, p. 167. Trustees appointed under sect. 60 during the minority of a tenant for life would, it seems, have an unrestricted power to sell the mansion house, *Re Countess of Dudley*, 35 Ch. D. 338, at p. 343, *per* Chitty, J.

(*a*) These improvements are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes, namely:

(1) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses.

(2) Irrigation, warping.

(3) Drains, pipes, and machinery for supply and distribution of sewage as manure.

(4) Embanking or weiring from a river or lake, or from the sea, or a tidal water.

(5) Groynes, sea walls, defences against water.

(6) Inclosing, straightening of fences, re-division of fields.

(7) Reclamation, dry warping.

(8) Farm roads, private roads, roads or streets in villages or towns.

(9) Clearing, trenching, planting.

(10) Cottages for labourers, farm-servants and artizans, employed on the settled land or not (and any buildings available for the working classes, the building of which, in the opinion of the Court, is not injurious to the estate, see 48 & 49 Vict. c. 72, s. 11).

(11) Farmhouses, offices, and outbuildings, and other buildings for farm purposes.

(12) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes, or as woodland or otherwise.

(13) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption.

(14) Tramways, railways, canals, docks.

(15) Jetties, piers, and landing-places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes.

(16) Markets and market-places.

(17) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land.

(18) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid.

(19) Trial pits for mines, and other preliminary works necessary

desirous that capital money arising under the Act, shall be applied in or towards payment for an improvement authorized by the Act (*a*), he may submit for approval to the trustees of the settlement, or to the Court as the case may require, a scheme for the execution of the improvement showing the proposed expenditure thereon; and by sub-sect. (2), where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(A). A certificate formerly of the land commissioners and now of the Board of Agriculture (*b*) certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate is to be conclusive in favour of the trustees, as an authority and discharge for any payment made by them in pursuance thereof; or on

(B). A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Board, or by the Court, which certificate shall be conclusive as aforesaid; or on

(C). An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

[Scheme.] It was essential that the scheme for the proposed works should be submitted by the tenant for life to the trustees before the works were commenced; and if the tenant for life before submitting

or proper in connection with development of mines.

(20) Reconstruction, enlargement, or improvement of any of those works.

This sub-section includes additional works for the purpose of the permanent working of mines; *e.g.* machinery required to guard against influx of water into a coal mine from the probable working of adjoining mines; *Re Mundy's Settled Estates*, (1891) 1 Ch. (C. A.) 399. Re-roofing may, according to circumstances, come under the head of repairs or permanent improvements; *Re Newton's Settled Estates*, W. N. 1890, p. 24, where Cotton, L.J., dissented from the opinion expressed by Kay, J., that section 9 of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), was more extensive than s. 25 of the Settled Land Act, 1882.

The Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13, provides that improvements authorized by the Act of 1882 shall include (1) bridges; (2) making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let; (3) erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof; (4) the rebuilding of the principal mansion house on the settled land: provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land.

(*a*) *Re Knatchbull's Settled Estate*, 27 Ch. D. 349; affirmed 29 Ch. Div. 588.

(*b*) See 52 & 53 Vict. c. 30, s. 2.

the scheme executed the works at his own expense, the Court could not authorize repayment out of capital money (*a*). But where a scheme had been approved by the trustees without any express limitation as to the amount of the expenditure, any extra expenditure, over and above the estimated cost, which was incidental to and necessary for the execution of the scheme might be paid out of capital money in the hands of the trustees (*b*).

Now, by the Settled Land Act, 1890 (*c*), sect. 15, it is enacted that the Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval as required by the Act of 1882, to trustees of the settlement or to the Court.

The effect of the Act of 1882 is to give to the tenant for life, with a view to the improvement of the land, a power to require the capital money to be laid out under a proper scheme for such improvement; and that, notwithstanding that there is a trust under which the trustees could apply income for such purpose, the power of the tenant for life being by sect. 56, sub-sect. 2, made paramount over that of the trustees (*d*).

[Capital money under the Act.]

18. We may here observe that under the term "capital money arising under the Act," are comprised, (1) Money received upon any sale or enfranchisement, or for equality of exchange or partition; (2) Fines received on the grant of leases under any power conferred by the Act of 1882 (*e*); (3) The proportion of rent under mining leases to be set aside under sect. 11 of the Act of 1882; (4) Money raised on mortgage of the settled land, under sect. 18 of the Act; (5) Three-fourths of the net proceeds of the sale of timber cut under the powers of sect. 35, where the tenant for life is impeachable for waste in respect of timber; (6) Money arising from the sale of heirlooms under sect. 37 of the Act; (7) Money received under an option to purchase contained in a building lease or agreement for a building lease under the Settled Land Act, 1889 (*f*); and (8) Money which under sect. 11 of the Settled Land Act, 1890 (*g*), the tenant for life is empowered

(*a*) *Re Hotchkin's Settled Estates*, 35 Ch. D. 41.

(*b*) *Re Bulwer Lytton's Will*, 38 Ch. Div. 20.

(*c*) 53 & 54 Vict. c. 30.

(*d*) *Clarke* v. *Thornton*, 35 Ch. D. 307; and see *Re Lord Stamford's Estate*, 43 Ch. D. 84, 96.

(*e*) The Settled Land Act, 1882, omitted to provide that these fines should be capital money under the Act, but the omission has been supplied by the Settled Land Act, 1884, s. 4.

(*f*) 52 & 53 Vict. c. 36.

(*g*) 53 & 54 Vict. c. 69.

to raise on mortgage of the settled land for the purpose of discharging an incumbrance on such land or any part thereof.

[Money arising from other sources.]

By sect. 32, where under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of the Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under the Settled Land Act. And by sect. 33, where, under a settlement (*a*), money is in the hands of trustees (*b*), and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of the Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under the Act.

[Application of capital money.]

19. By sect. 21, capital money arising under the Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, is when received (*c*) to be invested or applied in one or more of the following modes:—

(1) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law (*d*) authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special

(*a*) For the definition of "settlement," see *ante*, p. 605.

(*b*) It has been held in Ireland that this section does not apply to money in Court in an administration action, which has arisen from personal estate given to trustees upon trust to convert and to invest the proceeds in the purchase of lands to be settled; *Burke* v. *Gore*, 13 L. R. Ir. 367; but it applies where, under a will devising land to the uses of a settlement, the executors are directed to lay out money bequeathed by the will in the purchase of land to be limited to the same uses; *Re Mundy's Settled Estates*, (1891) 1 Ch. C. A. 399, and see *ante*, p. 338. Money arising from sale of land inalienably entailed by statute was ordered to be paid to trustees appointed under sec. 38; *Re Bolton*, 52 L. T. N.S. 728; W. N. 1885, p. 90.

(*c*) The words of the Act being "when received," the Court cannot create a charge on capital moneys before they are received. Thus the Court declined to authorize trustees to raise a sum of money to stock and work a derelict farm, part of a settled estate which they had contracted to sell at a future date; see *Round* v. *Turner*, W. N. 1889, p. 38; 60 L. T. N.S. 379.

(*d*) As to investments authorized by law, see *ante*, Chap. xiv. s. 4.

Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities.

(2) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rent-charge in lieu of tithe, Crown-rent, chief rent, or quit-rent, charged on or payable out of the settled land.

(3) In payment for any improvement authorized by the Act (*a*.)

(4) In payment for equality of exchange or partition of settled land.

(5) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land.

(6) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life.

(7) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein or in other land.

(8) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes.

(9) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge (*b*).

(10) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of the Act.

(*a*) For the authorized improvements, see *ante*, p. 622, note (*b*).

(*b*) As to the effect of this enactment in enabling the Court to direct payment out of Court under the Lands Clauses Act, 1845, of purchase moneys of settled lands to trustees, see *In Re Smith*, 40 Ch. Div. 386. A tenant for life who has power to cut and sell the timber, and apply the proceeds to his own use is not absolutely entitled to the proceeds, if he sells the timber as standing timber along with the estate, *In re Llewellin*, 37 Ch. D. 317; and trustees appointed under section 38 are not persons absolutely entitled, *Cookes* v. *Cookes*, 34 Ch. D. 498.

(11) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

(12) In payment (if the Court think fit) to the trustees of the settlement for the purposes of the Settled Land Acts (*a*). [Settled Land Act, 1890.]

And under the Agricultural Holdings (England) Act, 1883 (*b*), capital money arising under the Settled Land Act, 1882, may be applied in payment of any moneys expended and costs incurred by a landlord under the former Act in the execution of any improvement mentioned in the first or second parts of the schedule thereto (*c*), as for an improvement authorized by the Settled Land Act; and such money may also be applied in discharge of any charge created on a holding under the Act in respect of any such improvement as aforesaid, as in discharge of an incumbrance authorized by the Settled Land Act to be discharged out of such capital money. [Improvements under Agricultural Holdings Act.]

20. With reference to the discharge of incumbrances, it has been held that the words "incumbrances affecting the inheritance of the settled land" in subsection 2 of section 21 must be taken in their ordinary sense as referring to mortgages, charges for portions, and the like (*d*) and not as meaning incumbrances such as charges for land drainage and improvements created under the Land Improvement Act, 1864, and other similar Acts, which, although in one sense affecting the inheritance, are in numerous cases charges rather affecting the tenant for life than the remainderman (*e*), and therefore [Discharge of incumbrances.] [Land improvement charges.]

(*a*) 53 & 54 Vict. c. 69, s. 14.

(*b*) 46 & 47 Vict. c. 61, s. 29.

(*c*) The first part of the schedule relates to improvements to which the landlord's consent is required, and comprises:

(1) Erection or enlargement of buildings.

(2) Formation of silos.

(As to the Court authorizing the formation of silos, see *Re Broadwater Estate*, 33 W. R. 738; 54 L. J. N.S. Ch. 1104.)

(3) Laying down of permanent pasture.

(4) Making and planting of osier beds.

(5) Making of water meadows or works of irrigation.

(6) Making of gardens.

(7) Making or improving of roads or bridges.

(8) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.

(9) Making of fences.

(10) Planting of hops.

(11) Planting of orchards or fruit bushes.

(12) Reclaiming of waste land.

(13) Warping of land.

(14) Embankment and sluices against floods.

The second part of the schedule relates to drainage, an improvement in respect of which notice to the landlord is required.

(*d*) *E.g.* a debt secured by a mortgage of a long term of years; *Re Frewen*, 38 Ch. D. 383; or an annuity charged upon tithes, *Re Esdaile*, W. N. 1886, p. 47; 54 L. T. N.S. 637.

(*e*) *Re Knatchbull's Settled Estates*,

where before the passing of the Settled Land Act, 1882, charges of this nature have been created, the tenant for life is not entitled to have them discharged out of capital.

[Settled Land Acts Amendment Act, 1887.]

But now by the Settled Land Acts Amendment Act, 1887 (*a*), section 1, "where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882." Under this enactment "capital money" may be applied in redeeming a terminable rent-charge by paying not only the unpaid balance of principal, but also a proper sum by way of bonus as compensation for loss of interest consequent on the redemption (*b*). But the section is not applicable to a sum paid to redeem future annual instalments of tithe rent-charge payable by virtue of an order under the Irish Church Act Amendment Act, 1872, sect. 7 (*c*).

[Incumbrances affecting part only.]

It is not necessary that the incumbrance should affect the whole of the settled estates; it is sufficient if it affect any land the subject of the settlement (*d*), and where a part only of settled land is subject to a charge, capital money arising from that part can be applied for the improvement of the other part (*e*).

[Settled Land Act, 1890.]

By the Settled Land Act, 1890 (*f*), sect. 11, "where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction, on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land or any part

27 Ch. D. 369, *per* Pearson, J.; affirmed 29 Ch. Div. 588; and see *Re Duke of Leinster's Estate*, 23 L. R. Ir. 152, 161.

(*a*) 50 & 51 Vict. c. 30.

(*b*) *Re Lord Egmont's Settled Estates*, 45 Ch. Div. 395; disapproving *Re Lord Sudeley's Settled Estates*, 37 Ch. D. 123.

(*c*) *Re Duke of Leinster's Estate*, 23 L. R. Ir. 152, 161.

(*d*) *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; *In re Navan and Kingscourt Railway Co.*, 21 L. R. Ir. 369.

(*e*) *Re Lord Stamford's Settled Estates*, 43 Ch. D. 84.

(*f*) 53 & 54 Vict. c. 69.

thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly. Incumbrance in this section does not include any annual sum payable only during life or lives, or during a term of years absolute or determinable.

[Costs allowed to tenant for life.]

The word "incidental" in clause (10) of sect. 21 of the principal Act has received a liberal construction (*a*), and it has been held that a tenant for life was entitled to his extra costs of successfully defending an action brought to restrain him from exercising his powers (*b*), and the costs as between solicitor and client of the solicitor and surveyor of the tenant for life in preparing and carrying out schemes of improvement have been allowed (*c*); and where a tenant for life, acting honestly and with due diligence in the exercise of his powers, attempted to sell, but the sale was unsuccessful, his costs or expenses properly incurred were allowed, and the Court under sects. 46, sub-sect. 6, 47, and 55, sub-sect. 3, ordered that they should be paid out of the property subject to the settlement, and raised by a charge on the settled land (*d*).

[Abortive sale.]

[Concurrence of mortgagees.]

But the costs of obtaining the consent and concurrence of the mortgagees of the life estate, though "incidental" within the meaning of the clause, ought not as a general rule to be paid out of capital money (*e*).

[Investment, etc., of capital money.]

21. By sect. 22, sub-sect. (1), capital money arising under the Act is to be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and is to be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

Sub-sect. (2). The investment or other application by the trustees is to be made according to the direction of the tenant for life, and in default thereof, according to the direction of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of the trust money of the settlement; and any investment is to be in the names or under the control of the trustees.

Sub-sect. (3). The investment or other application under the direction of the Court is to be made on the application of the tenant for life, or of the trustees.

(*a*) *In re Llewellin*, 37 Ch. D. 317; *Cardigan* v. *Curzon-Howe*, 41 Ch. Div. 375.

(*b*) *In re Llewellin, ubi sup.*

(*c*) *Re Lord Stamford's Settled Estates*, 43 Ch. D. 84.

(*d*) *Re Smith's Settled Estates*, W. N. (1891), 98; 39 W. R. 590.

(*e*) *Cardigan* v. *Curzon-Howe, ubi sup.*

Sub-sect. (4). Any investment or other application is not during the life of the tenant for life to be altered without his consent.

[Devolution.] Sub-sect. (5). Capital money arising under the Act, and the securities arising from the investment thereof, are for all purposes of disposition, transmission, and devolution, to be considered as land, and to be held and go accordingly.

[Application of income.] Sub-sect. (6). The income of the securities is to be paid or applied as the income of the land, if not disposed of, would have been payable or applicable under the settlement.

Sub-sect. (7). The securities may be converted into money, which is to be capital money arising under the Act.

[Direction of tenant for life.] It will be observed that the tenant for life may *direct* in what manner, consistently with the Act, the capital money is to be invested or applied, and the duty of the trustees in carrying out such directions is purely ministerial, and, except where the consent or approval of the trustees is expressly required, as for an outlay on improvements, does not involve the exercise of any discretion. But nevertheless, in order that the tenant for life may exercise his *option* of directing the payment of purchase money into Court, it is necessary that there should be trustees for the purposes of the Act in existence (*a*).

The option is exercised by the tenant for life consenting to the payment of the purchase money into Court, in consequence of the purchaser refusing to complete unless this were done; and the money having thus come into Court, it was held that it must remain in Court, and be invested and applied under the direction of the Court pursuant to sub-sect. 3 (*b*); but now by the Settled Land Act, 1890 (*c*), sect. 14, all or any part of any principal money paid into Court may, if the Court thinks fit, be at any time paid to the trustees of the settlement for the purposes of the Settled Land Acts.

[Settled Land Act, 1890.]

[Purchase money of land sold under Lands Clauses Act.] 22. Where settled real estate has been sold under the Lands Clauses Consolidation Acts, and the purchase money paid into Court, the Court will, in the exercise of its discretion, appoint trustees of the settlement for the purposes of the Settled Land Act, and order the fund in Court to be paid out to them to be held upon the trusts of the settlement (*d*).

(*a*) *Hatten* v. *Russell*, 38 Ch. D. 334, 345.
(*b*) *Cookes* v. *Cookes*, 34 Ch. D. 498.
(*c*) 53 & 54 Vict. c. 69.
(*d*) *Re Harrop's Trusts*, 24 Ch. D. 717; *Re Wright's Trusts*, 24 Ch. D. 662; *Re Duke of Rutland's Settlement*, 31 W. R. 947; W. N. 1883, p. 140;

23. By sect. 23, capital money arising under the Act from settled land in England is not to be applied in the purchase of land out of England, unless the settlement expressly authorizes the same. [Purchases confined to England.]

24. By sect. 24, land acquired by purchase, or in exchange, or on partition, is to be made subject to the settlement, as follows: Freehold land is to be conveyed to the uses, on the trusts, and subject to the powers and provisions subsisting with respect to the settled land, but not so as to increase or multiply charges or powers of charging. Copyhold, customary, or leasehold land is to be conveyed to and vested in the trustees of the settlement on trusts, and subject to powers and provisions corresponding with the uses, trusts, powers, and provisions of the freehold land, but so that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under twenty-one. Where there is a charge which does not affect the whole of the settled land, the land acquired by purchase, or in exchange or on partition is not to be subject thereto, unless acquired by purchase with money arising from sale, or by exchange or partition, of land which was subject to the charge, and this is not confined to charges which take priority over the settlement, but extends to charges created by the settlement itself (*a*). [Form of conveyance.]

25. By sect. 34, where capital money arising under the Act is purchase money paid in respect of a lease for years, or life, or for years determinable on life, or in respect of any other estate or interest in land less than a fee simple, or in respect of a reversion, the trustees of the settlement or the Court, as the case may be, may require the same to be laid out, invested, accumulated, and paid in such manner as in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom, as they might lawfully have had from the lease, estate, interest, or reversion, in respect whereof the money was paid, or as near thereto as may be. [Application of money arising from limited interests.]

Under this section it will be the duty of the trustee to take care upon a sale by the tenant for life of a leasehold interest, or a reversion, that the proceeds of the sale are so dealt with as not to affect the relative interests of the tenant for life and re-

Re Rathmines Drainage Act, 15 L. R. Ir. 576; *Re Smith*, 40 Ch. Div. 386; and see sect. 14 of the Act of 1890, *ante*, p. 630.

(*a*) *Re Lord Stamford's Settled Estates*, 43 Ch. D. 84, 94.

mainderman (*a*). This section corresponds with the 74th section of the Lands Clauses Consolidation Act, 1845, and its construction will be regulated by the decisions under that Act (*b*). Thus, if the property is subject to a lease at a rent less than the income produced by the investment of the purchase money, the tenant for life will be entitled during the remainder of the term, for which the property was let, to a sum equal only to the rent, and the residue of the income should be accumulated at compound interest until the end of the term, after which the tenant for life will be entitled to the whole of the income, including the income of the accumulations (*c*).

So, on the other hand, if the property sold was a lease for a short term, the tenant for life is entitled to receive an annuity of such an amount as will exhaust the proceeds of sale in the number of years which the lease had to run (*d*).

[Heirlooms.] 26. By sect. 37, sub-sect. (1), where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born, or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them; and by sub-sect. (2), the money arising by the sale is to be capital money arising under the Act, and to be paid, invested, or applied, and otherwise dealt with in like manner in all respects as by the Act directed with respect to other capital money arising under the Act, or may be invested in the purchase of other chattels, of the same or any other nature, which are to be settled and held on the same trusts, and to devolve in the same manner as the chattels sold; but by sub-sect. (3), no sale or purchase of chattels under this section is to be made without an order of the Court. In giving its sanction to any proposed sale the Court must be satisfied that, under the circumstances of the case, such sale is reasonable and proper, having regard to the interests of all persons entitled, the interests of persons more remotely entitled being of less weight than those of persons nearer in succession; but the leaning of the Court is against a sale (*e*). And by force of sect. 52, the tenant for life is

[Sanction of Court to sale.]

(*a*) See *Re Griffith's Will*, 49 L. T. N.S. 161.

(*b*) *Cottrell* v. *Cottrell*, 28 Ch. D. 628.

(*c*) *Re Wootton's Estate*, 1 L. R. Eq. 589; *Re Mette's Estate*, 7 L. R. Eq. 72; *Re Wilkes' Estate*, 16 Ch. D. 597; *Cottrell* v. *Cottrell*, 28 Ch. D. 628.

(*d*) *Askew* v. *Woodhead*, 14 Ch. Div. 27.

(*e*) *Re Earl of Radnor's Will*, 45 Ch. Div. 402, 419, 424; and see *Re Beaumont's Settled Estates*, 58 L. T. N.S. 916; *Re Marquis of Ailesbury's Settled Estates*, W. N. 1891, p. 167.

in the position of a trustee with a discretionary power of sale, and must have a like regard to the interests of other persons entitled as well as to his own (*a*). Where circumstances rendered it expedient, the Court sanctioned the removal of some of the heirlooms to another family mansion, and the sale of the rest (*b*).

[Title of honour.]

A dignity or title of honour which descends to the heirs general or heirs of the body, is within the definition of land, and heirlooms settled so as to devolve with the dignity or title may be sold under this section (*c*).

[Whether proceeds of heirlooms devolve as personalty.]

Reference has already been made to the sections regulating the application or disposition of capital money arising under the Act (*d*), and it is to be observed that under sect. 22, sub-sect (5), capital money is "for all purposes of disposition, transmission, and devolution, to be considered as *land*," and is to be "held for, and go to, the same persons successively, in the same manner, and for and on the same estates, interests, and trusts, as the *land* wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement." It has been doubted whether this sub-section has any application to money arising from the sale of personal chattels; and there seems no sound reason for making the money arising from the chattels devolve as land, while if it is re-invested in other chattels they are to devolve as personalty. The latter part of the sub-section points to money arising from *land* as being the subject matter to which it relates and it would be construing the sub-section in direct opposition to the spirit in which it is framed to hold, that, although its apparent object was to leave the estates and interests of the persons beneficially interested in land unaffected by the sale, yet when applied, by reference, to money arising from personal chattels it is to have the effect of altering the nature of the estates, and in most cases of changing an absolute estate in remainder into a mere tenancy in tail. To effectuate such a change the language of the Act should be clear and unambiguous, and it is conceived that the language of sub-sect. (5) does not meet that test, and that the devolution of the moneys arising from personal chattels will remain unaffected by the sale. The effect of this sub-section in relation to money arising from heirlooms has been

(*a*) *Re Earl of Radnor's Will*, 45 Ch. Div. 402, 418.

(*b*) *Browne* v. *Collins*, W. N. 1890, p. 78; 62 L. T. N.S. 566.

(*c*) *Re Sir J. Rivett Carnac's Will*, 30 Ch. D. 136; *Re Earl of Aylesford's Settled Estate*, 32 Ch. D. 162.

(*d*) See *ante*, p. 625.

discussed in *Re Duke of Marlborough's Settlement* (*a*), in which different views were expressed by the judges; but the balance of opinion seems to be in favour of the view that the devolution of the proceeds of the sale of chattels and of any interim investments thereof follows the devolution which originally belonged to the chattels. The tenant for life may, however, apply the moneys arising under sect. 37 for any of the purposes authorized by sect. 21, notwithstanding that the effect of such application may be to alter the devolution, as, for instance, in paying off incumbrances affecting the inheritance of the settled land without keeping such incumbrances on foot; and so long as the moneys are applied for such authorized purposes the tenant for life cannot be prevented from directing any such application, on the ground of his being a trustee of the power under sect. 53, although the effect of the application may be to alter the course of devolution (*b*).

[Receipts.] 27. By sect. 40, the receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities paid or transferred to them or him is made a good discharge, and, in the case of a mortgagee or other person advancing money, exonerates him from being concerned to see that the money advanced is wanted for any purpose of the Act, or that no more than is wanted is raised. It would seem that this power extends to trustees appointed by the Court under sect. 38 (*c*).

In construing sect. 40, sect. 39 must be borne in mind, which expressly prohibits the payment of capital money to fewer than two persons as trustees of a settlement, unless the settlement otherwise provides; and, taking the two sections together, it seems to follow, that, in the absence of any special direction in the settlement, a sole personal representative of the last surviving or continuing trustee cannot give a good discharge for capital money under the Act.

[Indemnity and reimbursement.] 28. Sects. 41 & 43 supply the usual indemnity and reimbursement clauses for the trustees of the settlement.

[Protection of trustees.] 29. By sect. 42, the trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing,

(*a*) 30 Ch. D. 127; 32 Ch. Div. 1.
(*b*) *Re Duke of Marlborough's Settlement*, 30 Ch. D. 127; 32 Ch. Div. 1.
(*c*) See *Cookes* v. *Cookes*, 34 Ch. D. 408.

as they might make, bring, take, or do; and in case of purchase of land with capital money arising under the Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

Under this section the trustees are under no liability if they stand by and take no active part while the tenant for life is exercising his powers, but it is apprehended that the indemnity given by this section to the trustees only holds good so long as they have not actual notice that the tenant for life is acting fraudulently or even improperly. At any rate, trustees, who with the knowledge that the tenant for life is committing a fraud upon his powers take no active steps for the protection of the remaindermen, relying on this section, would be acting most imprudently, and would have little reason to complain if they were made personally liable for any loss arising from their negligence.

[Trustees must see that conveyance is in the proper form.]

It will be observed that trustees, in order to have the benefit of this section where land is brought into the settlement upon a purchase, exchange, partition, or lease, must see that the conveyance purports to convey the land in the proper mode, but they are not bound to do more than take care that the deed on the face of it is properly drawn, and is duly executed by the conveying parties, and that the person to whom the purchase money is paid by the direction of the tenant for life properly joins in the conveyance.

[Differences between tenant for life and trustees.]

30. By sect. 44, if at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of the Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit. It would be right for the trustees to avail themselves of

this section if a sale were proceeding which they disapproved of as being improvident (*a*).

31. By sect. 55, the powers conferred by the Act are exercisable from time to time, and in exercising the powers the tenant for life and trustees may respectively execute, make, and do, all necessary and proper deeds, instruments, and things.

[Additional powers.]

32. By sect. 57, sub-sect. (1), nothing in the Act is to preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by the Act; but by sub-sect. (2), any such additional or larger powers are to operate and be exercisable in the like manner and with all the like incidents, effects, and consequences, as if they were conferred by the Act, unless a contrary intention is expressed in the settlement.

[Infant entitled absolutely or for life.]

33. By sect. 59, where a person who is in his own right seised of or entitled in possession to land is an infant, then for the purposes of the Act the land is settled land, and the infant is to be deemed tenant for life thereof; and by sect. 60, where a tenant for life, or a person having the powers of a tenant for life under the Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life, the powers under the Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders. And persons appointed by the Court under this section can make a good title without the necessity of appointing under sect. 38 trustees of the settlement for the purposes of the Act (*b*). But in such a case the order ought to contain a direction that the purchase money be paid into court (*c*). Under these sections the Court in Ireland refused, where an infant was entitled to an undivided share of land, to appoint one of his co-owners to exercise on his behalf the powers of the Act, but required the appointment of an independent person (*d*). The Court in directing the mode of sale under this section can order it to be made out of Court (*e*).

[Tenant for life a married woman.]

34. By sect. 61, sub-sect. (1), the foregoing provisions of the Act do not apply in the case of a married woman; but by sub-

(*a*) *Hatten* v. *Russell*, 38 Ch. D. 334, 344.
(*b*) *Re Countess of Dudley's Contract*, 35 Ch. D. 338.
(*c*) *S. C.*
(*d*) *Re Greenville Estate*, 11 L. R. Ir. 138.
(*e*) *Re Price*, 27 Ch. D. 552.

sect. (2), a married woman entitled for her separate use, or entitled under any statute for her separate property or as a *feme sole*, is, without her husband, to have the powers of the Act; and by sub-sect. (3), where she is entitled otherwise than as aforesaid, she and her husband together are to have the powers. By sub-sect. (4), the provisions of the Act referring to a tenant for life extend to a married woman entitled to property as her separate estate or as a *feme sole*, and this appears to bring the case of an infant married woman so entitled within sect. 60, so that her powers can during infancy be exercised by the trustees of the settlement (*a*).

[Settlement containing a trust or direction for sale.]

35. Where the settlement contains a trust or direction for the sale of the property, the rights and powers of the trustees and tenant for life stand upon a different footing, and are governed by the independent enactment contained in the 63rd section (*b*). The construction of this section is somewhat obscure, and the extent to which the powers of trustees were affected by it was a question of grave difficulty; but by the Settled Land Act, 1884 (*c*), the powers given by the 63rd section of the Act of 1882 to tenants for life or other persons having limited interests are not to be exercised without the leave of the Court, which leave is to be given by order naming the persons to exercise the powers, and until such an order is made and registered as a *lis pendens*, it seems clear that the trustees may execute all trusts and powers reposed in them by the settlement as if the Settled Land Acts had not been passed, while after an order has been made and registered and so long as it remains in force the powers of the trustees are suspended, so far as relates to any purpose for which leave is given by the order to exercise a power conferred by the Act of 1882. Under these circumstances no conflict can now arise, under sect. 63, between the trustees and the tenant for life as to the exercise of their powers, and it seems unnecessary to consider what is the proper construction of the section in this respect.

[Trustees of such settlement.]

36. Where the powers of the Act are exercisable and any

(*a*) In the last edition of this work it was pointed out that the case where a woman who is an infant is married to a man of full age, and has property which does not belong to her as her separate property or as a *feme sole*, was apparently a *casus omissus* from the Act. But, having regard to the provisions of the Married Women's Property Act, 1882, s. 2, the omission can hardly at the present time be of practical importance.

(*b*) As to this section and the extent to which the powers given by the settlement to trustees are affected by it and the Settled Land Act, 1884, see Chap. xxiii. s. 2, v.

(*c*) 47 & 48 Vict. c. 18, s. 7. For a case in which the leave was granted, see *Re Harding*, (1891) 1 Ch. 60; *post*, p. 705.

necessity arises for trustees of the settlement for the purposes of the Act, they are by sect. 63, which follows with the necessary variation the definition contained in sect. 2 (*a*), defined to be "the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of the Act."

[Application of Act to such settlement.]

37. By sub-sect. (2) of sect. 63, the provisions of the Act referring to a tenant for life, and to a settlement, and to settled land, are to extend to cases under that section with certain exceptions, of which the following are the material ones for the present purpose:—

(A) Capital money is not to be applied in the purchase of land unless expressly authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by the Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

(B) Capital money and the securities in which the same is invested shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests and trusts, as the same would have gone, and been held, if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(C) Land of whatever tenure acquired under the Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land,

(*a*) *Ante*, p. 607.

or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

[Commission for sale.]

38. Where settled property had been put up for sale by auction by the tenant for life under the Act, but withdrawn for want of a sufficient offer, and was afterwards sold by private contract on the same day, it was held that the trustees were at liberty to pay out of the purchase moneys one commission for conducting the sale, including the conditions of sale, and also commission for deducing the title and perusing and completing the conveyance according to the scale of charges contained in Schedule 1, Part I. to the general order under the Solicitors' Remuneration Act, 1881 ; and also the costs occasioned by the concurrence in the sale of the tenant for life's mortgagees, and a proper sum to the auctioneer for his charges (*a*).]

[(*a*) *Re Beck*, 24 Ch. D. 608 ; but as to the mortagee's costs, see *ante*, p. 629.]

CHAPTER XXIII.

THE POWERS OF TRUSTEES.

THE powers of trustees are either *General* or *Special;* the former, such as by construction of law are incident to the office of trustee *virtute officii;* the latter, such as are conferred *vi terminorum, i.e.,* by the settlor himself by an express proviso in the instrument creating the trust.

SECTION I

OF THE GENERAL POWERS OF TRUSTEES.

Powers of trustees at law distinguished from their powers in equity.

1. IN a Court of *law* the trustee, as the absolute proprietor, may of course exercise all such powers as the legal ownership confers; but in *equity* the *cestui que trust* is the absolute owner, and the question we have to consider in this place is, how far the trustee may deal with the estate without rendering himself responsible in the *forum* of a Court of equity.

General rule as to powers of trustees in simple trusts.

2. With respect to the *simple* trust, as the trustee is a mere passive depositary, he can in equity neither take any part of the profits, nor exercise any dominion or control over the *corpus,* except at the instance of the *cestui que trust.*

In special trusts.

3. In the *special* trust the authority of the trustee is, as a *general* rule, equally limited except so far as the execution of the trust itself may invest him with a proprietary power, and the duties thus prescribed to him the trustee is bound strictly to pursue without swerving to the right hand or to the left.

Exceptions.

4. But, *under particular circumstances,* the trustee is held capable of exercising the discretionary powers of the *bonâ fide* proprietor; for the trust estate itself might otherwise be injuriously affected. The necessity of the moment may demand immediate action, while the sanction of the parties who are

beneficially interested could not be procured without great inconvenience (as where the *cestuis que trust* are a numerous class), or perhaps could not be obtained at all (as where the *cestuis que trust* are under disability, or not yet in existence). The alternative of consulting the Court would always be attended with considerable expense, and, it may be, an expense wholly disproportioned to the importance of the occasion, and perhaps in the meantime the opportunity might be lost. It is therefore evidently in furtherance of the *cestuis que trust's* own interest, that, where the circumstances of the case require it, the trustee should be at liberty to exercise a reasonable discretionary power (*a*). But a trustee for adults should not take any proceeding without consulting his *cestuis que trust;* and if he do, and the proceeding is disavowed by them, he may have to pay the costs (*b*).

Notice of trustee's intention to *cestui que trust.*

5. Where the trust is not definite and precise, and it is doubtful what ought to be done under the trust, it is said that the trustee may *give notice to the cestui que trust of his intention* to do a particular act, and that unless the *cestui que trust* interferes to stop it, the Court might well hold the trustee not to be liable for doing the act (*c*).

Validity of an act without suit.

6. It is a rule of equity, that what is compellable by suit, or would have been ordered by the Court, is equally valid if done by the trustee *without suit, i.e.*, without the sanction of the Court (*d*). The difficulty with which the trustee has to struggle is the danger of assuming that the Court, on application to it, would view the matter in the same light in which he regards it himself (*e*).

Matter of form may be dispensed with.

7. Trustees, to avoid circuity, may dispense with *forms*, the observance of which would only lead to expense. If, for instance, the transfer of a sum of stock be secured to trustees of a settlement, and they have power by the settlement to sell out the fund

(*a*) See *Angell* v. *Dawson*, 3 Y. & C. 317; *Darke* v. *Williamson*, 25 Beav. 622; *Harrison* v. *Randall*, 9 Hare, 407; *Forshaw* v. *Higginson*, 8 De G. M. & G. 827; *Ward* v. *Ward*, 2 H. L. Cas. 784.

(*b*) *Bradby* v. *Whitchurch*, W. N. 1868, p. 81.

(*c*) *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 74, *per* L. J. Turner.

(*d*) *Lee* v. *Brown*, 4 Ves. 369, *per Cur.*; *Earl of Bath* v. *Bradford*, 2 Ves. 590, *per* Lord Hardwicke; *Cook* v. *Parsons*, Pr. Ch. 185, *per Cur.*; *Inwood* v. *Twyne*, 2 Eden, 153, per Lord Northington; *Hutcheson* v. *Hammond*, 3 B. C. C. 145, *per* Buller, J.; *Terry* v. *Terry*, Gilb. 11, *per* Lord Cowper; *Shaw* v. *Borrer*, 1 Keen, 576, *per* Lord Langdale; *Seagram* v. *Knight*, 2 L. R. Ch. App. 630; *Gilliland* v. *Crawford*, 4 Ir. R. Eq. 42, *per Cur.* [*Brown* v. *Smith*, 10 Ch. Div. 377.] The same rule holds also at law, see Co. Lit. 171, a.

(*e*) See *Forshaw* v. *Higginson*, 3 Jur. N.S. 476.

and invest on mortgage, they need not insist on a transfer of the stock *in specie* for the purpose of immediately selling out and investing the proceeds on mortgage, but if they have the mortgage ready may take the value of the stock and hand it over to the mortgagor (*a*). So trustees, having a power to lay out a certain sum in the purchase of an annuity for A. B., may pay the sum to A. B. direct, without going through the form of purchasing the annuity (*b*).

Repairs.

8. Where the legal estate is vested in trustees in trust for one person *for life*, with remainders over to others, it would be natural to suppose that the rights in equity as between the tenant for life and the remaindermen would be the same as those at law between a legal tenant for life and legal remaindermen. It is, however, now clearly settled, that whatever may be the *legal* liability of a *legal* tenant for life in respect of *permissive waste* (*c*), the trustee cannot (where there is no special clause of management) interfere with the possession of an equitable tenant for life who neglects to repair (*d*). [But in a recent case where property was vested in trustees upon trust for several persons in succession, the Court of Appeal intimated the opinion that there was an obligation upon the trustees for the purpose of properly performing their trust to see that the property did not fall into decay from want of repair, and if the occasion for repairs arose they should apply to the Court to direct the proper repairs and the mode in which the expenses of such repairs were to be borne (*e*).]

Legal rights.

9. In other respects the rights in equity must, it is conceived, be governed by those at law. Thus a legal tenant for life may cut timber for the purpose of repairs (*f*), though he may not cut timber to sell it and apply the produce (*g*), or to repay himself

Equitable rights.

the outlay in repairs (*h*); and similarly, the trustee may, it is

(*a*) See *Pell* v. *De Winton*, 2 De G. & J. 20; *George* v. *George*, 35 Beav. 382.

(*b*) *Messena* v. *Carr*, 9 L. R. Eq. 260; [*Stokes* v. *Cheek*, 28 Beav. 620; *Re Mabbett*, (1891) 1 Ch. 707, 712.]

(*c*) *Powys* v. *Blagrave*, 4 De G. M. & G. 458, and cases there cited by Lord Cranworth; *Harnett* v. *Maitland*, 16 M. & W. 257; [*Re Cartwright*, 41 Ch. D. 532, and cases there cited.] Now by 36 & 37 Vict. c. 66, where there is any conflict between the rules of Equity and the rules of Common Law, the rules of Equity are to prevail.

(*d*) *Powys* v. *Blagrave*, Kay, 495; 4 De G. M. & G. 448; [*Re Hotchkys*, 32 Ch. Div. 408;] and see *Re Skingley*, 3 Mac. & G. 221; *Gregg* v. *Coates*, 23 Beav. 33.

[(*e*) *Re Hotchkys*, 32 Ch. Div. 408.]

(*f*) Co. Lit. 54 *b*.

(*g*) Co. Lit. 53 *b*. [But now by the Settled Land Act, 1882, s. 35, a tenant for life, whether legal or equitable, may, with the consent of the trustees of the settlement, or an order of the Court, cut and sell timber ripe and fit for cutting, but three-fourths of the net proceeds are to be retained in settlement.]

(*h*) *Gower* v. *Eyre*, G. Coop. 156;

conceived, as against the remainderman, cut timber for necessary repairs, if the tenant for life will consent to an application of income towards repairs in making use of the timber. The repairs by a tenant for life, however substantial and lasting, are his own voluntary act, and do not arise from any obligation, and he cannot claim any charge for them upon the inheritance (*a*). Nor [before the Settled Land Act, 1882,] would the Court at his instance direct *lasting improvements* to be made (*b*); and though it was said by the Court in one case that the rule might not be absolutely without exception, as if there were a settled estate, and a fund directed to be laid out in the purchase to the same uses, it might be more beneficial to the remainderman that part of the trust fund should be applied to prevent buildings on the settled estates from going to destruction, than that the whole should be laid out in the purchase of other lands (*c*), yet an extraordinary case was requisite to create such exception (*d*). [But where trustees having monies in their hands directed to be invested in lands to be strictly settled, entered into an agreement for purchase of an estate, and the farm buildings, and cottages on the property were out of repair, the Court sanctioned the application of 1000*l.* out of the monies in their hands in repairing, improving and rebuilding the farm buildings and cottages (*e*); and money paid into Court under the Lands Clauses Act has been applied in defraying expenditure necessarily incurred for the preservation of the trust estate (*f*).

Repairs and improvements.

10. Now by the Settled Land Act, 1882, sect. 26, the tenant for life may, with the approval of the trustees of the settlement, or the approval of the Court as the case may require, according as the money to be expended is in the hands of the trustees or in Court, expend any capital money arising under the Act in any of the improvements specified in sect. 25 of the Act (*g*).

[Under Settled Land Act.]

and see *Duke of Marlborough* v. *St. John*, 5 De G. & Sm. 181.

(*a*) *Hibbert* v. *Cooke*, 1 S. & S. 552; *Caldecott* v. *Brown*, 2 Hare, 144; and see *Bostock* v. *Blakeney*, 2 B. C. C. 653; *Hamer* v. *Tilsley*, Johns. 486; *Dent* v. *Dent*, 30 Beav. 363; *Floyer* v. *Bankes*, 8 L. R. Eq. 115; *Gilliland* v. *Crawford*, 4 Ir. R. Eq. 35; *Re Leigh's Estate*, 6 L. R. Ch. App. 887; [*Ferguson* v. *Ferguson*, 17 L. R. Ir. 552.]

(*b*) *Nairn* v. *Majoribanks*, 3 Russ. 582.

(*c*) *Caldecott* v. *Brown*, 2 Hare, 145, *per* Sir J. Wigram; and see *Re Barrington's Estates*, 1 J. & H. 142; [*Ferguson* v. *Ferguson*, 17 L. R. Ir. 552.]

(*d*) *Dunne* v. *Dunne*, 3 Sm. & G. 22; *Dent* v. *Dent*, 30 Beav. 363. [*Ferguson* v. *Ferguson*, 17 L. R. Ir. 552, where a tenant for life was allowed expenditure necessarily incurred by him in order to prevent previous expenditure by the settlor from being totally lost.]

[(*e*) *Lord Cowley* v. *Wellesley*, 46 L. J. N.S. Ch. 869.]

[(*f*) *Re Leigh's Estate*, 6 L. R. Ch. App. 887; *Re Aldred's Estate*, 21 Ch. D. 228.]

[(*g*) As to payment out of capital

And as, under sect. 59, an infant entitled in possession to land is for the purposes of the Act to be deemed tenant for life thereof, and by sect. 60, the powers of an infant tenant for life may be exercised on his behalf by the trustees of the settlement, or if there are none by the nominees of the Court, all proper improvements may be effected under the Act, notwithstanding the infancy of the beneficial owner.

Generally.

11. Independently of the powers of the Settled Land Act] a trustee holding an estate for the benefit of a person absolutely entitled, but incapable from infancy or otherwise to give directions, may make necessary *repairs*, but he must not go beyond the necessity of the case, as by *ornamental improvements*, or the expense will not be allowed (*a*). The trustees of a will were to permit the testator's son to have "the use and enjoyment" of a house, and were "empowered" during the son's "occupation" to make "repairs," and Lord Romilly, M.R., held that the trustees were to keep the house in a *habitable* state, but not to make *ornamental* repairs (*b*). Where a mansion house was dilapidated at the date of the testator's will, and he empowered his trustees "to keep all the buildings in good *repair*, and to make such improvements by draining, walling, *building*, liming or manuring, as they should think proper," the trustees had no power to *rebuild* the mansion house (*c*). But under a power to "improve the estate by erecting farm-houses and out-buildings, or by draining and planting," it was held that the trustees could erect agricultural cottages (*d*). And where the trustees of a term of 1000 years were specially authorized to keep the premises in good repair and "*generally to superintend the management*" of the estate, the Court held that the latter words conferred a general power without limit, that is, according to the discretion of the trustees, and allowed the sums expended by them in erecting and repairing farm-houses and buildings, in draining, fencing, sinking wells, putting up pumps, constructing a bridge, and forming, repairing, and altering roads (*e*). If trustees, without any special power to authorize it, lay out money in improving

money for improvements under the Agricultural Holdings (England) Act, 1883, see s. 29 of the Act, and *ante*, p. 627.]

(*a*) *Bridge* v. *Brown*, 2 Y. & C. C. C. 181; and see *Attorney-General* v. *Geary*, 3 Mer. 513; *Gilliland* v. *Crawford*, 4 Ir. R. Eq. 35.

(*b*) *Maclaren* v. *Stainton*, M. R. March 14, 1866, MS.; [and see *Re Colyer*, 55 L. T. N.S. 344; 50 L. J. Ch. 79.]

(*c*) *Bleazard* v. *Whalley*, 2 Eq. Rep. 1093; see *ante*, p. 592.

(*d*) *Lord Rivers* v. *Fox*, 2 Eq. Rep. 776.

(*e*) *Bowes* v. *Earl of Strathmore*, 8 Jur. 92.

the estate (as in building a villa upon ground intended to be building ground, and which object they are advised will be promoted by the erection of the villa), they cannot justify the expenditure, but on the other hand, the *cestuis que trust* cannot take the benefit and repudiate the whole outlay, but the trustees will be liable only for the loss to the estate (*a*). [And where the mansion house had been burnt down and the trustee applied a large sum, in addition to the insurance monies, in restoring the mansion house, the Court was of opinion that it had no jurisdiction to order a sale or mortgage of the settled estates to raise the amount of the outlay, or to authorize the expenditure, for the restoration, of monies which were subject to a trust for re-investment in land; but it appearing that the estate had been benefited to the full amount of certain funds in Court, which had arisen from the sale of part of the settled estates, Kay, J., sanctioned the application of those funds towards recouping the trustee, on the ground that the trustee having *bonâ fide* expended money for building on the estate, under a reasonable expectation that the Court would sanction the expenditure, and having improved the estate to the full amount of the funds in Court, might be recouped the amount so expended (*b*).] If the trust be to make repairs out of the *rents*, and the trustees borrow money to make the repairs, and then repay themselves out of the rents, they will not be allowed the interest on the money borrowed, for the trust was to apply the rents after they had accrued (*c*).

[12. Where trustees of a term are authorized to make improvements on the trust property, and to raise the sums required by mortgaging the hereditaments comprised in the term, or out of the rents, issues, and profits, and subject to the term the property is strictly settled, the tenant for life is entitled to have the amount of income applied by the trustees in *permanent* improvements raised out of the corpus of the estates (*d*). [Allowances to tenant for life.]

Where there was no power to manage or cultivate the real estate, and a farm was in hand, and no tenant could be found, the Court, on evidence that the outlay would be to the advantage of infant remaindermen, allowed £1,000, part of the personalty which was held on the same trusts as the realty, to be advanced to the tenant for life, who was one of the trustees, on his bond, [Personal estate advanced for benefit of real estate.]

(*a*) *Vyse* v. *Foster*, 8 L. R. Ch. App. 309, affirmed 7 L. R. H. L. 318.

[(*b*) *Jesse* v. *Lloyd*, 48 L. T. N.S. 656.]

(*c*) *Fazakerley* v. *Culshaw*, 19 W. R. 793; 24 L. T. N.S. 773.

[(*d*) *Re Marquess of Bute*, 27 Ch. D. 196.]

he undertaking to expend it in stocking, taking, and cultivating the farm to the satisfaction of his co-trustee (*a*).]

Land Improvement Act.

13. By the Improvement of Land Act, 1864 (*b*), trustees in the *actual possession or receipt of the rents or profits* of land are enabled, by the 24th section, to apply for and make, in conformity with the provisions of the Act, the several improvements mentioned in the 9th section, such as drainage, reclamation of land, erection of farm buildings, planting, &c.

Cutting timber.

14. Where an estate was devised to A. and his heirs upon trust to settle on B. for life, subject to impeachment of waste, remainder to C. for life, without impeachment of waste, remainder to C.'s first and other sons in tail, and before any settlement was executed the trustee, with the concurrence of B. and C., cut down timber which showed symptoms of decay, Sir L. Shadwell said "he considered the timber to have been cut by the authority of the trustee, who had a superintending control over the estate; that it was not a wrongful act; and that the effect of it must be the same as if it had been done with the sanction of the Court" (*c*). And in a later case (*d*) the Court seemed to think that a tenant for life, impeachable for waste, would not be chargeable with interest during his own life as to such timber felled by him as the Court would have ordered to be cut, but that the *onus* would be on the tenant for life to make out that such was the case.

[Settled Land Act.]

[15. Now by the Settled Land Act, 1882, sect. 35, a tenant for life impeachable for waste may, with the consent of the trustees of the settlement or an order of the Court, cut and sell timber ripe and fit for cutting, but three-fourth parts of the net proceeds of the sale are to be set aside as capital money arising under the Act (*e*).

[(*a*) *Re Household*, 27 Ch. D. 553; and see *Conway* v. *Fenton*, 40 Ch. D. 512, 517, where the Court sanctioned expenditure in repairing buildings.]

(*b*) 27 & 28 Vict. c. 114. Extended by 33 & 34 Vict. c. 56, to building and improvement of mansions; [and by 40 & 41 Vict. c. 31, to the construction and erection of reservoirs and other works of a permanent character for the supply of water; and by the Settled Land Act, 1882, s. 30, to all improvements authorized by that Act, see sect. 25. In *Re Dunn's Settled Estate*, W. N. 1877, p. 39, it was held that the sum to be charged under 33 & 34 Vict. c. 56, was not confined to two years' rental of the particular estate on which the mansion was to be built, but extended to two years' rental of all the estates comprised in the settlement. Kay, J., considered that sect. 9 of the Act of 1864 was in some respects more extensive than sect. 25 of the Act of 1882, but this view was dissented from by Cotton, L.J.; see *Re Newton*, W. N., 1890, p. 24.]

(*c*) *Waldo* v. *Waldo*, 7 Sim. 261; and see *Gent* v. *Harrison*, Johns. 517; *Earl Cowley* v. *Wellesley*, 1 L. R. Eq. 656.

(*d*) *Bagot* v. *Bagot*, 32 Beav. 509; 2 New Rep. 297.

[(*e*) If the timber is sold by the tenant for life along with the land the proceeds must be treated as capital

[Management of land and receipt and application of income during minority.]

16. In the case of instruments coming into operation after the 31st December, 1881, under which an infant, not being a married woman, is beneficially entitled to the possession or receipt of the rents and profits of land or hereditaments corporeal or incorporeal, large powers of management during the minority of the infant have, unless a contrary intention is expressed in the instrument, been provided by the Conveyancing and Law of Property Act, 1881. Sect. 42 of that Act enacts that:—

(1) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

(2) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course of sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same (*a*).

(3) The trustees may from time to time, out of the income of

money; *Re Llewellin*, 37 Ch. D. 317.]

[(*a*) By the Settled Land Act, 1882, the powers of cutting timber conferred on a tenant for life by that Act, may be exercised on behalf of an infant, tenant for life or absolute owner, by the trustees of the settlement, or if there are none by such person and in such manner as the Court, on the application of a testamentary guardian or other next friend of the infant, orders; see secs. 58–60.]

the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

[Maintenance of infant.] (4) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

[Accumulations of income.] (5) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate; but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.]

Trustees are authorized to oppose a bill in Parliament prejudicial to *cestuis que trust.*

17. Conservators of public works and similar *quasi trustees* are authorized to apply the funds under their control in *opposing* a bill in Parliament, the effect of which if passed would be injurious to the interests confided to them. "Every trustee," said Lord Cottenham, "is entitled to be allowed the reasonable and proper expenses incurred in protecting the property committed to his care. But if they have a right to protect the property from immediate and direct injury, they must have the same right where the injury threatened is indirect, but probable" (*a*).

Applications to Parliament.

18. On the other hand, *quasi* trustees, such as those before referred to, are not entitled to apply the funds of an existing undertaking in or towards the expense of obtaining *other or larger* Parliamentary powers (*b*).

[Settled Land Act.]

[By the Settled Land Act, 1882, it is provided that the Court may approve of any petition to Parliament, parliamentary opposition, or other proceeding to be taken for protection of settled lands, and may direct that any costs, charges, or expenses incurred in relation thereto be paid out of property subject to the settlement (*c*). Costs of proceedings in the House of Lords whereby a claim to a peerage was established, and which resulted in the recovery of estates settled on corresponding limitations, were allowed under the section (*d*).

As to insurance.

19. The duty of a trustee in reference to insuring the property was until recently not very clearly defined; it was conceived that] under special circumstances, and in due course of management, he would be justified in *insuring* (*e*); but that where there was a tenant for life, he could not be advised to do so out of the income without the tenant for life's consent. [But now by the Trustee Act, 1888 (*f*), sect. 7, it is enacted that "it shall be lawful for, but not obligatory upon, a trustee (*g*), other

(*a*) *Bright* v. *North*, 2 Ph. 220; *Queen* v. *Norfolk Commissioners of Sewers*, 15 Q. B. 549; *Attorney-General* v. *Andrews*, 2 Mac. & G. 225; *Attorney-General* v. *Eastlake*, 11 Hare, 205; [*Attorney-General* v. *Mayor of Brecon*, 10 Ch. D. 204; *Regina* v. *White*, 14 Q. B. Div. 358, reversing *S. C.* 11 Q. B. D. 309.]

(*b*) *Attorney-General* v. *Andrews*, 2 Mac. & G. 225; *Vance* v. *East Lancashire Railway Company*, 3 K. & J. 50; *Attorney-General* v. *Guardians of the Poor of Southampton*, 17 Sim. 6; *Attorney-General* v. *Corporation of Norwich*, 16 Sim. 225; *Stevens* v. *South Devon Railway Company*, 13 Beav. 48.

[(*c*) 45 & 46 Vict. c. 38, s. 36; and see to the like effect the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 17.]

[(*d*) *Re Earl of Aylesford*, 32 Ch. D. 162.]

(*e*) *Ex parte Andrews*, 2 Rose, 412; and see *Fry* v. *Fry*, 27 Beav. 146.

[(*f*) 51 & 52 Vict. c. 59.]

[(*g*) This expression includes an executor or administrator, see sect. 1.]

than a trustee bound forthwith upon request to convey absolutely to his *cestui que trust*, to insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to pay the premiums for such insurance out of the income thereof or out of the income of any other property, subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income."]

If an annuity and a policy on the life of the *cestui que vie* be made the subject of a settlement, it is implied that the trustee is to pay the premiums out of the income (*a*). A *mortgagee* is not regarded as a *trustee;* and if, in the absence of any stipulation on the subject, he effects an insurance, it is on his own account, and he cannot claim to be entitled to the premiums under just allowances. It is the same as if a lessor or lessee insured, in which case the other would have no claim to the benefit of the policy (*b*).

By mortgagee.

Breaking up the testator's establishment.

20. An *executor* is allowed a reasonable time for breaking up the testator's establishment, and a period of two months in one case was considered not to be excessive (*c*). Executors, as a general rule, do not pay legacies until the expiration of one year from the testator's death; but this is a rule of convenience; and, therefore, if the assets be clearly sufficient for payment of debts and legacies, there is nothing to prevent the executors from discharging the legacies before the expiration of the year (*d*).

[Carrying on trade of testator.]

21. [As it is the duty of the executors to realize their testator's estate to the best advantage, they may carry on his business for such reasonable time as is necessary to enable them to sell it as a going concern (*e*), and, if they do so, may be entitled even as against the testator's creditors to an indemnity out of the estate in respect of liabilities properly incurred (*f*); and, as

(*a*) *Darcy* v. *Croft*, 9 Ir. Ch. Rep. 19.

(*b*) *Dobson* v. *Land*, 8 Hare, 216; and see *Ex parte Andrews*, 2 Rose, 410; *Phillips* v. *Eastwood*, Ll. & G. *t.* Sugden, 289. [But see 23 & 24 Vict. c. 145, s. 11; since repealed and its place supplied by 44 & 45 Vict. c. 41, s. 19, sub-s. (1), (ii.).]

(*c*) *Field* v. *Peckett* (No. 3), 29 Beav. 576.

(*d*) *Angerstein* v. *Martin*, 1 T. & R. 241, *per* Lord Eldon; *Pearson* v. *Pearson*, 1 Sch. & Lef. 12, *per* Lord Redesdale; and see *Garthshore* v. *Chalie*, 10 Ves. 13.

[(*e*) *Collinson* v. *Lister*, 20 Beav. 256, 365, 366, *per* Romilly, M.R.; *Garrett* v. *Noble*, 6 Sim. 504; *Dowse* v. *Gorton*, (1891) A. C. 190.]

[(*f*) *Dowse* v. *Gorton*, (1891) A. C. 190, 199, *per* Lord Herschell; and see *ante*, pp. 252, 293.]

regards beneficiaries under the will, a power in the executors to carry on the business for a reasonable time may be implied from a general power to postpone the sale and conversion of the estate, although the business is not specially referred to (*a*). But, except for such purpose of realization, executors are not justified in continuing to carry on the testator's business unless there is a distinct and positive direction and authority given by the will to that effect (*b*), nor can the Court, where infants are interested, authorize an administrator to carry on the trade of the intestate (*c*).

[Special direction in will.]

Where the testator's business has been properly carried on in accordance with the provisions of the will and with the assent of the creditors, and in their interest as well as in that of the beneficiaries, the executors will be entitled, in priority to creditors, to indemnity out of the general estate, and not merely out of that portion of the assets which has come into existence or changed its form since the testator's death (*d*).

In a recent case in Ireland (*e*), it was held that a general bequest in the will of a trader to trustees upon trust to permit his wife to carry on his business so long as she should remain a widow empowered the trustees to allow her to use the property employed by the testator himself in the trade, and that the assets to the extent of such property were liable to pay for goods supplied to the testator's widow for the trade carried on by her; and where a will contained a direction that the testator's business was to be carried on for a specified time, without any actual disposition of his property beyond a direction for the payment by the executors of certain legacies, the executors were held to be entitled, so long as the business was carried on for the purposes of the will, to the free use and occupation of the business premises and the fixed plant and machinery without paying any rent for the same (*f*). Where a testator gave all his real and personal estate to trustees upon trust for sale and conversion, and empowered them to carry on his business and employ therein all the capital invested therein at his death, and to increase or abridge the business and his capital therein, an equitable mort-

[(*a*) *Re Chancellor*, 26 Ch. Div. 42.]

[(*b*) *Kirkman* v. *Booth*, 11 Beav. 273; *Collinson* v. *Lister*, 20 Beav. 356.]

[(*c*) *Laud* v. *Laud*, 43 L. J. Ch. 311.]

[(*d*) *Dowse* v. *Gorton*, (1891) A. C. 190, varying the decision of the Court of Appeal, 40 Ch. Div. 536.]

[(*e*) *Gallagher* v. *Ferris*, 7 L. R. Ir. 489; and see *Re Johnson*, 15 Ch. D. 548; *Strickland* v. *Symons*, 26 Ch. Div. 245; *Boylan* v. *Fay*, 8 L. R. Ir. 374.]

[(*f*) *Re Cameron*, 26 Ch. Div. 19.]

gage by the trustees of the testator's real estate to raise monies which were applied for the purposes of the business was held to be within their powers (*a*).]

Appropriation of legacy.

22. An executor may *appropriate* a legacy without the necessity of a suit, where the appropriation is such as the Court itself would have directed (*b*); [and an administrator may appropriate part of the estate to his own share as one of the next of kin (*c*).

[Trust legacy.]

Where a legacy is to be held by the executors upon trust, and the will is silent as to the mode of investment, the powers of the Trust Investment Act, 1889 (*d*), appear to be applicable (*e*), so that an investment in the securities authorized by the Act will be a proper mode of appropriation (*f*). Where several legacies are given, the executors may be justified in setting aside one entire amount without dividing it into portions, but the proper course as a general rule is to invest each particular sum in separate investments, and such investments should not be varied without reasonable cause (*g*). As the question whether an appropriation has been made is necessarily one of fact, and may be one of difficulty, it is obviously desirable that evidence of the appropriation should be preserved, and that distinct notice of it should be given to all the beneficiaries who are *sui juris*. The wishes and opinions of the tenants for life may properly be taken into consideration, so long as no undue favour is shown to them at the expense of the remaindermen (*h*).

[Effect of appropriation.]

Where an appropriation has been validly made it will be binding on the beneficiaries, who will alike share in any increment in value, and bear any loss arising from depreciation, of the investments of the severed fund (*i*), and thereafter there can

[(*a*) *Re Dimmock*, 52 L. T. N.S. 494.]

(*b*) *Hutcheson* v. *Hammond*, 3 B. C. C. 128, see 145, 148; and see *Cooper* v. *Douglas*, 2 B. C. C. 231; Roper on Legacies, 4th ed. 931.

[(*c*) *Barclay* v. *Owen*, 60 L. T. N.S. 220; as to appropriation of shares of residue, see *post*, p. 667; and as to an executor converting himself into a trustee, *ante*, p. 215.]

[(*d*) See *ante*, p. 340.]

[(*e*) See *Re Dick*, (1891) 1 Ch. (C. A.) 423.]

[(*f*) It may be observed that it must not be assumed that a general power of investment contained in the will is applicable to the investment of the particular fund, although it may occur, as in *Fraser* v. *Murdoch*, 6 App. Cas. 855, that such general power is wide enough to cover all the purposes of the will requiring investment. The question must necessarily turn upon the construction of the will. On the other hand, where there is a general investment clause containing prohibitory words, the safer course will be for the trustees to keep within the terms of that clause, as well as within the statutory power. See *ante*, p. 340, note (*d*).]

[(*g*) *Re Walker*, 59 L. J. Ch. 386.]

[(*h*) *Fraser* v. *Murdoch*, 6 App. Cas. 855, 864, 878.]

[(*i*) *Fraser* v. *Murdoch*, 6 App. Cas.

be no community of loss or gain between appropriated legacies *inter se* as to either income or capital (*a*); nor can the trustees claim any right of indemnity for subsequent loss as against the general trust estate (*b*). But an appropriation by means of an investment on an unauthorized security, as, for instance, on an equitable mortgage effected by the executors, when the will authorized investments on legal mortgages only, cannot stand (*c*).

Where the testator, instead of bequeathing a particular sum, directs the executors to set apart a sufficient sum on specified securities to answer a particular purpose, there can be no fund to which the powers of the Trust Investment Act, 1889, are applicable until the directions of the will have been observed. Thus where a testator empowered the trustees of his will to set apart and invest on any of the investments thereby authorized, such a sum as would be sufficient at the time of investment to satisfy an annuity, it was held that the trustees would not be justified in making an investment for that purpose in India 3½ per cent. stock, which was not one of the investments authorized by the will (*d*).] [Bequest of unascertained sum.] [*Ex. gr.*, to provide an annuity.]

23. A trustee may expend sums of money for the *protection and safety*, or *support*, of a *cestui que trust* who is incapable of taking care of himself, but the more prudent course is to apply to the Court (*e*). Maintenance.

24. If a *legacy* be left to an infant, and the Court, upon application, would, from the inability of the parent to support his child, order *maintenance* out of the *interest*, the trustee, should he make advances for that purpose without suit, would be allowed them in his account (*f*). In the case of *Andrews* v. Out of interest.

855, 865, 878, citing Roper on Legacies, 4th ed. p. 942; *Re Waters*, W. N. 1889, p. 39, where Kay, J., referring to the authorities last cited, said that it was clear that where a deferred legacy was *bonâ fide* set apart by an executor, the legatees must take it "for better or worse," and his lordship added (though the words do not appear in the report), "If the security improves in value, so much the better; if it deteriorates the loss must be theirs; but the executors have full power to make the appropriation without coming to the Court for an authority so to do, and when it is done, it is final and conclusive and binding upon everybody. That is the undoubted law."]

[(*a*) *S. C.* at p. 865, *per* Lord Selborne.]

[(*b*) *S. C.*]

[(*c*) *Re Waters, ubi supra.*]

[(*d*) *Re Owthwaite*, W. N. 1891, p. 151. Where an annuity is a charge upon the whole personal estate of a testator, it seems clear that the executor cannot affect the legatees' right to the entire annuity by any appropriation; Williams on Executors, 8th ed. p. 1409.]

(*e*) *Duncombe* v. *Nelson*, 9 Beav. 211; and see *Chester* v. *Rolf*, 4 De G. M. & G. 798, and cases there cited; [and Simpson on Infants, 2nd ed. p. 261.]

(*f*) *Sisson* v. *Shaw*, 9 Ves. 285; *Prince* v. *Hine*, 26 Beav. 634; [and for a consideration of the rules by

Partington (*a*), Lord Thurlow refused to indemnify the trustee; but the authority of that decision has been repeatedly denied, and may be considered as overruled (*b*). And the maintenance of each year need not be confined to the interest of that year, but the trustee will be allowed in his accounts to set off the gross amount of the maintenance against the gross amount of the interest (*c*).

[Conveyancing Act, 1881.]

[Now by the 43rd sect. of the Conveyancing and Law of Property Act, 1881 (*d*), it is provided as follows:—

(1) "Where any property is held by trustees (*e*) in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may at their sole discretion pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

(2) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations or any part thereof, as if the same were income arising in the then current year.

(3) "This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4) "This section applies whether that instrument comes into operation before or after the commencement of this Act (*e*)."

which the Court is guided in granting maintenance to infants under its inherent jurisdiction, see Simpson on Infants, 2nd ed. pp. 261, *et seq.*]

(*a*) 3 B. C. C. 60.

(*b*) See *Sisson* v. *Shaw*, 9 Ves. 288; *Maberly* v. *Turton*, 14 Ves. 499; *Lee* v. *Brown*, 4 Ves. 369; *Ex parte Darlington*, 1 B. & B. 241; *Cotham* v. *West*, 1 Beav. 381.

(*c*) *Carmichael* v. *Wilson*, 3 Moll. 79; *Edwards* v. *Grove*, 2 De G. F. & J. 210.

[(*d*) 44 & 45 Vict. c. 41.]

[(*e*) Where residue is bequeathed to an infant, the executor, when the estate is cleared and the residue ascertained, becomes trustee for the infant within the meaning of the section; *Re Smith*, 42 Ch. D. 302.]

The Act (*a*) repeals the corresponding section of Lord Cranworth's Act (*b*). [Lord Cranworth's Act.]

25. Upon the construction of the recent enactment, as of that for which it is substituted, various questions of difficulty have arisen. The consideration which first presents itself is as to the circumstances under which trustees can be said to hold property in trust for an infant in the manner indicated in the section. [Construction of Acts attended with difficulty.]

26. The corresponding section in Lord Cranworth's Act, the wording of which was very similar, was held to be confined to cases of absolute and contingent gifts, and not to apply to the case of a gift absolute in the first instance but liable to be defeated in the event of the legatee not attaining twenty-one. In such a case the accumulations of income were held to belong to the infant's estate notwithstanding his death under age (*c*). It may be doubted whether that case was not intended to be covered by the enactment, but it does not fall within the strict letter of it, and it would seem that no distinction can be drawn in this respect between the language of the corresponding sections in Lord Cranworth's Act and the recent Act. [Income of gift absolute in form but liable to be defeated.]

27. Where the infant was entitled contingently on his attaining twenty-one, or on some event before his attaining that age, to a legacy carrying interest in the meantime, the power of maintenance in Lord Cranworth's Act applied (*d*), as does also the power under the recent Act; but where a further contingency is involved in the gift, as in addition to attaining twenty-one the contingency of surviving a particular person, the case does not come within either of the enactments, and neither the trustees nor the Court can apply the income for maintenance, and there is no obligation to accumulate (*e*). [Income of contingent gift.]

28. Another question which arises is, whether, under sect. 43 of the recent Act, an infant is entitled to maintenance out of the income of property to which he is entitled contingently on his attaining twenty-one, where, independently of the section, he could never have become entitled to such income; as for instance in the case of a pecuniary legacy given by a person not the parent or *in loco parentis* to an infant contingently on his attaining twenty-one. By Lord Cranworth's Act where an infant was contingently entitled to property, the trustees were [Contingent legacy not carrying interest.]

[(*a*) See sect. 71.]
[(*b*) 23 & 24 Vict. c. 145, s. 26.]
[(*c*) *Re Buckley's Trusts*, 22 Ch. D. 583.]
[(*d*) *Re Cotton*, 1 Ch. D. 232.]
[(*e*) *Re Judkin's Trusts*, 25 Ch. D. 743.]

empowered to apply towards his maintenance and education "the whole or any part of the income to which such infant might be entitled in respect of such property;" and it was held in *Re George* (*a*), that this power did not extend to the case of a contingent pecuniary legacy not carrying interest until the time of payment. In this state of the law, the Conveyancing and Law of Property Act, 1881, was passed, and sect. 43 omitted the words "to which such infant might be entitled in respect of such property," but notwithstanding the variation in the language of the late Act, it has been held by the Court of Appeal, affirming Kay, J., that the section does not apply to the case of a pecuniary legacy given by a person not a parent or in *loco parentis* to an infant contingently on his attaining twenty-one, followed by a residuary gift. L. J. Cotton was of opinion that there is in such a case no property held in trust for an infant within the meaning of the section until the time arises for severing the legacy from the residue, *i.e.*, until the infant attains twenty-one; while Fry, L.J., though expressing his assent to this view, preferred to rest his judgment on the ground that the gift of residue which, independently of the section, carries the income accruing during the minority to the residuary legatee is a sufficient expression of a contrary expression within sub-sect. (3), to take the case out of the Act (*b*).

[Contingent gift to a class.]

Where a legacy is given to a class contingently on attaining twenty-one, so that the first member of the class who attains that age becomes entitled to the whole income until another member of the class attains a vested interest (*c*), it would seem to follow from the case last cited that there can be no scope for the application of the section; and in a recent case where there was a gift of residue to a class contingently on their attaining twenty-one, it was held by North, J., that the section was inapplicable, his lordship being of opinion that the income belonged exclusively to those of the class who had attained twenty-one at the time when it accrued (*d*). But it seems difficult to reconcile this decision with the authorities which show that a contingent gift of residue carries with it the intermediate income (*e*).

[Contingent legacy directed to be set apart.]

And where the testator directed the contingent legacy to be

[(*a*) 5 Ch. Div. 837.]

[(*b*) *Re Dickson*, 28 Ch. D. 291, 297; affirmed 29 Ch. Div. 331.

[(*c*) *Furneaux* v. *Rucker*, W. N. (1879), 135.]

[(*d*) *Re Jeffery*, (1891) 1 Ch. 675.]

[(*e*) *Green* v. *Ekins*, 2 Atk. 473; *Earl of Bective* v. *Hodgson*, 10 H. L. Ca. 656; *S. C.* 1 H. & M. 376; *Genery* v. *Fitzgerald*, Jac. 468; *Re Dumble*, 23 Ch. D. 360.]

immediately set apart for the benefit of the objects of the gift when the contingency happened, it was held that, as on the happening of the contingency the intermediate income would be carried to the legatee, the power of maintenance in the Act applied (*a*).

[Where property held for an infant for life.]

29. The section of the Conveyancing Act gives rise to this further question; the power applies to the case of "property held in trust for an infant for life," but the surplus accumulations are to be held "for the benefit of the person who ultimately becomes entitled to the *property* from which the same arise" (*b*). It has been thought to be difficult (*c*), without construing the word "property" in different senses in the same section, to attach any other meaning to these words than that the accumulations are to be added to and go with the corpus of the property, a construction which would have the effect of depriving an infant, who has an absolute life interest, of the income accrued during his minority, and not required for his maintenance.

However, in a recent case (*d*) where an infant was tenant for life of a share of residue, North, J., relying on the authority of *In re Buckley's Trusts* (*e*), held that on attaining her majority the infant became absolutely entitled to the accumulations of the past income of her share, and observed that he was by no means satisfied that the expression "the property from which" the accumulations arise did not mean the income from which the accumulations had arisen, that it was not necessary to say that "property" meant capital exclusively (*f*), and that "the object of the Conveyancing Act was to shorten and simplify

[(*a*) *Re Medlock*, 55 L. J. N.S. Ch. 738; *Johnson* v. *O'Neil*, 3 L. R. Ir. 476; and cf. *Re Judkin's Trusts*, 25 Ch. D. 743; 53 L. J. N.S. Ch. 496.]

[(*b*) Similar words occur in Lord Cranworth's Act, and their occurrence formed a ground for the decision on *Re Buckley's Trusts*, 22 Ch. D. 583, where Fry, J., observed that if he were to extend that Act to a defeasible legacy he should deprive a person defeasibly entitled to the principal of the interest he would otherwise be entitled to.]

[(*c*) The difficulty may have arisen from the language of Lord Cranworth's Act (which did not apply to a life interest), having been copied without the appropriate modification.]

[(*d*) *Re Wells*, 43 Ch. D. 281.]

[(*e*) 22 Ch. D. 583.]

[(*f*) The suggested construction seems to be in accordance with the natural import of the words "property" and "income," and to give a clear meaning to the section. Whether the property held in trust for the infant be an absolute interest, a life interest, or an interest defeasible by a gift over, the income or produce of such property belongs from first to last to the infant, and to him therefore the accumulations go. The words "ultimately becomes entitled" are satisfied by referring them to the case of a contingent interest not carrying intermediate income, and a case such as *In re Dickson* (*ante*, p. 656) can present no difficulty, since the property held in trust *ex necessitate rei* produces no income until the time when the section ceases to be applicable.]

conveyances, and it was not intended to alter the devolution of property."

[Past maintenance.]

30. The opinion has been expressed that under the recent enactment trustees have a discretionary power to apply past accumulations of income in payment for past maintenance (*a*).

[Contrary intention.]

31. A direction to trustees to accumulate the income of the shares of children who are entitled contingently on their attaining twenty-one, or being daughters attaining that age or marrying, and to pay the same to them as and when their presumptive shares become payable, is not the expression of a contrary intention within sub-sect. 3 of sect. 43 (*b*).

[Concurrent powers under the recent Act.]

32. It is to be observed that cases may easily arise in which the trustees would be in a position to exercise either the powers of sect. 42, or those of sect. 43 of the late Act, as for instance if under an instrument coming into operation since the 31st December, 1881, real estate were vested in them in trust for an infant for life, and the trustees had a power of sale or of consenting to the exercise of a power of sale.

Having regard to the recent decisions, it is not certain that any case can arise in which the ultimate destination of accumulations of income under the two sections would be different, but sect. 42 contains provisions applicable to the case of a female infant who marries while an infant which are not to be found in sect. 43. It is conceived that wherever the infant is beneficially entitled to the possession of land the income of which is received by the trustees they will be treated as having entered into possession under sect. 42, but that other cases, where the trustees merely receive the income as legal owners and are not called upon to exercise any of the powers of sect. 42, must be regarded as governed by sect. 43.]

Maintenance out of principal.

33. Where the amount of the legacy is inconsiderable, as 100*l*., the Court would, in the absence of other means, direct maintenance to the child out of the *principal* itself (*c*); the executor,

[(*a*) *Re Pitts' Settlement*, W. N. 1884, p. 225; but see *S. C.* Ib. p. 242, showing that the question did not in fact arise.]

[(*b*) *Re Thatcher's Trusts*, 26 Ch. D. 426.]

(*c*) *Ex parte Green*, 1 J. & W. 253; *Ex parte Chambers*, 1 R. & M. 577; *Ex parte Swift*, Ib. 575; *Re Mary England*, Ib. 499; *Harvey* v. *Harvey*, 2 P. W. 21; *Ex parte Hays*, 3 De G. & Sm. 485. [In *Re Howarth*, 8 L. R. Ch. App. 415, the Lords Justices held that the Court had jurisdiction to order maintenance, where there were no other means, out of the *corpus* of an infant's freehold estate; and in *De Witte* v. *Palin*, 14 L. R. Eq. 251, V. C. Malins allowed maintenance to be raised by a charge on reversionary property; but the decision in *Re Howarth* was rested upon the ground that where a judgment can be obtained against an infant for necessaries the

therefore, who, under similar circumstances but without the authority of the Court, breaks in upon the capital, would not be liable, on the *cestui que trust's* coming of age, to account for the expenditure (*a*). But where payments of this kind, which are not strictly authorized, are made by executors or trustees, and the propriety of them is questioned in a suit, and there is a deficiency of assets, the costs of suit will have priority over the allowances to the executors or trustees (*b*). Where the legacy was not more than 300*l.*, Sir W. Grant determined that the trustee had exceeded his duty, and said his *impression* was, that the rule had been never to permit trustees of their own authority to break in upon the capital (*c*); but the case of *Barlow* v. *Grant*, which is clearly to the contrary, must have escaped his Honour's recollection (*d*). The *general rule* is, however, not to break into capital for maintenance, and where the legacy is considerable, as 1000*l.*, or the like, as the Court itself would most probably not order the application of part of the principal, the trustee would not be safe in exceeding of his own authority the amount of the interest (*e*).

Maintenance where father alive.

34. Where the father of an infant is alive, trustees should, in granting maintenance, bear in mind that the Court never allows a *father* maintenance out of his children's property without a previous inquiry as to his ability to maintain them himself (*f*). The term *ability*, however, is relative to the position of the father and children; and maintenance has been allowed to a father who had 6000*l.* a year (*g*). And an express declaration in the instrument of trust, or a previous contract, as in the case of a marriage settlement to which the father is a party, may confer on the father a right to have maintenance for his children out of the

Court can charge his real estate with the amount so recoverable; and in *Re Hamilton*, 31 Ch. Div. 291, the Court of Appeal held that there was no jurisdiction to charge maintenance on a reversionary estate tail, inasmuch as such an estate could not be delivered in execution, and the principle of *Re Howarth* did not apply to it; and a similar view was also taken in *Cadman* v. *Cadman*, 33 Ch. Div. 397, where it was doubted whether the Court was warranted in making the order which was made in *Re Howarth*.]

(*a*) *Barlow* v. *Grant*, 1 Vern. 255; *Carmichael* v. *Wilson*, 3 Moll. 79; *Bridge* v. *Brown*, 2 Y. & C. C. C. 181, 189.

(*b*) *Robinson* v. *Killey*, 30 Beav. 520.

(*c*) *Walker* v. *Wetherell*, 6 Ves. 473.

(*d*) See also *Prince* v. *Hine*, 26 Beav. 636.

(*e*) *Barlow* v. *Grant*, 1 Vern. 255, *per* Lord Guildford; *Davies* v. *Austen*, 1 Ves. jun. 247, *S. C.* 3 B. C. C. 178; *Beasley* v. *Magrath*, 2 Sch. & Lef. 35.

(*f*) See now 23 & 24 Vict. c. 145, s. 26; [since repealed and its place supplied by 44 & 45 Vict. c. 41, s. 43.]

(*g*) *Jervoise* v. *Silk*, 1 G. Coop. 52; *Ex parte Williams*, 2 Coll. 740; *Culbertson* v. *Wood*, 5 I. R. Eq. 23, see 41.

settlement funds (*a*). But the decisions in this respect have gone as far as can be justified upon principle (*b*).

[In exercising their discretion trustees should consider what is most for the benefit of the infant, and they should not be deterred from doing what is for the infant's benefit, because it is also a benefit to the father, though on the other hand they must not act with a view to the father's benefit apart from that of the infant (*c*).

Where there was a power of maintenance in the usual form in the discretion of the trustees, and the trustees, without exercising any discretion in the matter, paid the whole income to the father of the infant, it was held that the father's estate must account for the income received by him (*d*).

[Past maintenance.]

Where the father had borrowed money to enable him to keep his infant children at school and was unable to repay the debt, the Court allowed him to be recouped the amount so borrowed as an allowance for past maintenance (*e*).]

After death of father.

35. It was formerly much doubted whether after the death of the father maintenance should be granted to the *mother* so long as she continued a *widow* without an inquiry as to her ability (*f*). But it was ruled that *where she had married again* there should be no inquiry as to ability, the second husband being, it was said, under no liability to maintain his wife's children (*g*). It has been since settled that no inquiry as to the mother's ability will be directed even during her widowhood (*h*); and as a widow is undoubtedly liable at law to maintain her children (*i*), the direction of the inquiry cannot be regarded as depending upon the *legal liability*. It would seem to follow that the enactment rendering a husband liable to maintain his wife's children by a former marriage (*j*) ought not to make (and it is believed that it has not in fact made) any alteration in the practice of the Court

(*a*) *Mundy* v. *Lord Howe*, 4 B. C. C. 223; *Meacher* v. *Young*, 2 M. & K. 490; *Stocken* v. *Stocken*, 4 Sim. 152, 2 M. & K. 489, 4 M. & Cr. 95; *White* v. *Grane*, 18 Beav. 571; *Ransome* v. *Burgess*, 3 L. R. Eq. 773; *Newton* v. *Curzon*, 16 L. T. N.S. 696; [*Malcolmson* v. *Malcolmson*, 17 L. R. Ir. 69.]

(*b*) *Thompson* v. *Griffin*, Cr. & Ph. 321, *per* Lord Cottenham; [*Wilson* v. *Turner*, 22 Ch. Div. 521;] and see *Re Kerrison's Trusts*, 12 L. R. Eq. 422, the case of a voluntary settlement.

[(*c*) *Re Lofthouse*, 29 Ch. Div. 921, 932.]

[(*d*) *Wilson* v. *Turner*, 22 Ch. Div. 521.]

[(*e*) *Davey* v. *Ward*, 7 Ch. D. 754.]

(*f*) As to the mother's right to be recouped for past maintenance of a child, see *Re Cottrell's Estate*, 12 L. R. Eq. 566.

(*g*) *Billingsly* v. *Critchet*, 1 B. C. C. 268.

(*h*) *Douglas* v. *Andrews*, 12 Beav. 310; and see the note, p. 311.

(*i*) 43 Eliz. c. 2, s. 6; 4 & 5 W. 4. c. 76, s. 56.

(*j*) 4 & 5 W. 4. c. 76, s. 57.

of granting maintenance where the mother has married again without any inquiry as to ability.

[36. Where a testator left property to the value of 10,000*l.* a year to be accumulated for twenty-one years, and directed that the accumulations should be laid out in the purchase of lands which, after the expiration of the twenty-one years, were to be held for A. for life, and after his death for his sons in strict settlement, and A.'s income was insufficient to enable him to bring up and educate his infant sons in a manner suitable to their prospective positions in life, V. C. Malins allowed him 2,700*l.* a year out of the income of the property, with liberty to apply for an increased allowance if necessary when the children grew older (*a*); and this decision was followed by Pearson, J. (*b*). But in a case in Ireland where the circumstances were similar, the Court refused to follow the decision of V. C. Malins, and held that where there is an imperative trust to accumulate, it is the duty of the Court to carry out the testator's intention, and that the Court has no discretion to allow maintenance out of the income (*c*); and the Irish decision seems to be in accordance with sound principle (*d*). [Where accumulation directed.]

37. Where an accumulation has been directed by a testator, and the Court allows maintenance out of the accumulations, the order should be framed so as to protect the interests of third parties by directing the interests of the infants in any legacy or share of residue to be held as a security for recouping any diminution in the accumulations (*e*). [Interests of third parties protected.]

Where an infant was entitled, contingently on her attaining twenty-one or marrying, to a large property, the Court sanctioned a scheme for providing for her past and future maintenance, by effecting a policy of assurance payable on her death before either attaining twenty-one or marrying under that age, and mortgaging the policy and charging the infant's contingent interest to secure the necessary advances and compound interest, but it was expressly provided that the interest of any person other than the infant was not to be affected (*f*).]

[(*a*) *Havelock* v. *Havelock*, 17 Ch. D. 807; and see *Bennett* v. *Wyndham*, 23 Beav. 521; and *S. C.* 4 De G. F. & J. 259.]

[(*b*) *Re Collins*, 32 Ch. D. 229.]

[(*c*) *Kemmis* v. *Kemmis*, 13 L. R. Ir. 372, affirmed 15 L. R. Ir. 90; following *Shaw* v. *M'Mahon*, 8 Ir. Eq. R. 584; and see *Re Smeed*, 54 L. T. N.S. 929.]

[(*d*) And see *Re Alford*, 32 Ch. D. 383.]

[(*e*) *Re Colgan*, 19 Ch. D. 305; see this case and *Re Arbuckle*, 2 Set. on Dec. 4th Ed. 726, for form of order providing for the recoupment.]

[(*f*) *Re Bruce*, 30 W. R. 922; and see *Re Tanner*, 53 L. J. N.S. Ch. 1108;

Advancement out of capital.

38. A part of the capital may be sunk by a trustee without the direction of the Court for the *advancement* of a child, where the same sums if expended for *maintenance* would not have been allowed (*a*). [But as an "advancement" is merely a payment before the time fixed for the obtaining of an absolute interest by the beneficiary, a power of advancement will not, in the absence of express words, be construed to authorize an advance out of corpus, where by the terms of the instrument the beneficiary can never become entitled to a share of corpus (*b*).]

Advancement when there is a limitation over.

39. But a trustee cannot apply part of the principal towards the advancement of the child where the legacy is subject to a limitation over in favour of a stranger, for in such a case the Court itself could not make an order to that effect.

Thus in *Lee* v. *Brown* (*c*), where a testatrix gave 100*l.* to trustees upon trust to apply the produce to the maintenance and education of A. B., and when he should attain twenty-one to transfer to him the capital, but in case he died under that age the testatrix gave the legacy to his brother and sister equally,

51 L. T. N.S. 507, as to adopting a similar course for the security of the other persons interested where an advance is required for an infant whose interest is only contingent.]

(*a*) *Swinnock* v. *Crisp*, Freem. 78; *Walker* v. *Wetherell*, 6 Ves. 477; and see *Ex parte M'Key*, 1 B. & B. 405. [As to what purposes will fall under the description of advancement, see *Boyd* v. *Boyd*, 4 L. R. Eq. 305; *Roper-Curzon* v. *Roper-Curzon*, 11 L. R. Eq. 452; *Re Gore's Settlement Trusts*, W. N. 1876, p. 79; *Taylor* v. *Taylor*, 20 L. R. Eq. 155; Simpson on Infants, 2nd ed. pp. 190, 191, 324 *seq.*] In *Taylor* v. *Taylor* an advancement by way of *portion* was said to be something given by a parent to establish his child in life, a provision for him, and not a casual payment. Under portions would be ranked the following, viz. sums advanced on *marriage* (*Lloyd* v. *Cocker*, 27 Beav. 643), on setting up a child in *business* or putting him into a *profession* (*Warr* v. *Warr*, Prec. Ch. 213; *Roper-Curzon* v. *Roper-Curzon*, 11 Eq. 452), buying the *goodwill* of a business and giving *stock-in-trade*, or supplying *further capital* for carrying on the business (*Gilbert* v. *Wetherall*, 2 S. & St. 254; *Taylor* v. *Taylor*, 20 Eq. 155), or paying the *entrance fee to an Inn of Court* with a view to the Bar (*Boyd* v. *Boyd*, 4 Eq. 305), or buying a *commission* and providing the *outfit* (*Taylor* v. *Taylor*, *sup.*; *Boyd* v. *Boyd*, *sup.*). So a *large sum* given to a child in *one payment* might be presumed in the absence of evidence to be an advancement by way of portion. But the qualities of a portion would not attach to *small sums* paid by a father to a child whether an infant or adult (*Morris* v. *Burroughs*, 1 Atk. 403; *Pusey* v. *Desbouverie*, 3 P. W. 317, note *o*; *Re Peacock's Estate*, 14 Eq. 236; *Watson* v. *Watson*, 33 Beav. 574), or to *temporary assistance* in the discharge of his debts, or to payment of his *travelling expenses*, as a passage to India, or to the payment of a *fee to a special pleader* (*Taylor* v. *Taylor*, *sup.*), which would come rather under preliminary education than advancement. [But in the recent case of *Re Blockley*, 29 Ch. D. 250, Pearson, J., dissented from the view that a sum given by a father to his son to enable him to pay his debts could not be treated as an advancement. And as to advances by way of portion under the Statute of Distributions, see Simpson on Infants, 2nd ed. p. 190.]

[(*b*) *Re Aldridge*, 55 L. T. N.S. 554, 556.]

(*c*) 4 Ves. 362.

Lord Alvanley said, "It certainly was not competent under this trust to the executor, nor could he, *if he had applied* have obtained permission from this Court, to advance any part of the capital of the legacy in putting the child out in the world; for *if it had been such a case that the Court would have authorized the act that was done, I desire to be understood that it would be considered as properly done; for the principle is now established, that if an executor does without application what the Court would have approved, he shall not be called to account, and forced to undo that merely because it was done without application*"(*a*). But where an infant was entitled, on a contingency, and at a certain time which had not arrived there was a power of advancement, and the trustee took upon himself the risk as against the person entitled if the contingency did not happen, and applied part of the capital for the advancement of the infant, he was allowed it in his account as between him and the infant who in the event became entitled (*b*).

Where there are cross limitations amongst the children.

40. And where legacies were given to children payable at twenty-one or marriage, with a limitation over on the death of any child before attaining twenty-one or marriage, *not in favour of a stranger, but for the benefit of such of the children as should attain twenty-one or marry,* a trustee, who had paid a premium on the apprenticeship of a child who died under twenty-one, was allowed it by the Court (*c*). The case turned upon the same principle as where a legacy is given to a class, all or some of whom must take the fund absolutely, when, as all have an equal chance of survivorship, the individuals of the class will be ordered maintenance even before their shares in the fund have become actually vested (*d*). This power is exercised by the Court, but cannot be exercised by trustees without the authority of the Court, nor can the Court itself make such an order in a summary way without the institution of a suit (*e*).

[Power of advancement.]

[41. Where there is a power of advancement the question of the propriety of any particular advance must necessarily depend

(*a*) 4 Ves. 369.

(*b*) *Worthington* v. *M'Craer,* 23 Beav. 81; [and for instances in which advances have been allowed in the absence of a power, see Simpson on Infants, 2nd ed. p. 325.]

(*c*) *Franklin* v. *Green,* 2 Vern. 137. That the limitation over was for the benefit of the children is not mentioned in the report, but appears from Reg. Lib.

(*d*) See Rop. Leg. chap. xx. s. 5; *Greenwell* v. *Greenwell,* 5 Ves. 194; *Cavendish* v. *Mercer,* cited Ib.; *Brandon* v. *Aston,* 2 Y. & C. C. C. 30; [Simpson on Infants, pp. 282, 326.]

(*e*) *Re Breeds' Will,* 1 Ch. D. 226; [and see *Re Lofthouse,* 29 Ch. Div. 921, 929.]

on the wording of the power, and the extent of the discretion conferred on the trustees. With this discretion, as in the analogous case of a power of maintenance (*a*), the Court will not readily interfere (*b*), though where the trustees fail to exercise the power, an inquiry has been directed as to the proper exercise of it (*c*). The trustees in exercising the discretion should, of course, regard the benefit of the *cestui que trust* as the primary consideration (*d*), but where it is clear that the proposed application will be beneficial to him, considerable latitude as to the mode of application may be permissible (*e*).

[Consent of tenant for life.]

Where the power is exercisable with the consent of the tenant for life, and the tenant for life becomes a bankrupt, his power of consenting is not extinguished, but can only be exercised with the consent of his trustee in bankruptcy acting under the directions of the Court of Bankruptcy (*f*).]

General power of advancing tenant for life.

42. Where trustees had a power to apply a moiety of a trust fund in or towards the preferment or advancement of the tenant for life, or *otherwise for his benefit*, in such a manner as they should in their discretion think fit, it was held that they might apply the moiety in payment of the debts of the tenant for life, the interest of which absorbed nearly the whole of his income and the principal of which he was unable to pay out of his own resources (*g*). [So a power of applying the capital for the benefit and advancement in the world of the tenant for life, coupled with words showing that the power of advancement was a large one, has been held to justify applications of the trust funds for the benefit of the tenant for life which were not strictly advancements (*h*).]

Debts barred by the Statute of Limitations.

43. An executor has never been held responsible for paying a debt due and owing from the testator's estate, the remedy for

[(*a*) *French* v. *Davidson*, 3 Mad. 396; *Livesey* v. *Harding*, Taml. 460; *Collins* v. *Vining*, C. P. Coop. Rep. 1837–38, 472; *Brophy* v. *Bellamy*, 8 Ch. 798, and other cases cited in sect. 2 of this chapter.]

[(*b*) *Edgeworth* v. *Edgeworth*, Beatt. 328; *Re Brittebank, ubi sup.*]

[(*c*) *Lewis* v. *Lewis*, 1 Cox, 162; *Robinson* v. *Cleator*, 15 Ves. 526; *Kilvington* v. *Gray*, 10 Sim. 293; and see *Re Sanderson*, 3 K. & J. 497.]

[(*d*) *Simpson* v. *Brown*, 13 W. R. 312; 11 L. T. N.S. 593.]

[(*e*) Thus in the case of a married daughter, an advance for setting up her husband in business has been allowed, *Phillips* v. *Phillips*, Kay, 40; *Re Kershaw*, 6 Eq. 322; but not for payment of the husband's debts, *Talbot* v. *Marshfield*, 3 Ch. 622, and for other instances, see Simpson on Infants, 2nd ed. p. 327, and as to the mode in which applications to the Court for maintenance and advancement are to be made, Ib. p. 330.]

[(*f*) *Re Cooper*, 27 Ch. D. 565.]

[(*g*) *Lowther* v. *Bentinck*, 19 L. R. Eq. 166; and see *Re Breeds' Will*, 1 Ch. D. 226; *Re Gore's Settlement Trusts*, W. N. 1876, p. 79; *Re Price*, 34 Ch. Div. 603, at p. 605.]

[(*h*) *Re Brittlebank*, 30 W. R. 99.]

which has been barred by the Statute of Limitations; and upon the same principle he may retain his own debt though barred (*a*). But an executor would not be at liberty to pay such a debt after a decree for the administration of the testator's estate, for from that time any other creditor, or even a legatee, specific, pecuniary, or residuary, may plead the statute in taking the accounts (*b*), except to the debt of a plaintiff in a creditors' suit, to which debt the defendant, the executor, did not plead the statute by his statement of defence, and on the basis of which the decree has been made (*c*). If after a decree neither the executor nor the parties beneficially interested before the Court plead the statute, the *Court* will not set up the statute on behalf of absent parties, but if the *executor* omits to plead the statute, it is at his own risk (*d*).

Promise of subscription.

44. It sometimes happens that the deceased made some promise, written or verbal, to subscribe a certain sum for the promotion of some "charitable or public purpose." If nothing has been done in consequence of such promise, the executor or administrator must treat the promise as voluntary, and therefore null. [It has been said, and some authorities have been thought to lend countenance to the view, that if] other persons have acted on the faith of the promise and would suffer loss if it were not observed, the executor or administrator would be justified in giving it effect (*e*). [But in a recent case where a testator promised to give £20,000 to the Congregational Union in five annual instalments, and having paid three instalments died leaving the remaining instalments unpaid and unprovided for, and the Union had incurred liabilities in consequence of the promise, it was nevertheless held that there was no enforceable contract (*f*).

[When trustees may apply under Settled Estates Act.]

45. If an estate is vested in trustees and there is not for the time being any beneficial owner of the rents and profits, the trustees are the proper persons to apply to the Court under

(*a*) *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Hill* v. *Walker*, 4 K. & J. 166; *Hunter* v. *Baxter*, 3 Giff. 214; *Dring* v. *Greetham*, 1 Eq. Rep. 442; *Louis* v. *Rumney*, 4 L. R. Eq. 451.

(*b*) See *Fuller* v. *Redman*, 26 Beav. 614; *Shewen* v. *Vanderhorst*, 1 R. & M. 347; 2 R. & M. 75; *Dring* v. *Greetham*, 1 Eq. Rep. 442.

(*c*) *Adams* v. *Waller*, 35 L. J. N.S. Ch. 727; 14 W. R. 789; 14 L. T. N.S. 727; *Fuller* v. *Redman* (No. 2), 26 Beav. 614; *Briggs* v. *Wilson*, 5 De G. M. & G. 12; *S. C.* 2 Eq. Rep. 153; *Ex parte Dewdney*, 15 Ves. 496.

(*d*) *Alston* v. *Trollope*, 2 L. R. Eq. 205; *S. C.* 35 Beav. 466; and see *Dring* v. *Greetham*, 1 Eq. Rep. 442.

(*e*) See *Cooper* v. *Jarman*, 3 L. R. Eq. 98; *Baxter* v. *Gray*, 3 Man. & G. 771; *Shallcross* v. *Wright*, 12 Beav. 558.

[(*f*) *Re Hudson*, 33 W. R. 819.]

the 23rd sect. of the Settled Estates Act, 1877, to exercise the powers conferred by the Act (*a*).]

Power to release or compound debts.

46. A trustee may, under circumstances, release or compound a debt (*b*). But if a trustee release or compound a debt without some sufficient ground in justification (*c*), or if he sell the debt for a grossly inadequate consideration (*d*), he will clearly be answerable to the *cestuis que trust* for the amount of the *devastavit*. Executors under wills *executed after the 28th August*, 1860, [were by Lord Cranworth's Act] expressly authorized "to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they should think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, without being responsible for any loss to be occasioned thereby" (*e*). [But this section has been repealed and its place supplied by the Conveyancing and Law of Property Act, 1881, which as to executorships and trusts constituted or created either before or after the commencement of the Act provides by sect. 37, that (1) "an executor may pay or allow any debt or claim on any evidence that he thinks sufficient;" (2) "an executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle, any debt, account, claim, or thing whatever relating to the testator's estate or to the trust," and may execute and do all such releases and things as may seem expedient without being responsible for any loss occasioned by anything done in good faith. But as regards trustees the section is subject to any contrary intention expressed in the instrument creating the trust (*f*).

23 & 24 Vict. c. 145.

[44 & 45 Vict. c. 41.]

[(*a*) *Vine* v. *Raleigh*, W. N. 1883, p. 128.]

(*b*) *Blue* v. *Marshall*, 3 P. W. 381; and see *Ratcliffe* v. *Winch*, 17 Beav. 216; *Forshaw* v. *Higginson*, 8 De G. M. & G. 827.

(*c*) *Jevon* v. *Bush*, 1 Vern. 342; *Gorge* v. *Chansey*, 1 Ch. Rep. 125; *Wiles* v. *Gresham*, 5 De G. M. & G. 770. A trustee is not liable for omitting to compound; *Ex parte Ogle*, 8 L. R. Ch. App. 715, *per Cur.*

(*d*) *Re Alexander*, 13 Ir. Ch. Rep. 137.

(*e*) 23 & 24 Vict. c. 145, s. 30. [This section was held not to be confined to claims in the nature of debts, but to extend to claims of legatees, *Re Warren*, 53 L. J. N.S. Ch. 1016; 51 L. T. N.S. 561; 32 W. R. 916.]

[(*f*) 44 & 45 Vict. c. 41, ss. 37, 71.]

In exercising the powers of this section in a case where there are several trustees, it is conceived that *all the trustees* must act together, except in cases in which, independently of the section, a majority of the trustees are by law capable of binding the minority (*a*). The object of the section was not to enable some of the trustees to act without the concurrence of their co-trustees.

It will be observed that the powers of this section are exercisable by a sole acting trustee only in cases where a sole trustee is by the instrument, if any, creating the trust "authorized to execute the trusts and powers thereof," but by the 38th section, as to trusts created by instruments coming into operation after the 31st December, 1881, any trust or power vested in two or more trustees jointly, in the absence of a contrary intention in the instrument creating the trust or power, may be exercised or performed by the survivor for the time being, and it seems to follow that in the case of trusts falling within this section the powers of sect. 37 may be exercised by a sole surviving trustee.

This section has largely extended the powers of executors and trustees, and it would seem that in future the only question will be whether the executors or trustees have acted in good faith in relation to any of the matters authorized by the section.

[Discretion of executors.]

Independently of the section, executors have a discretion whether they will press a debtor for payment, and will not be held liable for wilful neglect or default if they have exercised their discretion honestly and fairly in giving time to a debtor although loss may result from the delay (*b*).]

Settlement with one residuary legatee.

47. Executors and trustees of a will when they have discharged the funeral and testamentary expenses, debts and legacies, may come to a final account with one of the residuary legatees separately, and if such residuary legatee be paid only what is his fair share at the time, he will not be made to account to the other residuary legatees, if the undistributed part afterwards become depreciated or lost (*c*).

Appropriation of residue.

48. Where the residue consists of a great variety of securities, the question arises whether the trustees in the absence of any special power can *virtute officii*, where infants are concerned, divide the residue by appropriating some securities to one residuary legatee and other securities to another, but so that the distribution is a fair one according to the market price of the

[(*a*) As to a majority binding a minority in charity trusts, see *ante*, pp. 595, 602; and see *post*, p. 672.]

[(*b*) *Re Owens*, 47 L. T. N.S. 61.]

(*c*) *Peterson* v. *Peterson*, 3 L. R. Eq. 111; [*Re Winslow*, 45 Ch. D. 249.]

day of the funds so appropriated. The *Court* can make such an apportionment, for in a suit guardians *ad litem* of the infants are appointed and are heard on their behalf to protect their interests; but out of Court where the voice of the infants cannot be heard, it would be unsafe for trustees to make such an apportionment on their own responsibility. However, where trustees are directed to invest the infants' share on any particular securities, they might accept securities of the nature prescribed at the market price, as the transaction when resolved would be the payment of so much money, and the investment of it by the trustees in the requisite securities. Where there are no special powers, the trustees should turn the whole of the irregular species of property into money and divide the proceeds.

Release of equity of redemption.

49. Trustees of an *equity of redemption* of lands mortgaged for more than their value, may, it is conceived, release the equity of redemption to the mortgagee, rather than be made defendants to a foreclosure suit, the cost of which, so far as incurred by themselves, would fall upon the trust estate.

Whether trustees mortgagees can release part of the land in mortgage.

50. Where trustees are *mortgagees* they are often requested to release part of the land from the security, in order to enable the mortgagor to deal with it for his own convenience. Where the value of the land is not excessive as compared with the debt, it would, of course, be a gross breach of trust to deteriorate the security. But suppose the value of the part left in mortgage to be (say) double the amount of the debt, may the trustees release the residue? It is presumed that trustees can never justify the abandonment of any part of the security on the mere ground of consulting the convenience of the mortgagor; and they must be prepared to show that the act was calculated under the circumstances to promote the interest of the *cestuis que trust.* But if the mortgagor be ready to pay off the mortgage on a transfer of the security, unless the trustees will consent to release, and the existing mortgage, even when confined to the narrower parcels, is a clearly beneficial one and the value still abundantly ample, the trustees would surely incur no responsibility by acceding to the arrangement (*a*). The prevailing opinion of conveyancers appears to be that where trustees have a power of investing on mortgage and of varying securities the transaction will be considered as tantamount to repayment of the

(*a*) See *Whitney* v. *Smith*, 4 L. R. Ch. App. 513; *Pell* v. *De Winton*, 2 De G. & J. 13. [But the prudent course, in this as in other similar cases, would be for the trustees to apply by originating summons for the direction of the Court.]

mortgage money, and reinvestment by the trustees on a mortgage of the hereditaments retained as a security, and that the purchaser of the released hereditaments is not bound to see to the sufficiency of the new security, or that the acceptance of the new security does not involve a breach of trust (*a*).

[Whether bound to consolidate mortgages.]

[51. It is conceived that although trustees holding independent securities from the same mortgagor may have the right to consolidate them, it is not imperative upon them to do so, but that they may deal with the securities independently, or allow one or more of them to be redeemed, without incurring any liability for loss which may arise from the subsequent depreciation in the other securities. They should, however, satisfy themselves before parting with any of the securities, or allowing any of them to be redeemed, that the margin of value on those which are retained is then sufficient to justify a present advance to the amount remaining due to the trustees upon such securities.]

Discharge of a mortgage on a settled estate.

52. Trustees of a settled estate with a power of sale and reinvestment may, it is conceived, sell part of the estate to pay off a mortgage affecting the estate though not mentioned in the settlement, for this in substance is a reinvestment, and *à fortiori* if the trustees have a power of investing on real securities until a purchase can be found, they can sell part of the estate and apply the proceeds in taking a transfer of the mortgage, provided it be an adequate security (*b*).

Sale of limited interests.

53. Trustees for sale of a limited interest in an estate (as a remainder), or of an aliquot part of the estate (as an undivided one-fourth), may concur with the other parties in a sale of the whole estate for one entire sum (*c*), and may agree afterwards as to the apportionment of the purchase money, and if the parties cannot agree the apportionment will be made by the Court (*d*). But otherwise, if there be not any intelligible principle upon which the apportionment can be made (*e*).

Reimbursement of expenses on account of the trust.

54. A trustee may reimburse himself a sum of money *bonâ fide* advanced by him for the benefit of the *cestui que trust*, or even for his own protection in the execution of his office. For, "As

(*a*) See Davidson's Preced. vol. ii. p. 285, 4th ed.; Dart's V. & P. vol. ii. p. 689, 6th ed.

[(*b*) As to the discharge of mortgages under the powers of the Settled Land Acts, see *ante*, p. 627.]

[(*c*) See now sect. 35 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41) as to trusts created by instruments coming into operation after the commencement of that Act.]

(*d*) *Clark* v. *Seymour*, 7 Sim. 67; *Rede* v. *Oakes*, 32 Beav. 555; see *Earl Powlett* v. *Hood*, 5 L. R. Eq. 115, and *ante*, p. .

(*e*) *Rede* v. *Oakes*, 32 Beav. 555; 10 Jur. N. S. 1246; *S. C.* 4 De G. J. & S. 505.

it is a rule," said Lord Chancellor King, "that the *cestui que trust* ought to save the trustee harmless, so within the reason of that rule, when the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from being liable for the whole money lent, or from a plain and great hazard of being so, he ought to be repaid" (*a*).

Power of trustees for sale to clear the estate.

55. A trustee for sale has been held to be justified in applying part of the purchase money in paying off a charge without satisfaction of which the purchaser refused to complete, and which the trustee was professionally advised was still subsisting, though the charge itself was open to doubt (*b*).

Power to grant leases.

56. A trustee of lands may grant a reasonable husbandry lease (*c*), in the fair management of the estate (*d*). But he has no power to demise where it is a simple trust, and the *cestui que trust* is in possession, except he do it with the *cestui que trust's* concurrence. And *primâ facie* a trustee for *sale* would not be justified in granting a lease (*e*). And though a trustee may grant a farming lease, it does not follow that he could grant a *mining lease*, for the latter is *pro tanto* a destruction of the *corpus* (*f*).

[Trustees having power to grant leases to "any person or persons" may lease to a limited company (*g*).

By sect. 43 of the Agricultural Holdings (England) Act, 1883 (*h*), when, by any instrument, a lease of a holding is authorized to be made, provided that the best rent or reservation in the nature of rent is reserved, on a lease to the tenant of the holding, it shall not be necessary, in estimating such rent or reservation, to take into account against the tenant the increase (if any) in the value of such holding arising from improvements made or paid for by him.]

Powers of directors, &c.

57. The managers of a trading company or partnership have no power, whatever the necessity of the case, to borrow money beyond the capital prescribed by the Act or deed of settlement,

(*a*) *Balsh* v. *Hyham*, 2 P. W. 453.

(*b*) *Forshaw* v. *Higginson*, 8 De G. & G. 827.

(*c*) See *Naylor* v. *Arnitt*, 1 R. & M. 501; [*Fitzpatrick* v. *Waring*, 11 L. R. Ir. 35;] *Bowes* v. *East London Waterworks Company*, Jac. 324; *Drohan* v. *Drohan*, 1 B. & B. 185; *Middleton* v. *Dodswell*, 13 Ves. 268; [and cf. *Ferraby* v. *Hobson*, 2 Phil. 255.] But see *contra*, *Wood* v. *Patteson*, 10 Beav. 541; *Re Shaw's Trust*, 12 L. R. Eq. 124.

(*d*) See *Attorney-General* v. *Owen*, 10 Ves. 560.

(*e*) *Evans* v. *Jackson*, 8 Sim. 217; and see *Micholls* v. *Corbett*, 34 Beav. 376.

(*f*) *Wood* v. *Patteson*, 10 Beav. 544.

[(*g*) *Re Jeffcock's Trusts*, 51 L. J. N.S. Ch. 507; as to the power of trustees to grant leases in Ireland to a sanitary authority, see 48 & 49 Vict. c. 77.]

[(*h*) 46 & 47 Vict. c. 61.]

so as to give the lenders a remedy against the company (*a*). And where, without any special authority being conferred by the deed of settlement, money is borrowed for launching or enlarging the concern, the managers (though made to pay upon their personal liability under the contract) have no remedy over against the other members of the company (*b*). But every business must be carried on at either a profit or loss, and as the members of the company take the profit, they must also bear the loss, and therefore if the managers incur debts or expenses by employing labour or ordering goods *in the ordinary course of business*, or borrow money and apply it to these purposes, they must be indemnified in equity by the other members of the company (*c*).

Trustees' shares.

58. Trustees of shares in an unlimited Banking Company have no power, unless specially authorized by their settlement, to accept *new shares* allotted to them though issued at a premium (*d*).

Enfranchisement of copyholds.

59. By 15 & 16 Vict. c. 51, s. 32, trustees of *copyholds* were empowered on *enfranchisement* to charge the expenses on the estate enfranchised, but this section was repealed by 21 & 22 Vict. c. 94, s. 2, and re-enacted in effect by the 21st section, which authorizes all persons enfranchising to charge the expenses with the consent of the commissioners on the estate. [Further powers are conferred by the Copyhold Act, 1887 (*e*), which provides, by sect. 39, that anything by the Copyhold Acts required or authorized to be done by the lord of a manor or the tenant or owner of any land or right may be done by such lord or tenant or owner notwithstanding that he may be a trustee for any person, and by sect. 40 that when either the lords or tenants are trustees, and one or more of such trustees shall be abroad or shall be incapable or refuse to act, any proceedings necessary to be done by such trustees for effecting any enfranchisement under the Acts may be done by the other trustee or trustees as the case may be.]

[Copyhold Act, 1887.]

Any enfranchisement of a trust estate should be made to the trustee who has the legal estate, and not to the *cestui que trust* (*f*).

(*a*) *Burmester* v. *Norris*, 6 Exch. 796; *Ricketts* v. *Bennett*, 4 C. B. 686; and see *Hawtayne* v. *Bourne*, 7 M. & W. 595; *Hawken* v. *Bourne*, 8 M. & W. 703.

(*b*) *Re Worcester Corn Exchange Company*, 3 De G. M. & G. 180; *Ex parte Chippendale*, 4 De G. M. & G. 43; see *Australian, &c., Company* v. *Mounsey*, 4 K. & J. 733.

(*c*) *Ex parte Chippendale*, 4 De G. M. & G. 19; *Troup's case*, 29 Beav. 353; *Hoare's case*, 30 Beav. 225; Brice on Ultra vires, 2nd ed. p. 776.

(*d*) *Sculthorpe* v. *Tipper*, 13 L. R. Eq. 232; [and see *Re Morris*, W. N. 1885, p. 31; 54 L. J. N.S. Ch. 388; 52 L. T. N.S. 462; 33 W. R. 445; and see *Re Pugh*, W. N. 1887, p. 143, where the Court approved the acceptance of the new shares by the trustees, but intimated the opinion that they ought to realize them as speedily as possible.]

[(*e*) 50 & 51 Vict. c. 73.]

(*f*) See *Minton* v. *Kirwood*, 3 L. R. Ch. App. 614.

[Enlarging long term into fee.]

[60. By the Conveyancing and Law of Property Act, 1881, trustees in receipt of the income in right of a long term, or having the term vested in them in trust for sale, may exercise the powers of the Act for enlargement of the term into a fee simple. The estate in fee simple so acquired is to be subject to all the same trusts, powers, executory limitations over, rights, and equities as the term would have been subject to if it had not been enlarged. But where such long leaseholds have been settled in trust by reference to freeholds so as to go along with them as far as the law permits, and at the time of the enlargement the ultimate beneficial interest in the term has not become absolutely and indefeasibly vested, the estate in fee simple is, without prejudice to any conveyance for value previously made, to be conveyed and settled, and devolve in the same manner as the freeholds (*a*).

[Compensation for agricultural improvements.]

61. By the Agricultural Holdings (England) Act, 1883 (*b*), a tenant who has made on his holding certain improvements specified in the schedule to the Act is entitled on quitting his holding at the determination of his tenancy to compensation from the landlord for such improvements to be ascertained as provided by the Act. But by sect. 31, where the landlord is a trustee, the amount of compensation is not to be recoverable from him personally, but is to be charged on and recoverable against the holding only. And by sect. 42, subject to certain provisions as to Crown, duchy, ecclesiastical, and charity lands, a landlord, whatever may be his estate or interest in his holding, may give any consent, make any agreement, or do or have done to him any act in relation to improvements, in respect of which compensation is payable under the Act, as if he were, in the case of an estate of inheritance owner thereof in fee, and in the case of a leasehold possessed of the whole estate in the leasehold. By the Extraordinary Tithe Redemption Act, 1886, a tenant for life of land subject to an extraordinary charge or a rent-charge under the Act may borrow any money required for redemption thereof, or may charge the inheritance with repayment of the money so borrowed with interest (*c*).]

Powers of majority of trustees.

62. The general powers allowed to trustees must in a private trust be exercised by all the trustees as a *joint body*, but in *charitable* or *public* trusts the voice of the *majority* will bind the rest, and in certain cases the majority can give effect to their resolu-

[(*a*) 44 & 45 Vict. c. 41, s. 65; and see 45 & 46 Vict. c. 39, s. 11.]

[(*b*) 46 & 47 Vict. c. 61.]

[(*c*) 49 & 50 Vict. c. 54, s. 6 (2).]

tion by passing the legal estate under a statutory power (*a*), but of course in the absence of express statutory authority a majority of trustees cannot pass the legal estate (*b*).

Case of suit instituted and a decree made.

63. The powers assigned in the preceding pages to trustees must be taken subject to the qualification, that, if a *suit* has been instituted, *and a decree made*, for the execution of the trust, the powers of the trustees are henceforth so far paralyzed that the authority of the Court must sanction every subsequent proceeding (*c*). Thus the trustees cannot commence or defend any action or suit, or interfere in any other legal proceeding, without first consulting the Court as to the propriety of so doing (*d*): a trustee for sale cannot sell (*e*): the committee of a lunatic cannot make repairs (*f*): an executor cannot pay debts (*g*), or deal with the assets for the purpose of investment (*h*). But an executor as to a chattel, not the subject of the suit *specifically*, can after decree give a good title to a *bonâ fide* purchaser not having actual notice of the *lis pendens* (*i*), and it is presumed that he can equally, where there is no receiver appointed, sign a valid receipt for any part of the testator's personal estate (*j*). [And where an administration action has been heard on further consideration, and no subsequent further consideration has been reserved, but general liberty to apply has been given, trustees may exercise their powers without obtaining the sanction of the Court (*k*).]

Case of suit and no decree.

64. An action in which a *writ* merely has been issued is distinguishable from one in which a *decree* has been made, for until decree the plaintiff may dismiss his action at any moment, and should he do so, the progress of the trust may have been arrested

(*a*) See *supra*, pp. 595, 602.

[(*b*) See *Re Ebsworth and Tidy's Contract*, 42 Ch. Div. 23.]

(*c*) *Mitchelson* v. *Piper*, 8 Sim. 64; *Shewen* v. *Vanderhorst*, 2 R. & M. 75; *S. C.* affirmed, 1 R. & M. 347; *Minors* v. *Battison*, 1 App. Cas. 428.

(*d*) See *Jones* v. *Powell*, 4 Beav. 96. The Court is sometimes reluctant to give leave to institute or defend a suit, but holds out that if the trustee or executor acts *bonâ fide* the Court will protect him. The reason for this disinclination no doubt is that the application to the Court is *ex parte*, and is sometimes made a vehicle for multiplying costs. However, the Court frequently gives such leave, and a trustee or executor cannot be advised to commence or defend a suit without, at least, submitting the case to the Court, though no order may be made.

(*e*) *Walker* v. *Smalwood*, Amb. 676; *Annesley* v. *Ashurst*, 3 P. W. 282.

(*f*) *Anon. case*, 10 Ves. 104.

(*g*) *Mitchelson* v. *Piper*, 8 Sim. 64; *King* v. *Roe*, L. J. May, 27, 1858; *Irby* v. *Irby*, 24 Beav. 525; and see *Jackson* v. *Woolley*, 12 Sim. 13.

(*h*) *Widdowson* v. *Duck*, 3 Mer. 494; *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

(*i*) *Berry* v. *Gibbons*, 8 L. R. Ch. App. 747.

[(*j*) And see *post*, p. 695.]

[(*k*) *Re Mansel*, 54 L. J. N.S. Ch. 883; 52 L. T. N.S. 806; 33 W. R. 727.]

for no purpose (*a*). However, even in this case the trustees cannot be advised to act without first consulting the Court, and if by acting independently of the Court expenses be incurred which might have been avoided had the trustees applied to the Court, they may be made to bear them personally (*b*).

Duties of executor after institution of suit.

65. Even after a *decree* made the trustee is not absolved from the duties imposed by his office. Thus after a decree in an administration suit an executor was held liable for having allowed a policy of insurance to drop without any sufficient reason (*c*).

SECTION II.

THE SPECIAL POWERS OF TRUSTEES.

Upon this branch of our subject we shall consider, *First*, The different kinds of powers; *Secondly*, The construction of powers; *Thirdly*, The effect of disclaimer, assignment of the estate, and survivorship among the trustees: *Fourthly*, The control of the Court over the exercise of powers: [and *Fifthly*, The restrictions on the powers of trustees imposed by the Settled Land Acts.]

I. Of the different kinds of powers.

Powers legal and equitable distinguished.

1. In applying the doctrine of powers to the subject of trusts it may be useful to regard powers as either *legal* or *equitable:* the former, such as operate upon the legal estate, and so are matter of cognizance in Courts of common law; the latter, such as affect the equitable interest only, and so fall exclusively under the notice of Courts of equity. Thus, if lands be limited to the use of A. for life, remainder to B. and his heirs, and a power operating under the Statute of Uses be given to C., the execution of the power works a conveyance of the legal estate; but if lands be limited to the use of A. and his heirs upon trust for B. for life, and after his death for C. and his heirs, and a power not operating under the Statute of Uses be given either to the trustee or to the *cestui que trust*, the execution of such a power will have no effect at law, but will merely serve to transfer the beneficial interest in equity, and may therefore be designated by the name of an equitable power.

(*a*) *Cafe* v. *Bent*, 3 Hare, 249; *Neeves* v. *Burrage*, 14 Q. B. 504.

(*b*) *Attorney-General* v. *Clack*, 1 Beav. 467; and see *Cafe* v. *Bent*, 3 Hare, 249.

(*c*) *Garner* v. *Moore*, 3 Drew. 277.

Equitable powers, whether annexed to the estate or simply collateral.

2. An *equitable*, the same as a legal power, may be either annexed to the estate or be simply collateral; but whether it shall be taken as the one or the other will depend on the question, whether the donee of the power be possessed of the *equitable*, that is, of the *beneficial* interest or not. Thus, where a testator devised an estate to his *sister* and her heirs for ever, upon trust to settle it on such of the descendants of the testator's mother as his *sister* should think fit, [with a direction whereby in effect the appointment was not to take place until the sister's death or the previous determination of her life interest,] and the devisee having married, the question was raised whether the execution of the power by her, as she was under coverture at the time, was to be considered as valid, Lord Hardwicke held that this was a power *without an interest, i.e.* without any beneficial interest, and could therefore be executed by the *feme covert* (*a*). On the other hand, where the legal estate was devised to *trustees* in fee upon trust for an infant *feme covert* for her sole and separate use during her life, and upon trust to permit her by deed or writing executed in the presence of three or more witnesses, notwithstanding her coverture, to dispose of the estate as she should think fit, and the testator died leaving the *feme covert* his heir-at-law, and she, during the continuance of the coverture and infancy, exercised the power by will, Lord Hardwicke, upon the question whether the power had been duly executed, observed, that this was a power *coupled with an interest*, which was always considered different from naked powers: it was admitted that if this execution was to operate on the estate of the infant it might not be good: now this was clearly so, for she had the trust in equity for life, with the trust of the inheritance in her in the meantime, so that this was directly a power over *her own inheritance*, which could not be executed by an infant (*b*).

[Exercise of powers by infant.]

[3. In the case of personal estate, however, an infant may exercise a power in gross. Thus, where under a marriage settlement an infant *feme covert*, to whom the income of the settled property was given for her life for her separate use, had, in the events which happened, a general power limited to her of appointing the trust funds, after her death and subject to the interest of her husband, by deed or will, and she exercised the power by deed, and died an infant, it was held by the late M.R. and affirmed by the Court of

(*a*) *Godolphin* v. *Godolphin*, 1 Ves. 21; Belts' Supplement, p. 22.

(*b*) *Hearle* v. *Greenbank*, 1 Ves. 298; see 306; and see *Blithe's case*, Freem. 91; *Penne* v. *Peacock*, For. 43.

Appeal, *dissentiente* Cotton, L.J., that the power was well exercised, and the M.R. observed, "If it is clearly settled that the first class of powers—powers simply collateral—can be exercised by an infant, there can be no reason why the second class of powers—powers in gross—should not be so exercised when the exercise cannot affect the infant's interest; I can see no sufficient distinction between the two cases. It can make no difference that the infant has some interest under the settlement, so long as that interest cannot be affected by the exercise of the power" (*a*).]

Bare powers, and powers coupled with a trust.

4. Again, powers, in the sense in which the term is commonly used, may be distributed into *mere powers*, and *powers coupled with a trust* (*b*). The former are powers in the proper sense of the word; that is, *not imperative*, but purely *arbitrary;* powers which the trustee cannot be compelled to execute, and which, on failure of the trustee, cannot be executed vicariously by the Court (*c*). The latter, on the other hand, are *not arbitrary*, but *imperative*, have all the nature and substance of a trust, and ought rather, as Lord Hardwicke observed, to be designated by the name of trusts (*d*). "It is perfectly clear," said Lord Eldon, "that where there is a *mere power*, and that power is not executed, the Court cannot execute it. It is equally clear, that wherever a *trust* is created, and the execution of the trust fails by the death of the trustee or by accident, this Court will execute the trust. But there are not only *a mere trust* and a *mere power*, but there is also known to this Court a *power which the party by whom it is given is intrusted and required to execute;* and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has the duty imposed upon him does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place" (*e*).

Strict powers, and powers directory.

5. Again, powers have been dealt with by the Court as either of a *strict* or of a *directory* character: the former such as only arise under the exact circumstances prescribed by the settlement; the latter such as being merely monitory may be taken with a degree of latitude. Thus, where an advowson was vested in trustees upon

[(*a*) *Re D'Angibau*, 15 Ch. Div. 228; and see *ante*, p. 36.]

(*b*) See *Gower* v. *Mainwaring*, 2 Ves. 89; *Cole* v. *Wade*, 16 Ves. 43; *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. Rep. 332.

(*c*) See *Cowper* v. *Mantell*, 22 Beav. 231, and cases there cited; and *Re Eddowes*, 1 Dr. & Sm. 395.

(*d*) *Godolphin* v. *Godolphin*, 1 Ves. 23.

(*e*) *Brown* v. *Higgs*, 8 Ves. 570.

trust to elect and present a fit person *within six months* from the incumbent's decease, it was considered that the clause was *directory*, and that the trustees might equally elect and present, although that period had elapsed (*a*). So, where six trustees were empowered *when reduced to three* to substitute others, and all died but one, it was held competent to the sole survivor to fill up the number (*b*). And where in the case of twenty-five trustees, the direction was, that *when reduced to fifteen* the survivors should nominate, it was determined by the Court that, although seventeen remained, the survivors were at *liberty* to exercise their power, but that, when reduced to only fifteen, they were *compellable* to do so (*c*).

Charity.

6. These were cases of *charitable* trusts, in which it seems a greater latitude of construction is allowed. But in another case, where the trusts were not charitable, and estates were devised to trustees upon trust to sell "with all convenient speed, and within *five years* after the testator's decease," it was held that these words were directory only, and that the trustees could sell and make a good title, although the five years had expired (*d*).

II. We proceed to consider the *construction* of powers. As the powers of trustees are regulated by the doctrines applicable to powers in general, and as the admirable treatise of Lord St. Leonards is in every one's hands, we shall advert only to some cases of most frequent occurrence.

Power to "A. and B., and their heirs."

1. If a power be given to "A. and B. and *their heirs*," it is perfectly clear, that, although the limitation of an *estate* in such terms would so vest it in the grantees that they might convey it to a stranger, and the survivor devise it, the power is not to be construed as intended in like manner to be assignable and devisable (*e*).

Chief Justice Wilmot's opinion.

Upon the subject of such a power where it was given *personally*, and unaccompanied by any estate, to A. and B. and their heirs, Lord Chief Justice Wilmot observed, "It is asked What must become of the power upon the death of one of the trustees? It must be considered as a tenancy in common. Had the words

(*a*) *Attorney-General* v. *Scott*, 1 Ves. 413, see 415.

(*b*) *Attorney-General* v. *Floyer*, 2 Vern. 748; and see *Attorney-General* v. *Bishop of Lichfield*, 5 Ves. 825; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 139; but see *Foley* v. *Wontner*, 2 J. & W. 245.

(*c*) *Doe* v. *Roe*, 1 Anst. 86.

(*d*) *Pearce* v. *Gardner*, 10 Hare, 287; and see *Cuff* v. *Hall*, 1 Jur. N. S. 973.

(*e*) *Cole* v. *Wade*, 16 Ves. 46, *per* Sir W. Grant.

been 'their several and respective heirs,' it would have been clear; and in common parlance, and according to the common apprehension of mankind, when an estate is given to two men and their heirs, no one not illumined with the legal nature of joint-tenancy could ever conceive the estate was to go to the heirs of the survivor. It is equivalent to saying, *With consent of both while they live; and when one dies, that consent shall devolve upon his heir; the heir of the dead trustee shall consent as well as the surviving trustee. One may abuse the power; I will supply the loss of one by his heir, and the loss of both by the heirs of both*" (*a*).

Mere power.

But this was where A. and B. had a mere power, for where A. and B. are trustees of an estate limited to them and their heirs, and the power constitutes an essential part of the trust, it will pass with the estate to the survivor (*b*).

Townsend *v.* Wilson.

In *Townsend* v. *Wilson* (*c*) a power of sale was given to *three trustees* to preserve contingent remainders *and their heirs;* and it was directed that the money to arise from the sale should be paid into the hands of the trustees *or the survivors or survivor of them,* and the executors, administrators, or assigns of such survivor, and there was a *power of appointment of new trustees,* with a direction that such appointment should take place as often as any one or more of the trustees should die, &c. One of the trustees died, and it was determined by the Court of Queen's Bench, that the *survivors* alone were incapable of exercising the power of sale. Lord Eldon was dissatisfied with this decision, and asked, "Did the Court of Queen's Bench consider that the two surviving trustees and *the heir of the deceased trustee,* were to act together? for it was one thing to say that the survivors could not act *until another was appointed;* and a different thing to say, the *heir* of the deceased trustee could act in the meantime" (*d*). But his Lordship so far bowed to the authority of the decision, that he refused under similar circumstances to compel a purchaser to accept the title (*e*). In *Townsend* v. *Wilson* the trustees had not the *fee,* and the power was not to be executed as part of a trusteeship, and it is therefore no authority against the execution of a *trust* by the surviving trustees. Indeed, where an estate was devised to three trustees and their *respective* heirs, upon trust that they and their *respective* heirs

Execution of trust by surviving trustees.

(*a*) *Mansell* v. *Vaughan*, Wilm. 50, 51.

(*b*) See *infra*, p. 688.

(*c*) 1 B. & Ald. 608, 3 Mad. 261; and see *Cook* v. *Crawford*, 13 Sim. 91.

(*d*) *Hall* v. *Dewes*, Jac. 193; and see *Jones* v. *Price*, 11 Sim. 557.

(*e*) *Hall* v. *Dewes*, Jac. 189.

should sell, the word "respective" was rejected for surplusage, and it was held that the survivors could make a title (*a*).

Hewett *v.* Hewett.

2. In *Hewett* v. *Hewett* (*b*), a testator devised his estate to four persons to uses in strict settlement, with a power to the tenants for life, when in actual possession, to cut such trees as the *four devisees to uses, or the survivors or survivor of them* (omitting the words "and the heirs of the survivor") should direct; and all the trustees being dead, the question was whether the power was gone. Lord Henley held, that, upon the construction of the will, the testator intended the power to be co-extensive with the life estates, and that the trustees were interposed as supervisors only to prevent destruction; and that the office of the trustees was not personal, but such as might be executed by the Court. He, therefore, considered the power as subsisting, and referred it to the Master to inquire what timber was fit to be cut. The Court, therefore, did not regard the authority to the trustees as a mere power, but as a trust.

Power co-extensive with life estate.

Power to "trustee and his assigns."

3. Where a discretionary *legal power* is expressly limited to "A. and his *assigns*," the grantee or devisee of A., and even a claimant under him by operation of law as an heir or executor, may exercise the power (*c*); but in a *trust*, if an estate be vested in a trustee upon trust that he, his heirs, executors, administrators or *assigns* shall sell, *etc.*, the introduction of the word *assigns* will not authorize the trustee to assign the estate to a stranger (*d*), nor, if the assignment be made, will the stranger be capable of exercising the power (*e*).

Power given to a mortgagee.

4. In a *mortgage*, with a power of sale limited to the mortgagee, his heirs, executors, administrators, *and assigns*, the intention is that the power should go along with, and be annexed to, the security; and therefore, if the mortgage be assigned to a stranger, and the legal estate be conveyed to the stranger or to a trustee for him, the stranger, alone or with the concurrence of the trustee, can give a good legal and equitable title (*f*); and even if a mortgage be made to A. and B. to secure a *joint* advance and the power of sale and signing receipts be limited to A. and B., *their heirs and assigns*, it has been held that as the power

(*a*) *Jones* v. *Price*, 11 Sim. 557.

(*b*) 2 Eden, 332, Amb. 508; and see *Bennett* v. *Wyndham*, 22 Beav. 528.

(*c*) *How* v. *Whitfield*, 1 Vent. 338, 339; 1 Freem. 476.

(*d*) The case of *Hardwick* v. *Mynd*, 1 Anst. 109, cannot in this respect be supported.

(*e*) See p. 684.

(*f*) *Saloway* v. *Strawbridge*, 1 K. & J. 371; 7 De G. M. & G. 594.

and the security were plainly meant to be coupled together, and the security enures to the benefit of the survivor (the advance being a joint one), the survivor may also sell (*a*).

Power indicating personal confidence to "A. and his executors."

5. If a *power* indicating personal confidence be given to a "trustee and his *executors*," and the executor of the trustee dies having appointed an executor, the latter executor, though by law the executor not only of his immediate testator but also of the trustee, will not, it is said, be so considered for the purposes of the power (*b*); for a matter of personal confidence is not to be extended beyond the express words and clear intention of the settlor; and in this case, the settlor may have meant the power to be exercised exclusively by the executors, whom the trustee had himself named, and not by a person who is executor of the trustee by operation of law only. This, however, is a narrow construction, and the liberality of modern times may not improbably hold that, if a power be given to executors, the settlor must be taken to have contemplated generally every one whom the law invests with that character.

Power to "executors" "trustees."

6. A power limited to "executors" or "sons in law" may be exercised by the survivors so long as the plural number remains (*c*), and if a power be limited to a number of "trustees," we may reasonably conclude that, whether they have any estate or not—*i.e.* whether the power be an adjunct to the trust or collateral to it, it may be exercised by the surviving trustees. And a power given to "executors" will, if annexed to the executorship, be continued to the single survivor (*d*); and so a power given to "trustees" will, as annexed to the estate and office, be exercisable by the single survivor (*e*); but it cannot be exercised by one trustee in the lifetime of the other who has not effectually disclaimed (*f*). And it has been said that if a power to vary the rights of parties be communicated to the "*trustees for the time being*," it cannot be exercised by a single trustee (*g*). And where there was a trust for sale, but no sale was to be made without the consent of the testator's *sons and daughters*, and he left seven sons and daughters, and one died,

(*a*) *Hind* v. *Poole*, 1 K. & J. 383.

(*b*) See *Cole* v. *Wade*, 16 Ves. 44; *Stile* v. *Tomson*, Dyer, 210, a; Perk. sect. 552; Moore, 61, pl. 172; Sugd. Powers, 129, 8th ed.

(*c*) Sugd. Powers, 128, 8th ed.

(*d*) Sugd. Powers, 128, 8th ed.; *Houell* v. *Barnes*, Cro. Car. 382; *Brassey* v. *Chalmers*, 4 De G. M. & G. 528, reversing the decision of the Master of the Rolls, 16 Beav. 231.

(*e*) *Lane* v. *Debenham*, 11 Hare, 188.

(*f*) *Lancashire* v. *Lancashire*, 2 Ph. 664.

(*g*) *Lancashire* v. *Lancashire*, 2 Ph. 664.

it was held that a sale with the consent of the survivors was too doubtful a title to be specifically enforced (*a*).

Power to "trustees and survivors."

7. A discretionary power to four trustees "and the *survivors* of them" cannot, it seems, be executed by the last survivor (*b*); for though a power to trustees may, in general, be held to survive, an intention to the contrary may be fairly inferred: the settlor may be supposed to have said, "I repose a confidence in any two of the trustees jointly, but in neither one of them individually." But if a power be limited to four trustees "and the *survivor* of them," it may well be argued that, on the death of one, the power may still be exercised by the survivors; for there can be no valid reason why a person who trusted the four jointly, and each of them individually, should refuse to repose a confidence in the survivors for the time being (*c*).

To "trustees and survivor."

Trower *v.* Knightley.

8. In a case before Sir J. Leach, a testator devised an estate to trustees upon trust as to one moiety for A. for life, remainder to her children at twenty-one, and as to the other moiety for B. for life, remainder to her children at twenty-one, and gave the trustees a power of sale "*during the continuance of the trust.*" A. died, and her children attained twenty-one, and the question was whether the trustees could, under the power, sell the whole estate, the children of B. being infants. The Vice-Chancellor held, that if the children of A. could call for a present conveyance of their moiety it would have the effect of depriving B. and her children of the benefit of the power of sale, and also of the leasing power given to the trustees, for that an undivided moiety could not advantageously be sold or leased, and that the testator must have meant to continue the powers of ownership to the trustees until there were owners competent to deal with the whole estate (*d*).

Power "during the continuance of the trust."

9. But if a power be given to trustees to be exercised "during the continuance of the trust," it cannot be exercised after the time when the trust *ought* to have been completed, though, from the delay of the trustees, it happens that the trust has not in fact been executed (*e*).

(*a*) *Sykes* v. *Sheard*, 2 De G. J. & S. 6.

(*b*) *Hibbard* v. *Lamb*, Amb. 309. Note, further directions were declared necessary on the death of *either* of the surviving executors, see *Eaton* v. *Smith*, 2 Beav. 236.

(*c*) See *Crewe* v. *Dicken*, 4 Ves. 97; in which case it seems to have been assumed that the receipt of the survivors would be a sufficient discharge; [and see *Delany* v. *Delany*, 15 L. R. Ir. 55.]

(*d*) *Trower* v. *Knightley*, 6 Mad. 134; and see *Taite* v. *Swinstead*, 26 Beav. 525.

(*e*) *Wood* v. *White*, 2 Keen, 664. It was determined on appeal that the trusts in this case were still in being, 4 M. & Cr. 460.

Powers cease when settlement is at an end.

10. And though the power be not confined expressly to the continuance of the trust, yet the power is gone when the objects of the trust have been fully exhausted, but not before (*a*).

[But the mere fact of the beneficial interest in the property having become vested in persons, all of whom are *sui juris*, will not put an end to the power, if, on the construction of the instrument creating the power, the intention appears that it should still be exercisable, and the power in its creation was not obnoxious to the rule against perpetuities (*b*).

[Within what time power must be exercised.]

If a power of sale be given in general terms, the question arises, within what limit of time it must be exercised. This will depend on the nature of the limitations contained in the will or settlement; for when, by reason of the expiration or cesser of the limitations, the absolute interests come into existence, the power is considered to be at an end. And as, for the settlement to be valid, the limitations must become absolute within the period allowed by the rule against perpetuities, a power which is to continue in existence until the interests are absolute will also be valid. And where the settlement contains in the first instance absolute limitations of interest, a power of sale given for the purpose of division among the beneficiaries will not be invalid, but it must be exercised within a reasonable time (*c*).]

[Power for purpose of division.]

Joint powers.

11. Powers given to trustees must be exercised by them jointly, but an act by one trustee, with the sanction and approval of a co-trustee, will be deemed the act of both (*d*).

[Contract for lease by tenant for life carried out by trustees.]

[12. Where a power of leasing was given to a legal tenant for life, and after his death to trustees, during the minority of a legal tenant in tail, and the tenant for life entered into a contract to grant a building lease but died before the lease was granted, it was held that the trustees had power to effectuate the contract of the tenant for life by executing a lease (*e*).]

Moral considerations.

13. Trustees in the exercise of their powers must act *bonâ fide* and impartially for the benefit of their *cestuis que trust*—*i.e.* the

(*a*) *Wolley* v. *Jenkins*, 23 Beav. 53; *Mortlock* v. *Buller*, 10 Ves. 315; *Wheate* v. *Hall*, 17 Ves. 86; *Lantsbery* v. *Collier*, 2 K. & J. 709.

[(*b*) *Re Cotton's Trustees and the School Board for London*, 19 Ch. D. 624.]

[(*c*) *Per* Jessel, M.R., *Peters* v. *Lewes and East Grinstead Railway Company*, 18 Ch. Div. 429 (but see *S. C.* 16 Ch. D. 703); *Re Tweedie and Miles*, 27 Ch. D. 318.]

(*d*) *Messeena* v. *Carr*, 9 L. R. Eq. 260.

[(*e*) *Davis* v. *Harford*, 22 Ch. D. 128; and a succeeding tenant for life can make any conveyance which is necessary for giving effect to a contract validly made by his predecessor, Settled Land Act, 1890, sect. 6; and as to the exercise of powers by trustees where the tenant for life is an infant, see Settled Land Act, 1882, sect. 60.]

persons claiming under the settlement, and must not deviate from the terms of the trust from moral considerations, or seek to do what they may think right, if in excess of their trust (*a*).

III. Of the effect of *disclaimer, assignment* and *survivorship* of the estate.

First. Of disclaimer.

Effect of disclaimer upon powers.

1. If a power be given to several trustees, and one of them *disclaims* [the trust], the power may be exercised by the continuing trustees or trustee (*b*).

In *Hawkins* v. *Kemp* (*c*), a purchaser at first objected that the accepting trustees could not exercise the power, or not without the appointment of a new trustee in the place of the trustee who had disclaimed, but the point was afterwards abandoned by the purchaser's counsel as untenable. And the late Vice-Chancellor of England, in a subsequent case, observed: "I have always understood, ever since the point was decided in *Hawkins* v. *Kemp*, or rather was, as the judges said in that case, properly abandoned by the defendant's counsel as not capable of being contended for, that where two or more persons are appointed trustees, and all of them, except one, renounce, the trust may be executed by that one" (*d*).

Adams v. Taunton.

Adams v. *Taunton* (*e*) is a direct decision by Sir J. Leach to the same effect. A testator had devised his estates to A. and B. upon trust to sell and apply the proceeds amongst his children, and declared that the receipts of the said A. and B. should be sufficient discharges. A. renounced, and Sir J. Leach, after having taken time to consult the authorities, said, "It being now settled that a devise to A., B., and C. upon trust is a good devise to such of the three as accept the trust, it follows by necessary construction that by the receipt of the trustees is to be intended the receipt of those who accept the trust" (*f*).

Powers to "trustees" or "executors."

2. If the power be not given to the trustees by *name*, but to the "trustees" or "executors;" it is *clear, à fortiori*, that if

(*a*) *Ellis* v. *Barker*, 7 L. R. Ch. App. 104.

(*b*) Jenk. 44; *Crewe* v. *Dicken*, 4 Ves. 97; *Earl Granville* v. *McNeile*, 7 Hare, 156; *White* v. *M'Dermott*, 7 I. R. C. L. 1.

(*c*) 3 East, 410.

(*d*) *Cooke* v. *Crawford*, 13 Sim. 96.

(*e*) 5 Mad. 435; and see *Bayly* v. *Cumming*, 10 Ir. Eq. Rep. 410; *Cooke* v. *Crawford*, 13 Sim. 96; *Sands* v. *Nugee*, 8 Sim. 130.

(*f*) From his Honour's words, "the receipts of the trustees," it might be thought the power had been given, not to A. and B. by name, but to "the trustees:" the R. L. has been consulted, and it appears, as stated in the report, that the power was given to "the said A. and B."

one disclaim the acting trustees or executors may exercise the power (*a*).

[Disclaimer of power under Conveyancing Act.]

[3. By the Conveyancing Act, 1882, sect. 6, which applies to powers created by instruments coming into operation either before or after the commencement of the Act, "a person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power; and after disclaimer shall not be capable of exercising or joining in the exercise of the power. On such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power" (*b*). But this section does not authorize a trustee to disclaim a particular power so as to vest the exercise of it in his co-trustees while he continues a trustee for other purposes (*c*).

[Renunciation.]

4. It has been held in Ireland that the renunciation by one executor, by an instrument under seal, of the office of executor operates as a disclaimer under this section of powers annexed to the executorship (*d*).]

Secondly, Of assignment.

Effect of assignment of the estate.

1. The *power* is not appendant to the *estate*, so as to follow along with it in every transfer by the trustee, or devolution by course of law (*e*). But where the estate is duly transferred to persons regularly appointed trustees under a power in the settlement creating the trust, the transferees take the estate and the office together, and can exercise the power. Where the settlement contains no such power, it seems that the appointment of new trustees by the Court would not, but for recent Acts, communicate arbitrary or special discretionary powers (*f*), unless

(*a*) *Worthington* v. *Evans*, 1 S. & S. 165; *Boyce* v. *Corbally*, Ll. & G. *t.* Plunket, 102; and see *Clarke* v. *Parker*, 19 Ves. 1; *White* v. *M'Dermott*, 7 I. R. C. L. 1; [*Delany* v. *Delany*, 15 L. R. Ir. 55; *Crawford* v. *Forshaw*, (1891) 2 Ch. (C. A.) 261.]

[(*b*) 45 & 46 Vict. c. 39, s. 6.]

[(*c*) See *Re Eyre*, 49 L. T. N.S. 259.]

[(*d*) *Re Fisher and Haslett*, 13 L. R. Ir. 546. A renunciation by an executor was held by Kekewich, J., not to preclude such executor from exercising a power of selection or distribution conferred on "my executors herein named," *Crawford* v. *Forshaw*, 43 Ch. D. 643; but this decision was reversed on appeal on the ground that on the true construction of the will the power was given to the executors in their official capacity, (1891) 2 Ch. 261.]

(*e*) *Cole* v. *Wade*, 16 Ves. 47, *per* Sir W. Grant; *Crewe* v. *Dicken*, 4 Ves. 97; *Re Burtt's Estate*, 1 Drew. 319; *Wilson* v. *Bennett*, 5 De G. & Sm. 475. The case of *Hardwick* v. *Mynd*, 1 Anst. 109, is an anomaly.

(*f*) *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 194; *Fordyce* v. *Bridges*, 2 Ph. 497, see 510; *Newman* v. *Warner*, 1 Sim. N.S. 457; *Cooper* v. *Macdonald*, 35 Beav. 504; and see *Cole* v. *Wade*, 16 Ves. 44, 47; *Hibbard* v. *Lamb*, Amb. 309.

they were expressly (*a*) or in fair construction limited to the trustees for the time being (*b*). If powers be given to trustees, their heirs, executors, administrators, and *assigns*, and the Court appoints new trustees and makes a vesting order, the new trustees are duly constituted assigns, and may therefore be justly considered within the purview of the settlement. But assigns from a trustee *mero motu*, and without competent authority, would not be so considered.

[2. By a recent enactment every trustee appointed by any Court of competent jurisdiction has as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, the same powers, authorities, and discretions, and may in all respects act as if he had been originally nominated a trustee by the instrument creating the trust; and this enactment applies to appointments made either before or after the commencement of the Act (*c*).] [44 & 45 Vict. c. 41, s. 33.]

Release with intention of disclaiming.

3. We have seen that if one trustee *disclaims* in the strict sense of the word, the power will not be extinguished, but will survive to the co-trustee; but, according to the old doctrine, if a trustee instead of *disclaiming* had *assigned* the estate, that was a virtual acceptance of the trust, and then the conveyance of the retiring trustee did not pass the power into the hands of the continuing trustee (*d*); but at the present day it seems a release with the intention of disclaimer would have all the operation of a formal and actual disclaimer (*e*).

Whether the power will remain in the trustee after alienation of the estate.

4. Though an assignment of the *estate* will not carry the *power* to the assignee, it does not follow that the power will remain in the assignor, so as to be transmissible to his representative; for where it was the settlor's intention that the *estate and power should be coupled together*, the trustee, by severing the union through the alienation of the estate, may intercept the execution of the power by the representative. Thus [where, prior to the Conveyancing and Law of Property Act, 1881, an estate was] limited to A. and his heirs upon a trust to be executed by A. and his *heirs*, and A. in his lifetime conveyed away the estate, or devised it by his will, it was held

(*a*) *Bartley* v. *Bartley*, 3 Drew. 384; *Brassey* v. *Chalmers*, 4 De G. M. & G. 528.

(*b*) *Byam* v. *Byam*, 19 Beav. 66.

[(*c*) 44 & 45 Vict. c. 41, s. 33. This section takes the place of the corresponding section in Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 27, which was repealed by 44 & 45 Vict. c. 41.]

(*d*) *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 194; *Crewe* v. *Dicken*, 4 Ves. 97.

(*e*) *Supra*, p. 207.

that the heir of A. could not execute the power (*a*); for the heir was no heir *quatenus* this estate; for it was not allowed to *descend*, but was aliened or devised away from the person who would have been heir; [and the same principle equally applies to a case falling under the recent Act (*b*), where if the estate be conveyed away by the trustee in his lifetime, so as not to vest in his personal representative, such representative cannot execute the power.]

Case of real and personal estate coupled together.

5. In *Cole* v. *Wade* (*c*), a testator gave the residue of his real and personal estate to Ruddle and Wade (whom he appointed his executors), their executors, administrators, and assigns, and directed *his said trustees and executors*, after making certain payments thereout, to convey and dispose of the said residue of his real and personal estate unto and amongst such of his relations and kindred in such proportions, manner and form, as *his said executors* should think proper, his intention being that everything relating to that disposition should be entirely at the discretion of the said *trustees and executors, and the heirs, executors and administrators of the survivor of them* (*d*). Wade, the survivor, devised and bequeathed the real and personal estate of the testator to William and Edward Bray, their heirs, executors, administrators and assigns, upon the trusts of the will, and named them his executors for that specific purpose only, appointing his wife and another person executors as to his own estates. The question was discussed, whether William and Edward Bray could exercise the power of distribution among the relations. Sir W. Grant said, "The original trustees and executors were the same persons; all the real and personal estate was vested equally in them; but the heirs and executors of the surviving trustee might be different persons; yet all the directions about the distribution of the residue proceed upon the supposition that the same persons are to select the objects and settle the proportions in which they are to take; but if the real estate is to go to one, and the personal estate to another, the testator has left it entirely uncertain how the power is to be executed. Whether the Messrs. Bray can in any sense be the executors of Wade, with whose own property they are not to intermeddle, it is not material to determine." His Honour, therefore, decided that the power had become extinguished.

(*a*) *Wilson* v. *Bennett*, 5 De G. & Sm. 475; and see *Re Burtt's Estate*, 1 Drew. 319.

[(*b*) 44 & 45 Vict. c. 41, s. 30.]

(*c*) 16 Ves. 27.

(*d*) The testator used this last form of expression elsewhere in the will.

6. But the existence of a power annexed to a trust and forming an integral part of it does not depend on the continuance of the legal estate *per se* in the donee of the power, where there is no express declaration to the contrary; as, where a testator gave a sum of money to be invested in the funds in the names of the head of a college at Oxford, the junior bailiff of the city, and the elder churchwarden of a parish, the dividends to be applied to certain purposes as the trustees should approve, and the bailiff and churchwarden being *annual* officers, the investment as directed by the will would have been accompanied with frequent transfers of the stock, the Court ordered that the money should be invested in the names of two new trustees jointly with the head of the college, but that the objects of the charity should be nominated and approved in the manner pointed out by the will (*a*). The estate may be severed from the powers.

[7. By the Conveyancing and Law of Property Act, 1881, "a person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise the power;" and that, whether the power was created by an instrument coming into operation before or after the commencement of the Act (*b*). But it has been held that this does not apply to a power coupled with a duty; as to which Kay, J., observed, "a trustee who has a power coupled with a duty is bound, so long as he remains a trustee, to preserve that power, and to exercise his discretion as circumstances arise whether the power shall be used or not, and can no more by his own voluntary act destroy a power of that sort than he can voluntarily put an end to any other trust that may be committed to him" (*c*).] [Release of powers under recent Act.] [Does not apply to power coupled with a duty.]

Thirdly. As to *survivorship.*

1. The survivorship of the *estate* carries with it the survivorship of such *powers* as are annexed to the trust. If a *mere* power be given to A., B., and C., and one of them die, it is perfectly clear that the power cannot be exercised by the survivors: but if trustees have an *equitable* power annexed to the trust, and forming an integral part of it, as if an estate be vested Survivorship of powers.

(*a*) *Ex parte Blackburne*, 1 J. & W. 297; and see *Hibbard* v. *Lamb*, Amb. 309.

[(*b*) 44 & 45 Vict. c. 41, s. 52.]

[(*c*) *Re Eyre*, 49 L. T. N.S. 259; and though the release of a power by a tenant for life may be perfectly valid, the Court will not give effect to it by assisting him to obtain thereby a transfer of his deceased child's share of a settled fund; *Re Radcliffe*, 39 W. R. 457; *Cunynghame* v. *Thurlow*, 1 R. & M. 436; and see *Re Little*, 40 Ch. Div. 418; *Smith* v. *Houblon*, 26 Beav. 482; *Shirley* v. *Fisher*, 47 L. T. N.S. 109.]

in three trustees upon trust to sell, then, as the power is coupled with an interest, and the interest survives, the power also survives (*a*).

Trust powers.

The principle that *trust powers* survive with the *estate* appears to be as old as the time of Lord Coke, for he observes, "If a man *deviseth land to his executors to be sold,* and maketh two executors, and the one dieth, yet the survivor may sell the land, because as the *estate,* so the *trust* shall survive; and so note the diversity between a *bare trust* and a *trust coupled with an interest*" (*b*). At the present day a *trust,* that is, a *power imperative,* whether a bare power, or a power coupled with an interest, would be equally carried into execution in the *forum* of a Court of equity; for the maxim now is, The trust or power imperative is the estate. But in the time of Lord Coke, had a bare power been devised to A. and B. to sell an estate, as for payment of debts, the authority was one which A. and B. during their joint lives were compellable by *subpœna* in Chancery to execute for the benefit of the creditors; but if A. happened to die before the sale was carried into effect, the trust was extinguished, and the heir who had always retained a right to the intermediate rents and profits was then seised of the absolute and indefeasible inheritance. But in case the testator had *devised the estate* to A. and B. to sell for payment of debts, then, as the trust was not a mere power, but a power coupled with an interest, it received a more liberal construction, and as upon the death of A. the whole estate passed by survivorship to B., the power, being annexed to the estate, was held to survive with it (1).

(*a*) *Lane* v. *Debenham,* 11 Hare, 188; and see Gouldsb. 2, pl. 4; *Peyton* v. *Bury,* 2 P. W. 628; *Mansell* v. *Vaughan,* Wilm. 49; *Eyre* v. *Countess of Shaftesbury,* 2 P. W. 108, 121, 124; *Butler* v. *Bray,* Dyer, 189, b; *Byam* v. *Byam,* 19 Beav. 58; Jenk. 44; Co. Lit. 112, b, 113, a; *Flanders* v. *Clark,* 1 Ves. 9; *Potter* v. *Chapman,* Amb. 100; *Jones* v. *Price,* 11 Sim. 557.

(*b*) Co. Lit. 113, a; and see Ib. 181, b.

Before Statute of Uses a power given by will over the legal estate was void.

But over the use was good.

The execution of the power over the use passed the legal estate.

(1) In examining the cases of powers before the Statute of Uses, the following points may be usefully noticed: 1. A person seised of the legal estate of lands could not, before the Statute of Wills, have devised them directly, and therefore he could not have gained his object indirectly by means of a power: had a testator devised that A. and B. should sell his estate, the authority was void. 2. But a *use* was devisable, and therefore, if *cestui que use* had devised the lands to a stranger, though the legal estate did not pass (the Statute of Richard the Third, which made mention of feoffments and grants, not extending to wills), the devisee might still have sued his *subpœna* in Chancery, and have compelled the feoffees to execute a conveyance of the estate. 3. If *cestui que use* had devised that A. and B. should sell, and A. and B. in pursuance of the authority had made a feoffment or grant, this assurance seems to have operated retrospectively as the assurance of the testator, and so, falling within the words of the

Survivorship where the power is given to trustees by name.

2. A distinction may perhaps be thought to exist between cases where the language of the trust is indefinite as to the persons by whom it is to be exercised (for example, where an estate is vested in trustees and their heirs *in trust to sell*, &c.), and those cases where the estate is limited to *persons by name*, as upon trust that "the said A. and B.," or that "the *said* trustees" (which is equivalent to naming them), shall sell; but the Courts have never relied upon any distinction of the kind, and it seems to be now decided that even where the trust is reposed in the trustees by name, the survivor, who takes the estate with a duty annexed to it, can execute the trust (*a*); and the *rule* of survivorship applies not only to trusts, or powers imperative which are construed as trusts, but also to such discretionary powers as are annexed to the office of trustee, and are meant to form an integral part of it (*b*).

Powers not annexed to the trust.

3. But powers which are purely *arbitrary*, and independent of the trust, and not intended in furtherance of the trust, must, it is conceived, be construed strictly, and be governed by the rules applicable to ordinary powers. If, for instance, the trustees by name have a power of revoking the limitations, and shifting the property into a different channel, this discretion is evidently meant to be personal, and not to be annexed to the estate or office (*c*).

(*a*) *Lane* v. *Debenham*, 11 Hare, 188; *Hall* v. *May*, 3 K. & J. 585; [*Re Cooke's Contract*, 4 Ch. D. 454.]

(*b*) *Warburton* v. *Sandys*, 14 Sim. 622; [*Crawford* v. *Forshaw*, (1891) 2 Ch. C. A. 261.]

(*c*) See *Lane* v. *Debenham*, 11 Hare, 192.

Statute of Richard, served to pass even the legal estate. 4. And *cestui que use* might have devised such an authority even to his feoffees, and the power would have been construed in the same manner as if it had been devised to a stranger. Thus where a man enfeoffed A. and B. to his own use, and afterwards devised that the said A. and B. should sell the estate and apply the proceeds, &c., and A. and B., on the decease of the testator, enfeoffed C. and D. to the like uses, it was ruled that A. and B. might still sell under the power, although they had parted with the legal fee. 5. Until the sale was effected, the feoffees were trustees for the testator's heir, and were bound to account to him for the accruing rents and profits; and if the power which, whether given to a stranger or to the feoffees, was construed as a naked authority, became extinguished by any means, as by the death of the donees of the power, the heir was as absolutely entitled to the use in fee, as if no will had been made. 6. So long as the power subsisted, the person who would suffer by the extinguishment of the power might have compelled the donees, by filing a bill in Chancery, to execute the power. 7. But if the proceeds of the sale were to be distributed *in pios usus*, as no one could plead a personal loss by the non-execution of the power, there was no one to sue a *subpœna*, and the donees of the power were left to the arbitrary exercise of their own discretion. See case *temp.* H. 7. Treat. of Powers, Appendix No. 1, 6th ed.

The power might be vested in the feoffees.

Until the power was executed the feoffees were trustees for the heir.

The object of the power could have compelled the execution.

If no specific object of the power, the execution was optional.

[Recent Act.]

[4. Now, as to executorships and trusts constituted after or created by instruments coming into operation after the 31st December, 1881, it is enacted that "where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being" (*a*). But it is conceived that this section does not apply to a purely arbitrary and personal power given to trustees *nominatim*.]

IV. Of the *control of the Court* over the exercise of powers.

Control of the Court over arbitrary powers.

1. Where a power is given to trustees to do, or not do, a particular thing at their discretion, the Court has no discretion to lay a command or prohibition upon the trustees as to the exercise of that power, provided their conduct be *bonâ fide*, and their determination is not influenced by improper motives (*b*).

Pink *v.* De Thuisey.

Thus, in *Pink* v. *De Thuisey* (*c*), a testatrix gave 1000*l.* to A. upon a condition precedent, but left "her executor *at liberty* to give the said sum if he found the thing proper" though the condition should not have been performed. A. died without having fulfilled the condition or received the money, and his personal representative filed a bill against the executor of the testatrix to compel payment of the legacy. A. in his lifetime had applied for the money, but the executor had not thought right to comply with the request. Sir T. Plumer, in dismissing the bill, observed, "The executor says *he did not think proper to advance the legacy:* is the Court to decide upon the propriety of the executor's withholding the legacy? That would be assuming an authority confided by the will to the discretion of the

[(*a*) 44 & 45 Vict. c. 41, s. 38.]

(*b*) *Thomas* v. *Dering*, 1 Keen, 729; *Re Eddowes*, 1 Dr. & Sm. 395; *Talbot* v. *Marshfield*, 2 Dr. & Sm. 285; *French* v. *Davidson*, 3 Mad. 396; *Sillibourne* v. *Newport*, 1 K. & J. 602; *Walker* v. *Walker*, 5 Mad. 424; *Bankes* v. *Le Despencer*, 11 Sim. 527, *per* Sir L. Shadwell; *Attorney-General* v. *Governors of Harrow School*, 2 Ves. 551; *Cowley* v. *Hartstonge*, 1 Dow, 378, *per* Lord Eldon; *Potter* v. *Chapman*, Amb. 99, *per* Lord Hardwicke; *Carr* v. *Bedford*, 2 Ch. Rep. 146; *Wain* v. *Earl of Egmont*, 3 M. & K. 445; *Livesey* v. *Harding*, Taml. 460; *Collins* v. *Vining*, C. P. Coop. Rep. 1837–38, 472; *Kekewich* v. *Marker*, 3 Mac. & G. 326, *per* Lord Truro; *Re Coe's Trust*, 4 K. & J. 199; *Brophy* v. *Bellamy*, 8 L. R. Ch. App. 798; [*Gisborne* v. *Gisborne*, 2 App. Cas. 300, *per* Lord Cairns, at p. 367; *Tabor* v. *Brooks*, 10 Ch. D. 273; *Marquis Camden* v. *Murray*, 16 Ch. D. 161; *Tempest* v. *Lord Camoys*, 21 Ch. Div. 571, *per* Jessel, M.R., at p. 578; *Thomas* v. *Williams*, 24 Ch. D. 558; *Re Blake*, 29 Ch. Div. 913; *Re Courtier*, 34 Ch. Div. 136; *Re Burrage*, 62 L. T. N.S. 752.]

(*c*) 2 Mad. 157.

executor: it would be to *make* a will for the testatrix, instead of *expounding* it."

[But where a testator bequeathed certain moneys to his executor upon trust for such charitable purposes as he might think right, the Court, in an administration action, while holding that it had no right to interfere with the discretion given to the executor, refused to allow the fund to be paid out of Court without an affidavit by the trustee showing how he proposed to apply it, on the ground that the trustee might possibly consider some application of it as charitable which the Court would not so regard (*a*).]

Power with a duty.

2. But where the power is *accompanied with a duty* and meant to be exercised (as a power of leasing), the Court will compel the execution or execute it in the place of the trustees (*b*). So where the trustees had a power of sale, "if they should consider it advisable, but not otherwise," it was held that the power, though discretionary in form, was given to the trustees for the purposes of the will, and if those purposes could not be effected without the exercise of the power, they were bound to exercise it (*c*).

Where trustees are *required* to do an act.

3. The Court will not in general control the discretion of trustees in reference to the adoption of any particular species of investment (*d*). But where trustees were "authorized and *required*," with the consent and *direction* of the tenant for life, to invest in leaseholds, the clause was held to be imperative upon the tenant for life's demand, and the trustees were not even allowed to say that the leaseholds would impose personal liabilities upon themselves, for by being parties to the settlement they had engaged to do it (*e*). But where the trustees were *required* to lend money to the husband on his bond, and he took the benefit of the Insolvent Debtors Act, it was held that, under such altered circumstances, the trustees were justified in refusing a loan to the husband (*f*); and where a variation of securities was to be with the consent of the tenant for life, and the fund was in danger, the Court called in the fund, though the consent of the tenant for life was refused (*g*).

[(*a*) *Hagan* v. *Duff*, 23 L. R. Ir. 516.]

(*b*) *Tempest* v. *Lord Camoys*, 21 Ch. Div. 576, note; [*Re Burrage*, 62 L. T. N.S. 752.]

(*c*) *Nickisson* v. *Cockill*, 3 De G. J. & S. 622; 2 New Rep. 557; [and see *Re Courtier*, 34 Ch. Div. 136.]

(*d*) *Lee* v. *Young*, 2 Y. & C. C. C. 532.

(*e*) *Beauclerk* v. *Ashburnham*, 8 Beav. 322; *Cadogan* v. *Earl of Essex*, 2 Drew. 227.

(*f*) *Boss* v. *Godsall*, 1 Y. & C. C. C. 617.

(*g*) *Costello* v. *O'Rorke*, 3 I. R. Eq. 172.

[Maintenance of lunatic.]

[4. Where property was held upon trust to pay the income in such way, at such time, and in such manner, as the trustees should think fit towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital, it was held that the trustees had no such discretion as would oust the jurisdiction of the Court, to apply the income in the lunatic's maintenance in exoneration of her absolute property (*a*).]

Maintenance of infants.

5. If a fund be applicable to the *maintenance of children* at the discretion of trustees, the Court will not take upon itself to regulate the maintenance, but will leave it to the trustees (*b*). [But the discretion must be exercised within the limits of a sound and honest execution of the trust (*c*): and where the Court was of opinion that the exercise of the discretion had not been proper, it set it aside and regulated the maintenance irrespective of the wishes of the trustees (*d*). But the Court has no jurisdiction on a summons for maintenance intituled only "in the matter of the infant" to control the discretion of the trustees, which can only be done in an action or on an originating summons to which the trustees are made parties (*e*).

[Payment by guardian to co-guardian.]

6. Where trustees are guardians of infants, and one guardian pays the income to the other guardian for the maintenance and education of the infants, he will not be discharged by such payment, but must show that the infants have been properly maintained and educated, and that the amount paid to the other guardian was a proper allowance for the purpose (*f*).]

Mode of execution of trust.

7. Where a fund is bequeathed to executors or trustees upon trust to distribute among the testator's relations, or apply the fund to any other specific purpose *in such manner as the executors or trustees may think fit*, the executors or trustees, if willing to execute the trust, will not, even on a suit being instituted for carrying the trusts into execution, be deprived of their discretionary power, but may propose a scheme before the judge in chambers for the approbation of the Court (*g*).

Power as to the objects of the trust.

8. Where the *objects* of a charity are from time to time to be

(*a*) *Re Weaver*, 21 Ch. Div. 615.]

(*b*) *Livesey* v. *Harding*, Taml. 460; *Collins* v. *Vining*, C. P. Coop. Rep. 1837–38, 472; *Brophy* v. *Bellamy*, 8 L. R. Ch. App. 798.

[(*c*) *Costabadie* v. *Costabadie*, 6 Hare, 410; *Davey* v. *Ward*, 7 Ch. D. 754.]

[(*d*) *Davey* v. *Ward*, 7 Ch. D. 754; *Re Roper's Trusts*, 11 Ch. D. 272.]

[(*e*) *Re Lofthouse*, 29 Ch. Div. 921.]

[(*f*) *Re Evans*, 26 Ch. Div. 58.]

(*g*) *Brunsden* v. *Woolredge*, Amb. 507; *Bennett* v. *Honywood*, Id. 708; *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Supple* v. *Lowson*, Amb. 729, &c.

at the discretion of the trustees (as if annual sums be made distributable *either* to private individuals *or* public institutions, *as the trustees may think fit*), the Court will not even order a scheme to be proposed, but will leave the trustees to the free exercise of their power with liberty for all parties to apply (*a*).

Selection of particular objects.

9. So where trustees had the power of selecting a lad for education from certain parishes, and if there were no suitable candidate, then from any other parish, and the trustees upon consideration rejected the candidate from the specified parishes, and selected a lad from another parish, it was held that the Court could not control the discretion. The trustees had assigned no reason for their choice, but that the Court said was not necessary, and in many cases would not be proper (*b*).

Reasons for exercise of the power.

10. But though trustees invested with a discretionary power are not bound to assign their reasons for the way in which they exercise it; yet, if they do state their reasons, and it thereby appears that the trustees were labouring under an error, the Court will set aside the conclusion to which they came upon such false premises (*c*).

Powers not to be exercised *nunc pro tunc*.

11. Where the trustees have a discretionary power they must exercise their judgment according to the *circumstances as they exist at the time*, and they cannot, therefore, anticipate the arrival of the proper period by affecting to release it or by pledging themselves beforehand as to the mode in which the power shall be executed *in futuro* (*d*).

[Exercise of the power by will.]

[12. Where a trustee had an absolute discretion to apply the trust funds for certain charitable purposes as he might think fit, and he died without exercising the power by act *inter vivos*, but by his will gave definite directions as to the application of the funds, it was held that the power was duly exercised (*e*).]

Fraud.

13. There is sufficient ground for the interference of the Court, wherever the exercise of the discretion by the trustees is infected

(*a*) *Waldo* v. *Caley*, 16 Ves. 206; *Horde* v. *Earl of Suffolk*, 2 M. & K. 59; and see *Powerscourt* v. *Powerscourt*, 1 Moll. 616; *Holmes* v. *Penney*, 3 K. & J. 103; [*Re Lea*, 34 Ch. D. 528; *Shuldham* v. *Royal National Lifeboat Institution*, 56 L. J. Ch. 784; 57 L. T. N.S. 17; 35 W. R. 710.]

(*b*) *Re Beloved Wilkes's Charity*, 3 Mac. & G. 440.

(*c*) Ib. 3 Mac. & G. 448; *King* v. *Archbishop of Canterbury*, 15 East. 117.

(*d*) *Weller* v. *Ker*, 1 L. R. Sc. App. 11; [*Moore* v. *Clench*, 1 Ch. D. 447, 453; *Chambers* v. *Smith*, 3 App. Cas. 795, 815; *Oceanic Steam Navigation Company* v. *Sutherberry*, 16 Ch. Div. 236; *Saul* v. *Pattinson*, 55 L. J. Ch. 831; 54 L. T. N.S. 670; 34 W. R. 562; and see *Thacker* v. *Key*, 8 L. R. Eq. 408; and *ante*, p. 346.]

[(*e*) *Copinger* v. *Crehane*, 11 I. R. Eq. 429.]

with fraud (*a*), or misbehaviour (*b*), or they decline to undertake the duty of exercising the discretion (*c*); or generally where the discretion is *mischievously and ruinously* exercised, as if a trustee be authorized to lay out money upon Government, *or* real *or* personal security, and the trust fund is outstanding upon any *hazardous* security (*d*). [But where the course pursued by the trustees is within the letter of the power, the *onus* is on the persons challenging their conduct to show that their discretion has been mischievously, or ruinously, or fraudulently exercised (*e*).]

Powers in case of charity.

14. And where the trustees of a *charity* were empowered to lease for three lives or thirty-one years, the Court expressed an opinion that the discretion might be controlled, if it appeared for the benefit of the charity that such a power should not be acted upon (*f*).

The Court will exercise a surveillance where the trustees are before it.

15. Where proceedings had been taken for controlling the discretion of the trustees, Lord Hardwicke said, "though he could not contradict the intent of the donor, which was to leave it in the discretion of the trustees, yet he would not dismiss the information but would still *keep a hand over them*" (*g*).

After decree trustee cannot exercise even a special power without the sanction of the Court.

16. Where a suit has been instituted for the administration of the trust, *and a decree has been made, that* attracts the Court's jurisdiction, and the trustee cannot afterwards exercise the power without the concurrent sanction of the Court: as if a trustee have a power of investment he cannot make any investment without the approval of the Court (*h*); or if a trustee have a power of appointment of new trustees, he is not excluded from the right

(*a*) *Attorney-General* v. *Governors of Harrow School*, 2 Ves. 552, *per* Lord Hardwicke; *Potter* v. *Chapman*, Amb. 99, *per eundem*; *Richardson* v. *Chapman*, 7 B. P. C. 318; *French* v. *Davidson*, 3 Mad. 402, *per* Sir J. Leach; *Talbot* v. *Marshfield*, 4 L. R. Eq. 661; and on appeal, 3 L. R. Ch. App. 622; *Thacker* v. *Key*, 8 L. R. Eq. 408.

(*b*) *Maddison* v. *Andrew*, 1 Ves. 59, *per* Lord Hardwicke; *Attorney-General* v. *Glegg*, Amb. 585, *per eundem*; *Willis* v. *Childe*, 13 Beav. 117; and see *Re Beloved Wilkes's Charity*, 3 Mac. & G. 440; *Byam* v. *Byam*, 19 Beav. 65.

(*c*) *Gude* v. *Worthington*, 3 De G. & Sm. 389. This was apparently the ground on which the case was decided, but the refusal of the trustees to act does not sufficiently appear on the report. And see *Mortimer* v. *Watts*, 14 Beav. 622; *Re Sanderson's Trust*, 3 K. & J. 497; *Prendergast* v. *Prendergast*, 3 H. L. Cas. 195; *Palmer* v. *Newell*, 25 L. T. N.S. 892; *Bennett* v. *Wyndham*, 23 Beav. 528; *Gray* v. *Gray*, 11 Ir. Ch. Rep. 218, 13 Ir. Ch. Rep. 404.

(*d*) *De Manneville* v. *Crompton*, 1 V. & B. 359; *Costello* v. *O'Rorke*, 3 Ir. R. Eq. 172; and see *Lee* v. *Young*, 2 Y. & C. C. C. 532.

[(*e*) *Re Brittlebank*, 30 W. R. 99; and where trustees have an absolute discretion as to the payment of the income of a fund there is no jurisdiction to appoint a receiver, *Reg.* v. *Judge of County Court of Lincolnshire*, 20 Q. B. D. 167.]

(*f*) *Ex parte Berkhampstead Free School*, 2 V. & B. 138.

(*g*) *Attorney-General* v. *Governors of Harrow School*, 2 Ves. 551.

(*h*) *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

of nominating the person, but the Court must give its sanction to the choice (*a*); [and if the Court does not approve the nominee of the trustee it will call upon the trustee to make a new nomination, and will not appoint a person not nominated by the trustee merely on the ground that the nominee was not approved. Nor will the Court appoint a person not nominated by the trustee on the mere ground of such person being more eligible than the nominee of the trustee (*b*).

[Effect of Order 55.]

Where an action was commenced by suit for the general execution of the trusts of a will, and an order was made under Ord. 55, R. 3, directing certain inquiries, including an inquiry whether new trustees had been appointed, and whether any and what steps ought to be taken for the appointment of new trustees, and pending the inquiry the surviving trustee appointed a new trustee under the powers of the Conveyancing and Law of Property Act, 1881, it was held, that by the order the powers of the trustee were not interfered with, except so far as the exercise of them must necessarily clash with the particular inquiries directed; that it was the duty of the trustee not to fill up the vacancies in the trusteeship without the approval of the Court; and that the proper course would have been for the trustee to apply in chambers, stating that he intended to appoint the new trustee, and if it was found that there was no objection to the appointment it would have been approved (*c*).]

Acts before decree.

17. But if *no decree has been made*, then, as the plaintiff may abandon his suit at any moment, the trustee must not assume that a decree will be made, but must proceed in all necessary matters with the due execution of the trust (*d*). It would not be prudent, however, except in formal matters, to act without first consulting the Court. It was held in one case, that the trustees had not exceeded their duty by appointing new trustees after the filing of a bill, as no extra costs had been thereby occasioned (*e*); but in another case it was said that the trustees ought, under the diffi-

(*a*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; —— v. *Robarts*, 1 J. & W. 251; *Middleton* v. *Reay*, 7 Hare, 106; *Kennedy* v. *Turnley*, 6 Ir. Eq. Rep. 399; *Consterdine* v. *Consterdine*, 31 Beav. 333; *Gray* v. *Gray*, 13 Ir. Ch. Rep. 404; [*Minors* v. *Battison*, 1 App. Cas. 428; *Tempest* v. *Lord Camoys*, 21 Ch. Div. 571; *Re Norris*, 27 Ch. D. 333; *Cecil* v. *Langdon*, 28 Ch. Div. 1; *Re Hall*, 51 L. T. N.S. 901; 54 L. J. N.S. Ch. 527.]

[(*b*) *Re Gadd*, 23 Ch. Div. 134, and see *Middleton* v. *Reay*, *ubi supra*; *Thomas* v. *Williams*, 24 Ch. D. 558, 567.]

[(*c*) *Re Hall*, 51 L. T. N.S. 901; 54 L. J. N.S. Ch. 527; 33 W. R. 509.]

(*d*) See Williams on Executors, 891, 4th ed.

(*e*) *Cafe* v. *Bent*, 3 Hare, 245; [*Thomas* v. *Williams*, 24 Ch. D. 558, 567.]

culties in which they were placed, to have consulted the Court, and as, instead of so doing, they had acted independently and made an appointment, which, though they entered into evidence they could not justify, and great extra costs had arisen out of their conduct, the extra costs which had been occasioned were thrown upon the trustees personally (*a*).

Lord St. Leonards' Act.

18. [By 22 & 23 Vict. c. 35, s. 30 (an enactment which is still in force, though the procedure under it has been practically superseded by the more economical procedure under the Rules of Court, 1883 (*b*)) trustees are authorized to] apply by *petition* to any judge of the Court of Chancery (*c*), or by a *summons* upon a *written statement* to any such judge at chambers for the opinion or direction of such judge respecting the management or administration of the trust property.

Amendment Act.

19. By the Amendment Act, 23 & 24 Vict. c. 38, s. 9, the petition or statement is required to be *signed by counsel*, and the judge may require the attendance of counsel either in chambers or in court (*d*).

Affidavits not allowed.

20. In proceedings under this enactment there is no investigation of the facts, but the correctness of the petition or statement is assumed, and if there be any *suggestio falsi* or *suppressio veri* the order of the Court *pro tanto* is no indemnity to the trustee. No affidavits, therefore, ought to be filed, and the costs of them would be disallowed (*e*).

Jurisdiction.

21. The Court has jurisdiction in England, though one of the trustees be resident in Ireland (*f*).

Parties to be served.

22. What parties are to be *served* is in the discretion of the judge, and V. C. Wood was of opinion that the proper course was not to serve the petition on any one in the first instance, but to apply at chambers for a direction as to the persons to be served (*g*),

(*a*) *Attorney-General* v. *Clack*, 1 Beav. 467; and see *Turner* v. *Turner*, 30 Beav. 414; *Talbot* v. *Marshfield*, 4 L. R. Eq. 661, 3 L. R. Ch. App. 622; *Bethell* v. *Abraham*, 17 L. R. Eq. 24.

[(*b*) See *ante*, p. 288, and *post*, p. 698.]

(*c*) These applications should now be made to the Chancery Division of the High Court of Justice; see 36 & 37 Vict. c. 66, s. 34.]

(*d*) See observations of V.C. Stuart in *Re Dennis*, 5 Jur. N.S. 1388, which may have led to this additional enactment. For the practice under the Act, see [Rules of the Supreme Court 1883, Order 52, RR. 19–22, Order 65, R. 26. Notwithstanding the Judicature Act, 1873, and Order 19, R. 4, of the Rules of the Supreme Court, 1883, signature of counsel is still necessary, *Re Boulton's Trusts*, 51 L. J. N.S. Ch. 493.]

(*e*) *Re Muggeridge's Trust*, Johns. 625; *Re Mockett's Will*, Ib. 628; *Re Barrington's Settlement*, 1 J. & H. 142.

(*f*) *Re French's Trusts*, 15 L. R. Eq. 68.

(*g*) *Re Muggeridge's Trust*, Johns. 625.

and V. C. Malins thought the question of service ought to be dealt with at the hearing of the petition (*a*). But V.C. Kindersley said he would never allow a petition under the Act to be brought on for the purpose of ascertaining who were to be served; and that the petitioners must serve such persons as they thought proper, and state in the note at the end whom they had served, and that the V. C. and the other judges had agreed upon that course (*b*). On a petition by the trustees where the beneficiaries were infants absolutely entitled, it was held that the *infants* need not be served (*c*). And on a petition by trustees for the opinion of the Court as to the propriety of certain proposed *investments*, it was held that no one need be served (*d*). And so the Court dispensed with service on any party, where the question submitted to the Court by trustees was, whether they could make an *advancement* to a child out of a share to which the child was presumptively entitled (*e*).

No appeal, &c.

23. As the Act does not give any *right of appeal*, it was not intended to authorize adjudications upon nice questions of law (*f*). The object of the Act was to procure for trustees at a small expense the assistance of the Court upon points of minor importance arising in the management of the trust. Thus the Court, upon the petition of the trustees of a fund for the separate use of a *married woman, a lunatic* not so found by inquisition, has sanctioned the payment of the annual produce to the husband, he undertaking to apply the same for the benefit of his wife and family (*g*). So the Court can advise trustees as to *investment* of trust funds, *payment of debts or legacies*, &c. (*h*); and whether trustees of a remainder can with propriety *concur* with the owner of the particular estate *in the sale* of the fee simple (*i*); and whether trustees can properly grant a lease upon certain terms (*j*); exercise a *power of sale* (*k*); or a power of maintenance or *advancement* under the circumstances stated (*l*); and

(*a*) *Re Cook's Trust*, W. N. 1873, p. 49.

(*b*) *Re Green's Trust*, 6 Jur. N. S. 530.

(*c*) *Re Tuck's Trusts*, W. N. 1865, p. 15.

(*d*) *Re French's Trusts*, 15 L. R. Eq. 68.

(*e*) *Re Larken's Trust*, W. N. 1872, p. 85.

(*f*) *Re Mockett's Will*, Johns. 628; [*Re Tyrrell's Trusts*, 23 L. R. Ir. 263.]

(*g*) *Re Spiller*, 6 Jur. N.S. 386; [*Re* T—— 15 Ch. D. 78.]

(*h*) *Re Lorenz's Settlement*, 1 Dr. & Sm. 401; *Re Knowles' Settlement Trust*, W. N. 1868, p. 233; *Re Murray's Trusts*, W. N. 1868, p. 195; *Re Tuck's Trusts*, W. N. 1869, p. 15.

(*i*) *Earl Poulett* v. *Hood*, 5 L. R. Eq. 116.

(*j*) *Re Lees' Trusts*, W. N. 1875, p. 61.

(*k*) *Re Stone's Settlement*, W. N. 1874, p. 4.

(*l*) *Re Kershaw's Trusts*, 6 L. R. Eq. 322; *Re Breeds' Will*, 1 Ch. D. 226.

whether *calls on shares* in companies should be borne by the testator's general estate or the legatees (*a*), &c. But the Court will not give an opinion under the Act upon matters of detail which cannot be properly dealt with without the superintendence of the Court and the assistance of affidavits, such as the laying out a particular sum on *improvements* (*b*); nor will the Court adjudicate upon *doubtful points*, the decision of which would materially affect the rights of the parties interested (*c*).

[Order 55.] [24. It remains to call attention to the Rules of the Supreme Court, 1883, Order 55, Rule 3, under which an originating summons may be taken out in the Chambers of a Judge of the Chancery Division for directing executors, administrators, or trustees, to do or abstain from doing any particular act in their character as such executors, or administrators, or trustees; but this rule applies only to matters within the trust (*d*), and the Court refused to make an order under it, directing trustees to concur in a sale of property in a partition action (*e*). Under this Order directions have been given for an advance by the trustees to the tenant for life for the purpose of stocking and taking a farm subject to the trust, for which a tenant could not be found (*f*), and for an inquiry with a view to the expenditure of settled money in repairing buildings on a farm included in the settlement which were so much out of repair as to make the farm untenantable (*g*). By Rule 12, the issue of the summons is not to interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought; and an order made upon such a summons will not interfere with the powers or discretions, except so far as they necessarily clash with the directions of the order (*h*).

[Questions under Settled Land Act.] 25. If any question arises, or doubt is entertained, respecting any matter within sect. 56 of the Settled Land Act, 1882, being

(*a*) *Re Box*, 1 H. & M. 522.

(*b*) *Re Barrington's Settlement*, 1 J. & H. 142.

(*c*) *Re Lorenz's Settlement*, 1 Dr. & Sm. 401; *Re Hooper's Will*, 29 Beav. 656; *Re Evans*, 30 Beav. 232; *Re Bunnett*, 10 Jur. N.S. 1098; [*Re Tyrrell's Trusts*, 23 L. R. Ir. 26.]

[(*d*) See *ante*, p. 288.]

[(*e*) *Suffolk* v. *Lawrence*, 32 W. R. 899.]

[(*f*) *Re Household*, 27 Ch. D. 554.]

[(*g*) *Conway* v. *Fenton*, 40 Ch. D. 512, where Kekewich, J., intimated that the Court had precisely the same jurisdiction on an originating summons as in an administration action properly constituted; and as to the jurisdiction of the Court to deal with the question of costs of such a summons as in an action for administration, see *Re Medland*, 41 Ch. Div. 476.]

[(*h*) *Re Hall*, 51 L. T. N.S. 901; 54 L. J. N.S., Ch. 527; 33 W. R. 508.]

the section which saves powers of the tenant for life, or trustees under a settlement, which are concurrent with those under the Act, and restricts the exercise by trustees of such powers to the extent to be presently pointed out, the Court may on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon (*a*).

The application should be by summons to be served upon the tenant for life, if not the applicant. But unless the judge otherwise direct, no person except the tenant for life need be served in any case (*b*).]

V. Of the restrictions on the powers of trustees imposed by the Settled Land Acts.

1. The Settled Land Act, 1882, vests in the tenant for life, including any other limited owner to whom under sect. 58 the powers of a tenant for life are given, large powers of dealing with the settled land (*c*), which powers cannot be released, or defeated, or avoided, either by the tenant for life or the settlor; but sect. 56 enacts as follows: "Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction or otherwise; and the powers given by this Act are cumulative." The effect of this enactment is not to take away from the trustees named in any settlement the powers given to them by that settlement, but to leave those powers exercisable concurrently with the powers created by the Act (*d*). To obviate, however, the difficulty which might arise from the existence of concurrent powers, and in order to give full effect to the powers given by the Act to the tenant for life, the section further enacts: (2) "But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of

[Powers under Settled Land Act cumulative.]

[Consent of tenant for life to exercise of powers.]

[(*a*) 45 & 46 Vict. c. 38, s. 56, (3).]

[(*b*) Settled Land Act Rules 1882, RR. 4, 5.]

[(*c*) As to what is included in the term Settled Land, see sect. 2 of the Act.]

[(*d*) *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.]

this Act, be necessary to the exercise by the trustees of the settlement or other person, of any power conferred by the settlement exercisable for any purpose provided for in this Act."

The wording of this clause has given rise to some difficulty, but it has been interpreted by Pearson, J., by treating the first part of the clause as relating to concurrent powers in the tenant for life; in which case, if the powers under the settlement are less beneficial to him than those under the Act, he is entitled to exercise the powers under the Act notwithstanding any restriction in the settlement. The latter part of the clause, however, relates to the case of concurrent powers in the trustees of the settlement, or some other person under the settlement, and in the tenant for life, and requires the consent of the tenant for life to the exercise of the powers in addition to the requirements of the settlement (*a*); and such concurrence is necessary, although the tenant for life be a lunatic not so found (*b*). Where the tenant for life is capable of exercising his powers, the Court will not, even though he be a bankrupt, make an order under the Settled Estates Act, giving general powers of sale or of leasing to any other person, but if the tenant for life wrongfully refuse to exercise his powers, so as to prevent obvious and practicable improvements from being effected, and the persons interested come before the Court with a well-considered scheme, and show that it is for the benefit of the estate that some particular lease should be granted, and that the tenant for life without sufficient reason refuses to exercise his power, the Court will make an order under the Settled Estates Act (*c*).

[Settled Estates Act.]

Powers already given by an order of the Court under the Settled Estates Act are not affected by sect. 56, and the proper course, if it is desired to supersede them, is to apply under the Settled Estates Act for that purpose (*d*).

The power of a tenant for life under sect. 26 to require capital money to be laid out in improvements, was held to be in conflict with and to prevail over a power given by the settlement to the trustees to apply income in repairs and improvements (*e*).

2. It may be observed that the powers of the trustees, for the

[(*a*) *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.]

[(*b*) *Re Atherton*, W. N. 1891, p. 85.]

[(*c*) *Re Mansel's Settled Estates*, W. N. 1884, p. 209; and see *Cecil* v. *Langdon*, 54 L. T. N.S. 418.]

[(*d*) *Re Poole's Settlement*, 32 W. R. 956; 50 L. T. N.S. 585; *Re Barrs Haden's Settled Estates*, 32 W. R. 194 49 L. T. N.S. 661.]

[(*e*) *Clarke* v. *Thornton*, 35 Ch. D. 307.]

exercise of which the consent of the tenant for life is required, are those *conferred by the settlement*, and the enactment does not touch general powers exercisable by the trustees *virtute officii*.

3. The effect of the enactment stated shortly is that any special power given to trustees for any of the purposes for which similar powers are given by the Settled Land Act to the tenant for life cannot be exercised without his concurrence.

[Consent of all tenants for life in possession required by Act of 1882.]

4. By the definition of a tenant for life it is provided that if, in any case, there are two or more persons entitled for life to possession of settled land as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Act. And by sect. 58, the limited owners therein specified are to have the powers of a tenant for life, and the provisions of the Act referring to a tenant for life are to extend to each of such limited owners, and reading these provisions with the 56th section, it resulted that where several persons were concurrently entitled as tenants for life, or as such limited owners, in possession to the income of the settled land, the consent of all of them was necessary to the exercise by the trustees of the powers affected by the section (*a*). This was found in practice to lead to useless delay and expense, and to remedy the evil it was enacted by the Settled Land Act, 1884 (*b*), that where two or more persons together constitute the tenant for life for the purposes of the Settled Land Act, 1882, then, notwithstanding anything contained in sub-sect. (2) of sect. 56 of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exercisable for any purpose provided for in that Act. And the section applies to dealings as well before as after the passing of the Act.

[Consent of one sufficient under Act of 1884.]

As the law, therefore, now stands the trustees can exercise their powers if the concurrence of the tenant for life, or limited owner in possession, of any share of the settled property can be procured.

[Case of tru t for sale or direction to sell.]

5. Hitherto we have been considering the case where there is no trust for sale, or imperative direction to the trustees to sell. Where, however, there is such a trust or direction the case falls within sect. 63 of the Act of 1882, and the right of

[(*a*) *Re Collinge's Settled Estates*, 36 Ch. D. 516.]

[(*b*) 47 & 48 Vict. c. 18, s. 6 (2).]

the trustees to exercise their powers for any purpose for which similar powers are conferred by the Act is subject to restrictions of an entirely different nature, which we proceed now to consider.

[Sect. 63.] 6. By sect. 63 of the Act of 1882, sub-sect. (1), it is provided that any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of the Act, is subject to a trust or direction for sale (*a*) of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled (*b*) to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of that Act, are for purposes of the Act trustees of the settlement. And by sub-sect. (2), in every such case the provisions of the Act referring to a tenant for life and to a settlement, and to settled land, are to extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land

[(*a*) As to the meaning of these words, see *Re Horne's Settled Estate*, 39 Ch. Div. 84, from which case it would seem that the trust or direction to which the property is "subject" must be presently exercisable and not postponed.]

[(*b*) That is, entitled *in præsenti*; see *Re Horne's Settled Estate*, 39 Ch. Div. 84.]

therein comprised, subject to certain exceptions not material to the present purpose.

[Difficulties under the section.]

This obscure section, which cannot but be regarded as a most unfortunate enactment, gave rise to many difficulties, and in many cases added considerably to the costs of administering trust estates by unnecessarily obstructing the free disposition by the trustees of property vested in them upon trust for sale. Thus, the effect of the section was, where the proceeds of sale, or any share of the proceeds of sale, were held in trust for a person or several persons concurrently, any of whom had a life or other limited interest, to render various consents necessary (*a*); and it was a question of difficulty whether, even where the first trust affecting the proceeds of sale was for payment of debts, and the residue only, or a share of such residue, was held in trust for persons in succession, such consents could be dispensed with, though the better opinion seems to have been that such consents were in that case unnecessary.

[Remedy provided by Settled Land Act, 1884.]

It is not proposed, however, to discuss what consents were required under the section, as the inconveniences which arose from requiring any consents were found to be so serious, that the legislature intervened, and enacted by the Settled Land Act, 1884 (*b*), sect. 6, sub-sect. (1), that in the case of a settlement within the meaning of sect. 63 of the Act of 1882, any consent not required by the terms of the settlement is not, by force of anything contained in that Act, to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement. And by sub-sect. (3), the section applies to dealings before, as well as after, the passing of the Act. But sect. 7 provides that, with respect to the powers conferred by sect. 63 of the Act of 1882, the following provisions are to have effect:—

(1) Those powers are not to be exercised without the leave of the Court.

(2) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

[(*a*) In *Taylor* v. *Poncia*, 25 Ch. D. 646, a distinction was drawn between the case where there was an absolute trust for sale at a particular time, without any discretion in the trustees as to the time at which the sale should take place, and the ordinary case of a trust for sale with a discretion in the trustees to postpone the sale, and it was held that in the former case the section did not apply, and the trustees could sell without any consent.]

[(*b*) 47 & 48 Vict. c. 18.]

(3) The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

(4) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is, by the order, given to exercise a power conferred by the Act of 1882.

(5) An order under this section may be registered and re-registered, as a *lis pendens*, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."

(6) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered, as a *lis pendens*.

(7) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of sect. 63 of the Act of 1882.

(8) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(9) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by sect. 63 of the Act of 1882, and shall have, and may exercise those powers accordingly.

(10) This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.

[Effect of enactments.]

7. The effect of these enactments is, that where property is subject to a trust or direction for sale, as distinguished from a mere power of sale, the trustees may execute the trust, and exercise their powers irrespective of the restrictions arising under the Settled Land Act, 1882, until an order has been made by the Court giving leave to some other person or persons to exercise all or any of the powers conferred by sect. 63 on the tenant for life; and that until such an order has been made no tenant for life or other limited owner is able, under the Act of 1882, to exercise any power conferred by that Act. But when

such an order has been made, and so long as the order remains in force, the trustees cannot execute any trust or power created by the settlement for any purpose to which the leave given by the order extends (*a*). The powers under the settlement and the Act will thus never be concurrent, and as every order to be effectual must be registered and re-registered as a *lis pendens*, there will never be any difficulty in ascertaining, by a search for *lites pendentes*, whether the trustees are in a position to execute their trusts and powers. Moreover, as the persons to whom leave is given to exercise the powers "are to be deemed the proper persons to exercise them, and may accordingly exercise them," any person dealing with such persons will acquire a statutory title from them, and will not be under any obligation to ascertain that the leave was properly given.

[Instrument creating the trust.]

8. It has been held that, in determining whether land vested in trustees upon trust for sale is subject to the provisions of the Settled Land Act, 1882, the Court must look simply at the instrument which created the trust for sale, and that if at the time when a contract for sale is entered into by the trustees there is no person who, by virtue of the provisions of *that* instrument, is entitled to the income of the money arising from the sale, or of the land until sale, for his life or any other limited period, sect. 63 does not apply, notwithstanding that, under other instruments subsequent to that creating the trust for sale, there may be tenants for life or persons with other limited interests (*b*).

[Leave to tenant for life to sell.]

9. Where the tenants for life of the income of the proceeds of sale were two elderly maiden ladies, and in default of their having children the proceeds belonged to persons who were trustees for sale, leave was granted to the tenants for life to sell the land, North, J., observing that it was the simplest possible case, and if he were not to say that these tenants for life were to have leave he could not imagine any case in which leave should be given (*c*).]

[(*a*) *Re Harding's Estate*, (1891) 1 Ch. 60, 64.]

[(*b*) *Re Earle and Webster's Contract*, 24 Ch. D. 144.]

[(*c*) *Re Harding's Estate*, (1891) 1 Ch. 60, 65.]

CHAPTER XXIV.

OF ALLOWANCES TO TRUSTEES.

Now that we have discussed the *duties* of trustees, and the extent of their *powers*, we may next enter upon subjects very closely interwoven with the execution of the office, viz. First, Allowances to trustees for their *time and trouble;* and, Secondly, Allowances to trustees for *actual expenses.*

SECTION I.

ALLOWANCES FOR TIME AND TROUBLE.

General rule.

1. It is an established rule in general, that a trustee shall have no allowance for his trouble and loss of time. One reason given is, that on these pretences, if admitted, the trust estate might be loaded and rendered of little value; besides the great difficulty there would be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon the trustee, for it lies in his own option whether he will accept the trust or not (*a*). The true ground, however, is, that if the trustee were allowed to perform the duties of the office, and to claim compensation for his services, his interest would be opposed to his duty; and, as a matter of prudence, the Court would not allow a trustee or executor to place himself in such a false position (*b*).

(*a*) *Robinson* v. *Pett*, 3 P. W. 251, *per* Lord Talbot; *Gould* v. *Fleetwood*, cited Ib. note (A); *How* v. *Godfrey*, Rep. *t.* Finch, 361; *Brocksopp* v. *Barnes*, 5 Mad. 90; *Ayliffe* v. *Murray*, 2 Atk. 58; *Re Ormsby*, 1 B. & B. 189, *per* Lord Manners; *Charity Corporation* v. *Sutton*, 2 Atk. 406, *per* Lord Hardwicke; *Bonithon* v. *Hockmore*, 1 Vern. 316, &c.

(*b*) *New* v. *Jones*, Exch. Aug. 9, 1833, cited 9th Jarm. Prec. 338, *per* Lord Lyndhurst; and see *Burton* v. *Wookey*, 6 Mad. 368.

Executors, mortgagees, receivers, committees of lunatics.

2. And the rule applies not only to trustees in the strict and proper sense of the word, but to all who are virtually invested with a fiduciary character, as executors and administrators (*a*), mortgagees (*b*), receivers (*c*), committees of lunatic's estates (*d*), a surviving partner (*e*), &c.

Trustees of West India estates.

3. But trustees for absentees of estates in the *West Indies* are allowed a commission for their personal care in the management and improvement of the property. However, if, instead of remaining upon the island, they commit the management to the hands of agents, the Court will reject the claim; for it would be a strange construction that one allowed a commission on account of the proprietor's absence should insist upon his reward when he had been absent himself (*f*). But a manager, though he forfeits his *commission* during the period of his absence, will be repaid the sums actually disbursed by him for the care of the estate by others, provided the payments he has made be in themselves reasonable and proper (*g*).

Rate of commission in Jamaica.

The rate of commission in *Jamaica* has been regulated by several Acts of Assembly; it was originally 10*l.* per cent. upon the receipts, then 8*l.* per cent., and since 6*l.* per cent. (*h*). But the intention of the Legislature was only that the rate should not exceed 6*l.* per cent., not that under particular circumstances it might not be a great deal less (*i*).

Mortgagees in possession of West India estates.

Mortgagees in possession of estates in Jamaica are, by the Act referred to, expressly prohibited from charging any commission, except what they may have themselves paid by way of commission to a factor (*j*); and, without regard to statutory prohibition, mortgagees in possession of West Indian property are under the same disability of charging commission as if the property were situate in this country (*k*).

(*a*) *Scattergood* v. *Harrison*, Mos. 128; *How* v. *Godfrey*, Rep. *t.* Finch, 361; *Sheriff* v. *Axe*, 4 Russ. 33.

(*b*) *Bonithon* v. *Hockmore*, 1 Vern. 316; *Langstaffe* v. *Fenwick*, 10 Ves. 405; *French* v. *Baron*, 2 Atk. 120; *Carew* v. *Johnston*, 2 Sch. & Lef. 301; *Arnold* v. *Garner*, 2 Ph. 231; *Matthison* v. *Clarke*, 3 Drew. 3; *Barrett* v. *Hartley*, 12 Jur. N. S. 426; [*Re Wallis*, 25 Q. B. Div. 176; *Stone* v. *Lichorish*, 39 W. R. 331; 64 L. T. N.S. 79; 60 L. J. N.S. Ch. 289 (as to costs of solicitor-mortgagee).] Mortgagees were also disabled formerly *by the effect of the usury laws* from claiming anything beyond their principal and legal interest.

(*c*) *Re Ormsby*, 1 B. & B. 189.

(*d*) *Anon. case*, 10 Ves. 103; *Re Walker*, 2 Ph. 630; *Re Westbrooke*, Ib. 631.

(*e*) *Burden* v. *Burden*, 1 V. & B. 170; *Stocken* v. *Dawson*, 6 Beav. 371.

(*f*) *Chambers* v. *Goldwin*, 9 Ves. 273.

(*g*) *Forrest* v. *Elwes*, 2 Mer. 68.

(*h*) *Chambers* v. *Goldwin*, 9 Ves. 267.

(*i*) See *S. C.* Id. 257.

(*j*) See *S. C.* 5 Ves. 837; 9 Ves. 268.

(*k*) *Leith* v. *Irvine*, 1 M. & K. 277; see *Chambers* v. *Davidson*, 1 L.R.P.C. 296.

Executor in the East Indies.

4. An executor appointed in the *East Indies* and administering in that country, and then returning to England, is, if called upon in a Court of equity to render an account, allowed a commission of 5 per cent. upon the receipts *or* payments, [where according to the practice of the Indian Courts a similar allowance would be made in India.] The appointment of an executor in the East Indies is considered the appointment of an agent for the management of the estate. Without such an allowance, where a person dies in India deprived of the presence of his relations, the effects of the testator might often not be collected at all. Besides, the executors in England could scarcely procure a person to undertake the office at any cheaper rate (*a*). If an Indian executor, after collecting part of the assets, comes over to this country, he is allowed a commission on those assets only that were collected by himself in India, and not on the assets subsequently collected by his agents and transmitted to this country, for the Courts here allow the commission because the Indian Courts allow it, and the Indian Courts allow it on the ground of residence in India (*b*).

(*a*) *Chetham* v. *Lord Audley*, 4 Ves. 72; *Matthews* v. *Bagshaw*, 14 Beav. 123. To the latter case is appended the following note:—

"The custom of allowing a commission to executors and administrators in the presidency of *Bengal* has been abolished by Act No. VII., of 1849, of the Governor-General in Council. By that Act an Administrator-General has been appointed in place of the Ecclesiastical Registrar, with a reduced commission of 3 per cent. on monies distributed or invested in manner therein provided.

"By Act No. II., of 1850, the provisions of the above Act, with certain restrictions, are extended to the presidencies of *Madras* and *Bombay*, but the rate of commission to the public administrator is there to remain 5 per cent. until altered to 3 per cent. by the Governor and Council in each of these presidencies."

[By Act No. II., of 1874, sect. 56, no person other than the Administrator-General acting officially is to receive or retain any commission or agency charges, for anything done by the executor or administrator under any probate or letters of administration or letters *ad colligenda bona* which have been granted by the Supreme Court, or High Court at Fort William in Bengal, since the passing of the Act No. VII. of 1849, or by either of the Supreme or High Courts at Madras and Bombay, since the passing of the Act No. II. of 1850, or which have been or shall be granted by any Court of competent jurisdiction within the meaning of sections 187 and 190 of The Indian Succession Act, 1865. But this enactment is not to prevent any executor or other person from having the benefit of any legacy bequeathed to him in his character of executor or by way of commission or otherwise.

By the Indian Trusts Act, 1882 (Act II. of 1882), sect. 50, it is provided that "in the absence of express directions to the contrary, contained in the instrument of trust, or of a contract entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill, and loss of time in executing the trust," but nothing in this section is to apply to any official trustee, Administrator-General, Public Curator, or person holding a certificate of administration.]

(*b*) *Campbell* v. *Campbell*, 13 Sim. 168; and see 2 Y. & C. C. C. 607.

Where he has a legacy for his trouble.

An executor in India is only allowed the commission where the testator himself has not left him a legacy for his trouble (*a*); but if the amount of the legacy be an inadequate compensation for the duties of the office, it seems the executor, so as he signify his resolution in proper time, may renounce the intended legacy, and take advantage of the commission (*b*).

Constructive trustees.

5. A person who has carried on a business with another man's money under circumstances which make him liable to account for profits, will be allowed a compensation for his *skill and exertions* in the management of the concern (*c*).

Express trustee has no allowance for management of a trade.

6. But a person will not be permitted, except under very special circumstances (*d*), to charge anything for his management of a trade or business, where he has been clothed in *express* terms with the character of a trustee or executor (*e*).

Solicitors.

7. A *solicitor* who sustains the character of trustee will not be permitted to charge for his time, trouble, or attendance, but only for his actual disbursements (*f*). Lord Lyndhurst observed, "It would be *placing his* INTEREST *at variance with the duties he has to discharge.* It is said, the bill may be taxed, but that would not be a sufficient check; the estate has a right not only to the protection of the taxing officer, but also to the vigilance and guardianship of the executor or trustee: a trustee placed in the situation of a solicitor might, if allowed to perform the duties of a solicitor and to be paid for them, find it very often proper to institute and carry on legal proceedings, which he would not do, if he were to derive no emolument from them himself, and if he were to employ another person" (*g*).

Settled accounts.

8. If a *cestui que trust* settle accounts with a trustee, who is a solicitor, and execute a general release, and the accounts contain items of charges for professional services, the *cestui que trust*, if he had no legal advice, and was not expressly informed that professional services might have been disallowed, may open the accounts as regards the objectionable items (*h*); but if the *cestui*

(*a*) *Freeman* v. *Fairlie*, 3 Mer. 24.

(*b*) See Id. 28.

(*c*) *Brown* v. *De Tastet*, Jac. 284; and see Sir Samuel Romilly's argument in *Crawshay* v. *Collins*, 15 Ves. 225; and *Wedderburn* v. *Wedderburn*, 22 Beav. 84. To this principle must also be referred the decision in *Brown* v. *Litton*, 1 P. W. 140; 10 Mod. 20.

(*d*) *Forster* v. *Ridley*, 4 N. R. 417; *S. C.* 4 De G. J. & S. 452.

(*e*) *Stocken* v. *Dawson*, 6 Beav. 371; *Burden* v. *Burden*, 1 V. & B. 170; *Brocksopp* v. *Barnes*, 5 Mad. 90. See *Marshall* v. *Holloway*, 2 Sw. 432.

(*f*) *New* v. *Jones*, Excheq. Aug. 9, 1833, 9 Jarm. Prec. 338. See the result of the various decisions stated at p. 298, *supra*.

(*g*) *New* v. *Jones*, 9 Jarm. Prec. 338.

(*h*) *Todd* v. *Wilson*, 9 Beav. 486.

que trust had independent legal assistance, he is bound by the release (*a*).

Purchaser.

9. The doctrine against professional charges by a trustee, who is a solicitor, is so rigidly applied, that where a security has been given for payment of such professional charges, it may be set aside, even as against a *purchaser for valuable consideration*, if he had *notice* (*b*).

Allowance directed by the settlor.

10. The rule against allowances to trustees is merely a general one in the absence of express directions to the contrary; for there is no objection to the settlor himself *directing compensation* to the trustee for his services, either by the gift of a sum in gross, or by the allowance of a salary (*c*).

Allowance does not cease on institution of a suit.

11. And if a testator give an executor a salary for his trouble the allowance will not cease on the institution of a suit; for though the management be thenceforward under the direction of the Court, the executor is still called upon to assist the Court in the administration with his care and vigilance (*d*). If the executor be wholly incapacitated, even by the act of God, from discharging the duties of executor (*e*), and *à fortiori* if the executor, being capable, do not act when there is nothing to prevent his acting (*f*) he cannot claim a legacy given to him for his trouble in the executorship (*g*), and an annuity, limited to a trustee during the continuance of his office, cannot be claimed when the duties of the office have ceased by the absolute vesting of the property (*h*).

Amount of allowance not expressed.

12. Where the settlor has directed a remuneration to the trustee, but has not declared the *amount*, a reference will be directed to settle the *quantum meruit*, according to the circumstances of the case (*i*).

Contract for an allowance with the *cestui que trust*.

13. The trustee may also, at the time of accepting the trust, *contract* for an allowance or remuneration for his services (*j*);

(*a*) *Stanes* v. *Parker*, 9 Beav. 385; *Re Wyche*, 11 Beav. 209.

(*b*) *Gomley* v. *Wood*, 3 Jon. & Lat. 678, [where the solicitor having acted for the purchaser, the purchaser was treated as having notice of all that the solicitor knew, see p. 693.]

(*c*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Robinson* v. *Pett*, 3 P. W. 250, *per* Sir J. Jekyll; *Willis* v. *Kibble*, 1 Beav. 559.

(*d*) *Baker* v. *Martin*, 8 Sim. 25; see *ante*, p. 674.

(*e*) *Re Hawkins' Trusts*, 33 Beav. 570; *Hanbury* v. *Spooner*, 5 Beav. 630.

(*f*) *Slaney* v. *Witney*, 2 L. R. Eq. 418.

(*g*) *Re Hawkins' Trusts*, 33 Beav. 570; *Hanbury* v. *Spooner*, 5 Beav. 630.

(*h*) *Hull* v. *Christian*, 17 L. R. Eq. 546.

(*i*) *Ellison* v. *Airey*, 1 Ves. 111, see 115; and see *Willis* v. *Kibble*, 1 Beav. 559.

(*j*) *Re Sherwood*, 3 Beav. 338; *Douglas* v. *Archbutt*, 2 De G. & J. 148.

but bargains of this kind are watched by the Court with exceeding jealousy (*a*), and must be freely made and not submitted to from pressure (*b*); and where the person about to become trustee and bargaining for remuneration is a solicitor, who is *acting as such in the preparation of the instrument of trust which purports to confer the right of remuneration*, there would seem to be considerable difficulty in upholding the contract unless the client had independent professional advice, or unless, at all events, the solicitor can show that the precise nature of the arrangement was distinctly explained to the client (*c*).

Terms of the contract must be fulfilled to the letter.

14. Where the contract is valid originally, the conditions of it must be *fulfilled to the letter*, or the trustee is not entitled to his reward. An executor, who had no legacy, and where the execution of the trust was likely to be attended with trouble, agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship. He died before the execution of the trust was completed, and his executors brought a bill to be allowed those 100 guineas out of the trust money in their hands; but the Court said all bargains of this kind ought to be discouraged, as tending to eat up the trust, and here the executor had died before he had finished the affairs of the trust; and so the plaintiffs' demand was disallowed (*d*).

Contract for an allowance with the Court.

15. A trustee dealing with the *Court*, is at liberty, before accepting the trust, to stipulate for any remuneration which the Court may choose to give him (*e*). But if he omit to contract with the Court before entering upon his duties, he will have great difficulty in obtaining compensation afterwards, and we may add that in no case will the Court remunerate a trustee for his trouble by permitting him to make *professional charges* where the settlor has not so directed, but will compensate him for his trouble, if at all, by a regular and fixed salary (*f*).

Mortgagee.

16. During the continuance of the usury laws a *mortgagee* could not, as a general rule, have *bargained* for a compensation

(*a*) *Ayliffe* v. *Murray*, 2 Atk. 58.
(*b*) *Barrett* v. *Hartley*, 12 Jur. N. S. 426.
(*c*) *Moore* v. *Frowd*, 3 M. & Cr. 48.
(*d*) *Gould* v. *Fleetwood*, cited *Robinson* v. *Pett*, 3 P. W. 251, note (A).
(*e*) *Marshall* v. *Holloway*, 3 Sw. 452, 453; *Newport* v. *Bury*, 23 Beav. 30; *Brocksopp* v. *Barnes*, 5 Mad. 90, *per* Sir J. Leach; *In re Freeman's Settlement*, 37 Ch. D. 148, and see *Morison* v. *Morison*, 4 M. & Cr. 215.
(*f*) *Bainbrigge* v. *Blair*, 8 Beav. 588. See the observations of Lord Langdale, pp. 595, 596; [and see *In re Freeman's Settlement*, 37 Ch. D. 148, where a commission of 5 per cent. was allowed to an English trustee for receiving rents, all the *cestuis que trust* and the other trustees being resident out of the jurisdiction.]

exceeding together with the actual interest the legal rate, for an agreement of this kind would have tended to usury (*a*). But after a long struggle certain special exceptions were established in favour of mortgagees *not in possession* of West Indian estates (*b*).

[Effect of repeal of usury laws.]

[It has been said that the rule that the mortgagee should not be allowed to stipulate for any collateral advantage beyond his principal and interest does not depend on the laws against usury (*c*), and a stipulation by the mortgagee that he should receive a bonus was, under special circumstances, held invalid on this ground (*d*); but sums actually deducted by a mortgagee for commission and bonus at the times of making the advances, in accordance with the mortgage contract, entered into deliberately and without any unfair dealing on the part of the mortgagee, were allowed, the return thus made by the mortgagor to the mortgagee being regarded as part of the consideration for the accommodation to him (*e*)].

Employment of agents.

17. As a trustee will not be permitted to charge for his personal care and loss of time, it is but just he should be allowed on proper occasions to call in the assistance of *agents* at the expense of the estate.

Collector of rents.

18. Thus a trustee, though he may not act as a collector himself with a commission (*f*), may, if the case require it, appoint a *collector of rents* (*g*), [or of book debts (*h*),] at a commission. [But trustees who under an order of the Court receive rents and are allowed a commission will not be allowed additional charges in respect of a collector of rents (*i*).]

Bailiff.

19. As a man is not bound to be his own *bailiff*, if a trustee employ a skilful person in that capacity, the salary must be allowed (*j*); at least the Court will grant that indulgence where

(*a*) See *Chambers* v. *Goldwin*, 9 Ves. 271.

(*b*) See the history of the struggle detailed in Lord Brougham's judgment in *Leith* v. *Irvine*, 2 M. & K. 277.

[(*c*) *James* v. *Kerr*, 40 Ch. D. 449, 460, *per* Kay, J.]

[(*d*) *James* v. *Kerr*, *ubi sup.*]

[(*e*) *Mainland* v. *Upjohn*, 41 Ch. D. 126; following *Potter* v. *Edwards*, 26 L. J. Ch. 468; and see *Marquess of Northampton* v. *Pollock*, 45 Ch. Div. 190, 212.]

(*f*) *Nicholson* v. *Tutin*, 3 K. & J. 159; [*Re Bedingfield*, 57 L. T. N.S. 332.]

(*g*) *Davis* v. *Dendy* (the case of a mortgagee), 3 Mad. 170; *Stewart* v. *Hoare*, 2 B. C. C. 633; and see *Wilkinson* v. *Wilkinson*, 2 S. & S. 237; *Re Westbrooke*, 2 Ph. 631; [but as to the propriety of trustees employing the solicitor to the trust estate to collect rents and receive a commission, see *Re Weall*, 42 Ch. D. 674.]

[(*h*) *Re Brier*, 26 Ch. Div. 238.]

[(*i*) *Cox* v. *Bennett*, 39 W. R. 303.]

(*j*) *Bonithon* v. *Hockmore*, 1 Vern. 316; *Chambers* v. *Goldwin*, 9 Ves. 272, *per* Lord Eldon.

the estate is at such a distance that the trustee must have appointed a bailiff had the estate been his own (*a*).

Attorney.

20. An executor employed a person who had been his clerk to transact some business for him relative to the testator's affairs, and the Master insisted it was the executor's own duty, and refused to allow the expense. But Lord Hardwicke said, "it was clear that if an executor paid an *attorney* for his trouble and attendance in the management of the estate, he ought to be repaid the sums he had so disbursed," and ordered a reference to the Master to tax the items of the bill (*b*).

Accountant.

21. If the accounts be complicated, and the executor or trustee take upon himself to adjust and settle them, although it may occupy a great deal of his time and attention, the principle of equity is that he cannot claim a compensation; but if he choose to save his own trouble by the employment of an *accountant,* he is entitled to charge the trust estate with it under the head of expenses (*c*).

Weiss *v.* Dill.

22. In *Weiss* v. *Dill* (*d*) the executor of a trader had employed an agent to *collect debts,* which were numerous and only paid after repeated applications, at a commission of 5 per cent. The Master had reduced the commission to $2\frac{1}{2}$ per cent.; and, the executor upon that ground taking an exception to the report, Sir J. Leach said, "Executors, generally speaking, are not allowed to employ an agent to perform those duties which, by accepting the office of executors, they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them the expenses they have incurred in the employment of agents; I have some doubt whether in this case the Master ought to have made *any* allowance, but with the allowance of $2\frac{1}{2}$ per cent. the executor must be content." The observations of Sir J. Leach might seem at first either to cast doubt upon the general right of a trustee to employ salaried agents in fitting cases, or to establish a distinction between the collection of *debts* and the collection of *rents,* but it cannot be supposed that his Honour intended to reverse his previously expressed views on the general principle (*e*), and there seems no ground for any such distinction

(*a*) *Godfrey* v. *Watson* (as to a mortgage), 3 Atk. 518, *per* Lord Hardwicke.

(*b*) *Macnamara* v. *Jones,* 2 Dick. 587.

(*c*) *New* v. *Jones,* Exch., Aug. 9, 1833, cited 9 Jarm. Prec. 338; *Henderson* v. *M'Iver,* 3 Mad. 275.

(*d*) 3 M. & K. 26; and see *Giles* v. *Dyson,* 1 Stark, N. P. C. 32; *Hopkinson* v. *Roe,* 1 Beav. 180; *Day* v. *Croft,* 2 Beav. 488.

(*e*) See *Wilkinson* v. *Wilkinson,* 2

as that adverted to. The decision in substance was, that the Court declined to over-rule the Master's opinion on the question of *quantum*.

SECTION II.

ALLOWANCES TO TRUSTEES FOR EXPENSES.

General rule.

1. THOUGH a trustee is allowed nothing for his *trouble*, he is allowed everything for his *expenses out of pocket* (*a*). "It flows," said Lord Eldon, "from the nature of the office, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust" (*b*). Even where trustees had been *wrongfully appointed* but acted *bonâ fide*, and believed themselves to have been duly appointed, they were allowed their costs, charges, and expenses, notwithstanding the defect of title (*c*).

Travelling expenses.

2. A trustee will be entitled to be reimbursed his *travelling* expenses (*d*), provided they be properly incurred (*e*).

Employment of solicitor.

3. Trustees are justified in employing a *solicitor* for the better conduct of the trust (*f*). And a trustee is entitled to be paid all costs properly incurred for which he is liable to the solicitor so employed; as where *two* executors, defendants in an administration suit, gave a *joint retainer* to a firm of solicitors, and one of the executors became bankrupt and was a debtor to the estate, it was held that the other executor, being liable for the whole costs under the joint retainer, was entitled to the whole costs as against the estate (*g*). [But this case has been dissented from

S. & S. 237; [*Re Brier*, 26 Ch. Div. 238.]

(*a*) *How* v. *Godfrey*, Rep. *t.* Finch. 361; *Re Ormsby*, 1 B. & B. 190, *per* Lord Manners; *Hide* v. *Haywood*, 2 Atk. 126; *Caffrey* v. *Darby*, 6 Ves. 497, *per* Sir W. Grant; *Godfrey* v. *Watson*, 3 Atk. 518, *per* Lord Hardwicke; *Feoffees of Heriot's Hospital* v. *Ross*, 12 Cl. & Fin. 512, 515, *per* Lord Cottenham.

(*b*) *Worrall* v. *Harford*, 8 Ves. 8; and see *Dawson* v. *Clarke*, 18 Ves. 254; *Attorney-General* v. *Mayor of Norwich*, 2 M. & Cr. 424; *Morison* v. *Morison*, 7 De G. M. & G. 214.

(*c*) *Travis* v. *Illingsworth*, W. N. 1868, p. 206.

(*d*) *Ex parte Lovegrove*, 3 D. & C. 763; and see *Ex parte Elsee*, 1 Mont. 1; *Ex parte Bray*, 1 Rose, 144. These were cases of assignees who, by 6 G. 4. c. 16, s. 106 (the Bankrupt Act then in force), were to have "all just allowances," but trustees are equally entitled to all just allowances *virtute officii*; see *Blackford* v. *Davis*, 4 L. R. Ch. App. 305.

(*e*) *Malcolm* v. *O'Callaghan*, 3 M. & Cr. 62; and see *Bridge* v. *Brown*, 2 Y. & C. C. C. 181.

(*f*) *Macnamara* v. *Jones*, Dick. 587.

(*g*) *Watson* v. *Row*, 18 L. R. Eq. 680.

by the late M.R., who held, in a similar case, that the solvent executor should be allowed only his own proportion of the costs up to the bankruptcy out of the estate, the defaulter's proportion being set off against the debt due from him, but that the costs incurred by both subsequently to the bankruptcy should be allowed in full (*a*). And this view has since been approved (*b*). The proportion of the common costs which should be allowed to the solvent trustee is a matter for the Taxing Master (*c*).] And the sums paid will, at the instance of the *cestui que trust*, though not liable to taxation, be looked over and moderated (*d*). And trustees, if they employ one of themselves as solicitor, instead of engaging a third person, will be answerable for all the consequences, if they be misled by the professional advice of such trustee solicitor (*e*).

[(*a*) *Smith* v. *Dale*, 18 Ch. D. 516; this case probably referred to a bankruptcy under the law as it existed prior to the Act of 1869, as under that Act the bankrupt trustee would not have been entitled to his costs after the bankruptcy until he had made good his default. See *post*, Chap. xxxii. s. 5.]

[(*b*) *McEwan* v. *Crombie*, 25 Ch. D. 175.]

[(*c*) *Smith* v. *Dale*, *McEwan* v. *Crombie*, *ubi supra*.]

(*d*) *Johnson* v. *Telford*, 3 Russ. 477; *Langford* v. *Mahony*, 2 Conn. & Laws 317.

(*e*) *Alton* v. *Harrison* (a legatee's suit), and *Poyser* v. *Harrison* (a residuary legatee's suit), both which were consolidated and heard before V. C. Sir J. Stuart on 6th and 8th June, 1868. The testatrix, who died in 1851, devised her real and personal estate to two trustees, Ingle and Harrison (the former a solicitor, the latter a manufacturer), upon the usual trusts for sale and conversion; and as to the residue after payment of legacies and annuities to invest upon sufficient securities in trust for a class of persons. The trustees lent 500*l*. upon mortgage to one Thornley, and another 500*l*. to one Walker, and in 1853 Ingle died insolvent. It afterwards turned out that both Thornley's security and Walker's security were second mortgages, and the whole money was lost. Ingle had been solicitor of the testatrix, and had made her will and acted as solicitor to the trust. The plaintiffs sought to make Harrison liable for the two sums of 500*l*. each as lent upon insufficient security. Harrison declared on oath that the value of the mortgaged property, free from incumbrance, was personally known to him, and was far in excess of the loan, and that the loss had arisen not from the inadequacy of value, but from the defect of title, viz., in the two mortgages being second mortgages; that when the advances were made he fully believed that in each case the security was a first mortgage, and that he had relied as to the title upon the legal advice of Ingle, who had fraudulently represented the security as a fit and proper one; that the trustees had a right to employ one of themselves as solicitor to the trust (though no professional profits could be allowed), and that Harrison was entitled to the same protection from the legal advice given by Ingle, as if the trustees had employed a third person as solicitor, who had approved the title on their behalf. However, the Vice-Chancellor ruled that two trustees, one of whom was a solicitor, were liable to all the consequences if they employed one of themselves as such solicitor, instead of calling in a third person; and his Honour put the case of a single trustee, a solicitor, and asked whether it could be contended that such trustee was not liable for the consequences if he acted without other professional advice, and his Honour decided that Harrison was made liable for both the sums lent. This point seems to have arisen for the first time,

[If in conveyancing matters regulated by the Solicitors Remuneration Act, 1881, the solicitor of the trustees elects under rule 6 of the General Order of August, 1882, to be remunerated according to the old system, it may be matter for the consideration of the trustees whether they should continue to employ him on those terms (*a*).]

Fees to counsel.

4. A trustee may give *fees to counsel* and shall have allowance thereof (*b*).

[Costs of opposing Bill in Parliament.]

[5. And a trustee will be allowed the costs of opposing a bill in Parliament which affects the trust estate (*c*).

[Of protecting the estate.]

And the Court will sanction the payment by the trustees of settled estates of costs which have been properly incurred by the tenant for life for the protection of the estates, whether as plaintiff or as defendant (*d*).

And costs incurred with a view to protect the trust estate in taking proceedings to strike off the rolls a solicitor who is a defaulter to the trust, may be allowed (*e*).

The Settled Land Act, 1882, expressly authorizes trustees of a settlement to reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them (*f*).]

Extra costs.

6. And if a trustee be sued by a stranger concerning the trust, and have his costs paid him as between *party and party*, and the *cestui que trust* afterwards institute proceedings for an account, the trustee will be allowed his necessary costs in the former suit, and will not be concluded by the amount of the taxation (*g*);

and the judgment of the V. C. may be supported on principle; for if two persons be appointed trustees, they ought in matters of title to take professional advice, and for that purpose to employ a competent solicitor; but the selection of a proper legal adviser must be the *joint* act of the two, and as a man cannot be judge in his own case, they cannot appoint one of themselves to the office. *A fortiori* if there be a single trustee, a solicitor, he cannot act himself as solicitor and claim the same protection as if he had appointed another. When a settlor appoints a person as trustee, who is also a solicitor, he does not in the absence of any special direction, mean him also to act as solicitor; for a person may be a very good trustee and yet a very bad solicitor. The settlor selects his trustee, not because he is a solicitor or valuer, or fills any other scientific capacity, but because he is a person to be trusted with the property and capable of managing it with the aid of professional advice.

[(*a*) See *Re United Kingdom Land and Building Association*, 37 W. R. 486.]

(*b*) Cary, 14; *Poole* v. *Pass*, 1 Beav. 600.

[(*c*) *Re Nicoll's Estates*, W. N. 1878, p. 154.]

[(*d*) *Re Earl de la Warr's Estates*, 16 Ch. D. 587; 51 L. J. N.S. Ch. 407; *Re Lord Rivers' Estate*, 16 Ch. D. 588, n. And see 45 & 46 Vict. c. 38, s. 36.]

[(*e*) *Re Davis*, 57 L. J. N.S. Ch. 3; 57 L. T. N.S. 755.]

[(*f*) S. 43.]

(*g*) *Amand* v. *Bradburne*, 2 Ch. Ca. 138; *Ramsden* v. *Langley*, 2 Vern. 536; and see *Fearns* v. *Young*, 10 Ves. 184.

and if a trustee as defendant be ordered to pay the plaintiff's costs, he will, unless he has forfeited his right by some misconduct, be entitled *as between him and his cestui que trust* to be reimbursed the costs which he has paid, and also those which he has himself incurred (*a*). The fact of a trustee having been unsuccessful in litigation, either as plaintiff or defendant, will not in the absence of misconduct disentitle him to be reimbursed his costs (*b*), but a trustee will have no claim to reimbursement out of the trust fund, where the legal proceedings were occasioned by his own negligence in the first instance (*c*); or were improperly instituted by himself (*d*); and a trustee will not be allowed, without question, whatever sums by way of costs he may have paid his solicitor; for the bill, as between trustee and *cestui que trust*, though not submitted to a regular taxation (which is between solicitor and client), will be moderated by the Court by a deduction of such charges as may appear irregular and excessive (*e*); and the trustee will not be allowed interest on the costs, though at the time he paid them he had no trust monies in his hands (*f*).

Interest not allowed.

[7. Where a bill was filed to set aside a decree for a compromise on the ground of personal fraud in one of the trustees in obtaining the decree, but the charge of fraud was disproved, and the bill dismissed with costs to be paid by the next friend of the plaintiff, who, however, was unable to pay them, it was held that the trustee was entitled to have his costs discharged out of the trust estate, for the defence was by him not on his own behalf but for the benefit for the trust estate, and his right was not affected by the fact that his character was incidentally cleared in the suit (*g*). And this decision has recently been referred to as a very strong illustration of the general rule that a trustee is

[Costs of trustee defending his conduct in the trust.]

(*a*) *Lovat* v. *Fraser*, 1 L. R. H. L. Sc. 37, *per* Lord Kingsdown.

(*b*) *Courtney* v. *Rumley*, 6 Ir. R. Eq. 99.

(*c*) *Caffrey* v. *Darby*, 6 Ves. 497; *Courtney* v. *Rumley*, 6 Ir. R. Eq. 99.

(*d*) *Peers* v. *Ceeley*, 15 Beav. 209; *Leedham* v. *Chawner*, 4 K. & J. 458.

(*e*) *Johnson* v. *Telford*, 3 Russ. 477; *Allen* v. *Jarvis*, 4 L. R. Ch. App. 616; [and see *Brown* v. *Burdett*, 40 Ch. Div. 244, 254.] As to the right of the *cestui que trust* to obtain a taxation as against the solicitor, see *Re Drake*, 22 Beav. 438; *Re Dickson*, 3 Jur. N. S. 29, and cases there cited; *Re Dawson*, 28 Beav. 605; *Re Press*, 35 Beav. 34; *Re Brown*, 4 L. R. Eq. 464, in which it was held, that the costs are to be taxed as between solicitor and client; but that if not proper having regard to the nature of the trust, they can only be recovered from the trustee personally, and are not chargeable as between the solicitor and the *cestui que trust*.

(*f*) *Gordon* v. *Trail*, 8 Price, 416. But if he pays off a debt carrying interest, he stands in the place of the creditor in respect of interest; *Re Beulah Park Estate*, 15 L. R. Eq. 43; *Finch* v. *Pescott*, 17 L. R. Eq. 554.

[(*g*) *Walters* v. *Woodbridge*, 7 Ch. Div. 504.]

entitled in an ordinary case to recover out of the trust estate, as costs, charges, and expenses properly incurred, all his costs of an action which he has properly defended, and as showing that where a tenant for life has properly defended an action to restrain him from exercising his powers under the Settled Land Act, the difference between solicitor and client and party and party costs may be treated as charges and expenses incidental to the exercise of the power (*a*).]

Allowance for expenses besides remuneration for trouble.

8. Even a specific remuneration given by the testator to his trustees for their services in the trust is no reason for excluding them from the usual allowance for *expenses*. A testator bequeathed to his acting trustees for the time being the yearly sum of five guineas apiece for the care and trouble they might have in the execution of the trust. The testator's estates consisted in part of about fifty houses in London, thirty-four of which were let to weekly tenants. The trustees employed a person to collect the rents, and Sir John Leach said, "The annuity was given to them as a recompense for the care and trouble which would attend the due execution of the office; and if it was consistent with the due execution of the office to employ a collector, they were entitled to the annuity. A provident owner might well employ a collector in such a case, and the labour of such a collection could not be imposed on the trustee" (*b*). [But where annuities were expressly given to trustees for "their services and collecting of rents" it was held that they could not claim the annuities in addition to a commission of greater amount allowed to a collector of rents (*c*).]

Amount of expenses.

9. A regular account of the expenses should invariably be kept; but where this has not been done the Court has ordered a *reasonable allowance* to be made in the gross, at the same time taking care that the remissness and negligence of the trustee in not having kept any account should not meet with any encouragement. Thus in *Hethersell* v. *Hales* (*d*) the trustee put in a general claim for 2500*l.*, apparently an average estimate of the expenses he had incurred in the trust. "The Court," says the reporter, "took some time to deliberate what was fit to be allowed in a matter of this

[(*a*) *Re Llewellin*, 37 Ch. D. 317, 327, *per* Stirling, J., and see *ante*, p. 629.]

(*b*) *Wilkinson* v. *Wilkinson*, 2 S. & S. 237; and see *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Fountaine* v. *Pellet*, 1 Ves. jun. 337; [and that an annual payment to trustees for their trouble in carrying on the testator's business after his death is liable to legacy-duty, see *Re Thorley*, 39 W. R. 233, affirmed W. N. (1891), p. 83.]

[(*c*) *Re Muffet*, 56 L. J. Ch. 600; 56 L. T. N.S. 671.]

(*d*) 2 Ch. Rep. 158.

nature; and having considered that the trustee was a friend to the family, and undertook the trust at their great importunity, and that he had incurred the charge of surveying the whole estate, selling and letting the same, looking after tenants, adjusting their accounts, calling in their rents, returning monies to creditors, and treating with them and stating their debts, and procuring and agreeing with purchasers, and for law charges, and for keeping servants and horses, and employing others in journeys to London and elsewhere, and his care there lying from home a long time, the Court was of opinion that the trustee might well deserve the whole 2500*l.*, yet would not allow but 2000*l.*, which the trustee was to have."

Extraordinary outlay.

10. As it is a rule that the *cestui que trust* ought to save the trustee harmless from all damages relating to the trust, so within the reason of the rule, where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from a loss, or from a *plain and great hazard of it*, the trustee ought to be repaid (*a*). So where a trustee employed a bailiff to fell some trees, and the woodcutter allowed a bough to fall on a passer by, who was injured, and recovered damages from the trustee, it was held that as the trustee had meant well, had acted with due diligence, and had employed a proper agent to do an act which was within the sphere of the trustee's duty, and the agent made a mistake, the trustee was entitled to charge the damages on the trust estate (*b*).

[Expenses of carrying on a business.]

[11. If a trustee is authorized to carry on a business and to employ certain specific property for that purpose, the creditors of the business have a right to the benefit of indemnity and lien which the trustee has against the property devoted to the business; but this right is subject to any equities subsisting between the trustee and the *cestui que trust* of the specific property; and where the trustee is in default and is not entitled to indemnity except upon the terms of making good the default, the creditors will have no right to indemnity except upon the same terms (*c*).

(*a*) *Balsh* v. *Hyham*, 2 P. W. 455, *per* Lord King; and see *Attorney-General* v. *Mayor of Norwich*, 2 M. & Cr. 424; *Attorney-General* v. *Pearson*, 2 Coll. 581; *Quarrell* v. *Beckford*, 1 Mad. 282; *Sandon* v. *Hooper*, 6 Beav. 246; *Bright* v. *North*, 2 Ph. 216; *James* v. *May*, 6 L. R. H. L. 328.

(*b*) *Benett* v. *Wyndham*, 4 De G. F. & J. 259.

[(*c*) *Re Johnson*, 15 Ch. D. 548; *Ex parte Garland*, 10 Ves. 110; *Re Sumner*, W. N. 1884, p. 121; *Gallagher* v. *Ferris*, 7 L. R. Ir. 489; *Re Blundell*, 44 Ch. Div. 1, 11. These authorities proceed on this principle, that where a particular part of a trust estate is specifically dedicated to a particular purpose which involves trade debts and liabilities, it is a trust to use it

But where the trustee for sale of a business carries on the business without authority for the benefit of the *cestuis que trust*, and incurs liabilities to tradesmen in so doing, there is no right in the creditors to come against the trust estate, but they must look to the trustee personally (*a*).

In a case in Ireland it was held premature for creditors of the business to apply for leave to attend proceedings in an action for the administration of the testator's estate, until on further consideration the executors were proved not to be in default, as in that case alone would the creditors be entitled to stand in the place of the executors in their right to indemnity against the estate (*b*).

Where the business is carried on in accordance with a general direction empowering the executors to continue it and to employ any part of the general estate therein, and *with the assent of the testator's creditors*, in their interest as well as in that of the beneficiaries, the executors will be entitled, in priority to the claims of the testator's creditors, to be indemnified out of the general estate against liabilities properly incurred, and the indemnity will not be limited to the portion of the assets which has come into existence or changed its form since the testator's death (*c*).]

Expenses a *lien* on the trust estate.

12. The expenses incurred by a trustee in the execution of his office are treated by the Court as a first charge or *lien* upon the estate, and the *cestui que trust* or his assign cannot compel a conveyance in equity without a previous satisfaction of the trustee's just demands (*d*), and in a suit for the administration of the fund in respect of which the expenses have been incurred, the lien of

for that particular purpose, and the trustee, though personally liable for the debts which he contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose, and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned, *per* Selborne, L. C. *Strickland* v. *Symonds*, 26 Ch. Div. 248; and see *Boylan* v. *Fay*, 8 L. R. Ir. 374.]

[(*a*) *Strickland* v. *Symons*, 22 Ch. D. 666; affirmed 26 Ch. Div. 245; and see *Re Evans*, 34 Ch. Div. 597; *Re Gorton*, 40 Ch. Div. 536, 543.]

[(*b*) *Re Morris*, 23 L. R. Ir. 333.]

[(*c*) *Dowse* v. *Gorton*, (1891) A. C. 190, varying the decision of the Court of Appeal (see *Re Gorton*, 40 Ch. Div. 536), limiting the indemnity in the manner indicated.]

(*d*) See *Ex parte James*, 1 D. & C. 272; *Hill* v. *Magan*, 2 Moll. 460; *Norwich Yarn Company*, 22 Beav. 143; *Ex parte Chippendale*, 4 De G. M. & G. 19; *Re Exhall Coal Company*, 35 Beav. 449; *Oliver* v. *Osborn*, W. N. 1867, p. 245; *Re Layton's Policy*, W. N. 1873, p. 49; Brown, P. C. 266; and *Trott* v. *Dawson*, 1 P. W. 780, more fully referred to in the last edition of this work, p. 639, note (*c*), where it is shown that the case does not justify the erroneous inference which has been drawn from it, that a trustee gives credit for the expenses, not to the *estate*, but to the *person* of the *cestui que trust*, and that the assignee of the latter is not liable for the trustee's expenses incurred in the time of the assignor.

the trustee will be paid even before the costs of suit (*a*). [And the expenses are a first charge as well upon the income as upon the corpus of the estate, and the trustees have therefore the right to retain their expenses out of the income until provision can be made for raising them out of the corpus (*b*).] The trustee of a *void* trust deed cannot charge his expenses as against persons who establish the invalidity of the deed (*c*); though he will be allowed for improvements (*d*). [Where, however, a voluntary settlement was set aside, at the instance of the settlor, on the ground of improvidence and having regard to her age, the trustees, in the absence of any evidence of improper motive, were allowed their costs, charges, and expenses properly incurred (*e*); and where a settlement originally valid, is afterwards avoided under sect. 47 of the Bankruptcy Act, 1883, the trustees are entitled to their costs of an action unsuccessfully brought to set aside the settlement (*f*).] There will be no lien for expenses incurred by trustees in respect of an act done in excess of their powers, and therefore in breach of their duty (*g*). And the Court has refused to give effect to a trustee's lien by a foreclosure decree, or a sale, which would be the destruction of the trust itself; but the Court has gone as far as it could by delivering the deeds into his custody and prohibiting any disposition of the property without previous discharge of the trustee's lien (*h*).

[13. Where a trustee has a right of indemnity out of the trust estate, he may at any time come to the Court to enforce it, and is under no obligation to wait until the trust estate has been turned into money under the trust (*i*).] [Enforcing right to indemnity.]

14. If trustees have to raise a certain sum which is properly chargeable on the corpus, and a *cestui que trust*, at the *request of the trustees*, advances money for the purpose, the *cestui que trust* stands in the place of the trustees and has a lien on the corpus for the amount (*j*). Advance by *cestui que trust*.

(*a*) See *Morison* v. *Morison*, 7 De G. M. & G. 226; *Re Exhall Coal Company*, 35 Beav. 449.

[(*b*) *Stott* v. *Milne*, 25 Ch. Div. 710.]

(*c*) *Smith* v. *Dresser*, 1 L. R. Eq. 651; 35 Beav. 378; [and see *Ex parte Russell*, 19 Ch. Div. 588, 602; *Dutton* v. *Thompson*, 23 Ch. Div. 278.]

(*d*) *Woods* v. *Axton*, W. N. 1866, p. 207.

[(*e*) *Everitt* v. *Everitt*, 10 L. R. Eq. 405; and see *James* v. *Couchman*, 29 Ch. D. 212, 217.]

[(*f*) *Re Holden*, 20 Q. B. D. 43.]

(*g*) *Leedham* v. *Chawner*, 4 K. & J. 458; in which case the Court held that there was no lien even as against a *cestui que trust* who knew and approved of the proceedings, but otherwise remained passive.

(*h*) *Darke* v. *Williamson*, 25 Beav. 622.

[(*i*) *Re Pumfrey*, 22 Ch. D. 255, 262; and see *post*, pp. 724, 725.]

(*j*) *Todd* v. *Moorhouse*, 19 L. R. Eq.

Lien does not extend to the trustees' agents.

15. Although the trustees themselves are creditors upon the trust fund for the amount of their expenses, the persons who are employed by them as solicitors, surveyors, &c., have no such lien, [as they are the solicitors, &c., of the trustees personally, and not of the trust estate (*a*).] And the law is so settled, notwithstanding an express declaration by the settlor that the trustees shall *in the first place pay the expenses of the trust*, and though the trustees themselves be charged to be insolvent. In every deed is *implied* a direction to pay the costs and expenses, and *expressio eorum quæ tacite insunt nihil operatur*. It would be a mischievous principle to hold, that every person with whom the trustees had incurred a just and fair demand might sue the trustees, and come for an account of the whole administration (*b*).

Secus if there be a positive direction to employ a particular agent.

16. But a *solicitor* in accounting for his receipts to the trustees may *set off his costs* (*c*). And a *positive direction* to the trustees to employ a particular person as auditor or receiver, and allow him a proper salary, will constitute a trust in his favour, and, of course, give him a claim against the trust fund (*d*). But if a testator merely *recommend or express a desire* that his trustees should employ him as receiver, the question is, whether the words used amount to a trust, or only to an expression of opinion and advice: and to discover the meaning, the Court examines the provisions of the will, and if it finds that, to consider the words as a trust would be inconsistent with the general character of the will, which assumes that the administration of the estate is to be unfettered by such a trust, the Court comes to the conclusion that the words were meant only by way of suggestion (*e*). [And where a will contained a direction that "the testator's solicitor should be the solicitor to his estate and to his trustees in the management and carrying out the provisions of his will," it was held that no trust or duty was imposed on the trustees, to continue the testator's solicitor as their solicitor (*f*).

69; *Re Layton's Policy*, W. N. 1873, p. 49; and see *Clack* v. *Holland*, 19 Beav. 262.

[(*a*) *Staniar* v. *Evans*, 34 Ch. D. 470; and that a trustee or executor may retain a solicitor upon the terms that he is to look only to the estate for repayment, see *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 359.]

(*b*) *Worrall* v. *Harford*, 8 Ves. 4, see 8; *Hall* v. *Laver*, 1 Hare, 571; *Feoffees of Heriot's Hospital* v. *Ross*, 12 Cl. & Fin. 507; *Francis* v. *Francis*, 5 De G. M. & G. 108; [and see *Staniar* v. *Evans*, 34 Ch. D. 470.]

(*c*) *Re Sadd*, 34 Beav. 650.

(*d*) *Williams* v. *Corbet*, 8 Sim. 349; *Hibbert* v. *Hibbert*, 3 Mer. 681; *Consett* v. *Bell*, 1 Y. & C. C. C. 569.

(*e*) *Shaw* v. *Lawless*, 1 Ll. & G. *t.* Sugd. 154; reversed 1 Dr. & Walsh, 512; 5 Cl. & Fin. 129; Ll. & G. *t.* Plunk. 559; *Finden* v. *Stephens*, 2 Ph. 142; *Knott* v. *Cottee*, 2 Ph. 192.

[(*f*) *Foster* v. *Elsley*, 19 Ch. D. 518.]

17. Where after the death of an administratrix her solicitor, acting upon the instruction of a relative of the deceased person whose estate was being administered, continued to do work for the benefit of the estate, and the person who afterwards took out administration declined to pay the costs incurred during the period while there was no legal personal representative, it was held that there was no obligation upon him to do so (*a*).] [Costs incurred while there was no personal representative.]

18. *Vice versâ*, the agent of a trustee is accountable to the employer only, the trustee, and not to the *cestui que trust* (*b*); and an action by *cestui que trust* against the trustee and *his solicitor*, alleging improper payments out of the trust fund by the trustee to the solicitor, [cannot be maintained as against] *the solicitor* (*c*). But under the special provisions of the Solicitors Act (*d*), *cestuis que trust* may, at the discretion of the Court, obtain an order to tax the bill of the solicitor employed by the trustee (*e*), and generally *cestuis que trust* may proceed against an agent where he has not confined himself to the duties of an agent, but by accepting a delegation of the whole trust (*f*), or by fraudulently mixing himself up with a breach of trust (*g*), has himself become a trustee by construction of law. Trustee's agents not accountable to the *cestuis que trust*.

19. Monies voted by Act of Parliament for the *public service*, are not trust funds in the hands of the *Secretaries of State* for any particular individual, but for the general purposes of the office. The persons employed by them, therefore, have no lien which they can enforce in equity (*h*). Monies in hands of Secretaries of State.

20. If a person be trustee of different estates for the *same cestuis que trust* under the same instrument, and he incurs expenses on account of one estate in respect of which he has no funds, it is Trust of two estates.

[(*a*) *Re Watson*, 18 Q. B. D. 116; 19 Q. B. Div. 235.]

(*b*) *Myler* v. *Fitzpatrick*, 6 Mad. 360, *per* Sir J. Leach; *Attorney-General* v. *Earl of Chesterfield*, 18 Beav. 596; and see *Langford* v. *Mahony*, 2 Conn. & Laws. 317; *Lockwood* v. *Abdy*, 14 Sim. 441; *Keane* v. *Robarts*, 4 Mad. 350; *Archer* v. *Lavender*, 9 Ir. R. Eq. 225, *per Cur.*

(*c*) *Maw* v. *Pearson*, 28 Beav. 196; [*Re Spencer*, 51 L. J. N.S. Ch. 271; 30 W. R. 435; 45 L. T. N.S. 645; *Re Jackson*, 40 Ch. D. 495.]

(*d*) 6 & 7 Vict. c. 73, s. 39.

[(*e*) *Re Spencer*, *ubi sup.*] As to the circumstances under which the Court will direct taxation at the instance of a *cestui que trust*, see *Re Drake*, 22 Beav. 438; *Re Dickson*, 3 Jur. N. S. 29, and cases there referred to; and *Re Dawson*, 28 Beav. 605; [*Re Jackson*, *ubi sup.*]

(*f*) *Myler* v. *Fitzpatrick*, 6 Mad. 360; and see *Pollard* v. *Downes*, 1 Eq. Ca. Ab. 6; *Lee* v. *Sankey*, 15 L. R. Eq. 204.

(*g*) See *Fyler* v. *Fyler*, 3 Beav. 550; *Alleyne* v. *Darcy*, 4 Ir. Ch. Rep. 199; *Portlock* v. *Gardner*, 1 Hare, 606; *Ex parte Woodin*, 3 Mont. D. & De G. 399; *Attorney-General* v. *Corporation of Leicester*, 7 Beav. 176; *Pannell* v. *Hurley*, 2 Coll. 241; *Bodenham* v. *Hoskyns*, 2 De G. M. & G. 903; *Morgan* v. *Stephens*, 3 Giff. 226; *Hardy* v. *Caley*, 33 Beav. 365.

(*h*) *Grenville-Murray* v. *Earl of Clarendon*, 9 L. R. Eq. 11.

presumed that he may apply to their discharge any money which has come to his hands from any other of the estates (*a*); but he would not be justified in mixing up claims under one instrument of trust with those under another (*b*). [But where different estates are held under the same instrument for different *cestuis que trust*, the trustee cannot reimburse himself from one estate losses incurred in a *bonâ fide* administration of the other estate (*c*).]

How expenses recoverable where no trust estate.

21. If the trust estate fail, the trustee may then institute proceedings against the *cestui que trust* on whose *behalf* and at whose *request* he acted, to recover from him personally the amount of the money expended (*d*); and the rule applies to the case of a *cestui que trust* under *coverture*, to the extent of any property settled to her *separate use*, and where her anticipation is not restrained (*e*); and, generally, trustees acting with the sanction of their *cestuis que trust*, and not exceeding their powers, may call upon their *cestuis que trust* personally to reimburse them any necessary outlay (*f*); and it was held that a trustee who, in that character, had incurred a legal liability, might call upon the *cestui que trust* in equity to give an *indemnity* against the liability before any actual loss had accrued (*g*). [In a recent case, where the plaintiff was holding, as a trustee for the defendant, shares in a company in liquidation, which were not fully paid up, but on which no call had been actually made, Fry, J., refused relief by way of indemnity, and observed that the action was a mere action *quia timet*, and that if it could be maintained it would follow that every person who had undertaken any position of responsibility for another which entitled him to indemnity might sue before the right to indemnity

[Right to indemnity against *cestui que trust* personally.]

[(*a*) But see *Re Munster Bank*, 17 L. R. Ir. 341, and observations of Fitzgibbon, L.J., at p. 348. It would, however, seem that in that case the *cestuis que trust* were not the *same*, and that the decision in no way affects the limited proposition stated above.]

(*b*) *Price* v. *Loaden*, 21 Beav. 508.

[(*c*) *Fraser* v. *Murdoch*, 6 App. Cas. 855; and cf. *Re Johnson*, 15 Ch. D. 548.]

(*d*) *Balsh* v. *Hyham*, 2 P. W. 453; *Ex parte Watts*, 3 De G. J. & S. 394; *Re Southampton Imperial Hotel Company*, 26 L. T. N.S. 384, 20 W. R. 435; *Jervis* v. *Wolferstan*, 18 L. R. Eq. 18; [and see *Fraser* v. *Murdoch*, 6 App. Cas. 855, 872: and *Re Knott*, 56 L. J. Ch. 318; 56 L. T. N.S. 161; *Hobbs* v. *Wayet*, 36 Ch. D. 256; *Whitaker* v. *Kershaw*, 45 Ch. Div. 320.]

(*e*) *Butler* v. *Cumpston*, 7 L. R. Eq. 16; [*Whitaker* v. *Kershaw*, *ubi supra*.]

(*f*) *Ex parte Chippendale*, 4 De G. M. & G. 19, see 54; *Re Exhall Coal Company*, W. N. 1867, p. 244; *Ex parte Challis*, 16 W. R. 451; 17 L. T. N.S. 637; *James* v. *May*, 6 L. R. H. L. 328; and see *Hemming* v. *Maddock*, 9 L. R. Eq. 175.

(*g*) *Phené* v. *Gillan*, 5 Hare, 1, see pp. 9, 13; [the indemnity was ordered to be given by the recognizance of the defendant, see p. 14;] and see *Re Southampton Imperial Hotel Company*, 26 L. T. N.S. 384; 20 W. R. 435; [and *Re Blundell*, 40 Ch. D. 370, 376.]

accrued, and before the damage had accrued which gave rise to the right to indemnity (*a*). But where the right to indemnity was denied, it was held that the executor of the sole trustee of shares in a bank which was being wound up, who had received notice from the liquidator that he would be placed on the list of contributories, was entitled to a declaration of indemnity before he was actually placed on the list or any call was made against him (*b*). Where the trustee acts at the instance of the maker of the trust, at any rate where the maker of the trust is not also beneficially interested under the trust instrument, the trustee has no right to personal indemnity from him, but must look exclusively to the trust funds to make good his expenses or losses (*c*).]

[Where trustee has acted in breach of duty.]

22. But the trustee can establish no claim to reimbursement either against the *cestuis que trust* personally, or against the trust estate, where he has incurred the outlay not in the strict line of his duty, and without either the request or the implied assent of the *cestuis que trust* (*d*).

Funds out of which expenses payable.

23. Questions occasionally arise respecting the proper fund for payment of expenses. In one case (*e*), Sir John Leach decided that a provision made in a will for payment of *debts and funeral and testamentary expenses* out of a particular fund, did not make that fund *primarily* liable for *costs of administration*. In a subsequent case, Lord Langdale arrived at a different conclusion (*f*); [and after considerable variation of judicial opinion, the later cases seem to have established the rule that the words *testamentary expenses* include the *costs of administration* (*g*).

[(*a*) *Hughes-Hallett* v. *Indian Mammoth Gold Mines Company*, 22 Ch. D. 561, 564; but see *Lord Ranelaugh* v. *Hayes*, 1 Vern. 189; *Phené* v. *Gillan*, *ubi supra*; *Wooldridge* v. *Norris*, 6 L. R. Eq. 410; *Hobbs* v. *Wayet*, 36 Ch. D. 256, 259; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 362.]

[(*b*) *Hobbs* v. *Wayet*, 36 Ch. D. 256, 259; and see *Re Blundell*, 40 Ch. D. 377.]

[(*c*) *Fraser* v. *Murdoch*, 6 App. Cas. 855, 872.]

(*d*) *Leedham* v. *Chawner*, 4 K. & J. 458. In *Collinson* v. *Lister*, 20 Beav. 368, where the advances were not proper, the M.R. said, "No assets exist out of which the executor could seek for payment, and of course, it could not be contended that the plaintiffs (who were the *cestuis que trust*) were liable to repay the advances."

(*e*) *Brown* v. *Groombridge*, 4 Mad. 495.

(*f*) *Wilson* v. *Heaton*, 11 Beav. 492.

[(*g*) *Miles* v. *Harrison*, 9 L. R. Ch. App. 316; *Harloe* v. *Harloe*, 20 L. R. Eq. 471; *Sharp* v. *Lush*, 10 Ch. D. 468; *Penny* v. *Penny*, 11 Ch. D. 440; *Morrell* v. *Fisher*, 4 De G. & Sm. 422, but see *contra*,] *Stringer* v. *Harper*, 26 Beav. 585; *Linley* v. *Taylor*, 1 Giff. 67; *Webb* v. *De Beauvoisin*, 31 Beav. 573; *Gilbertson* v. *Gilbertson*, 34 Beav. 354; *Hill* v. *Challinor*, W. N. 1867, p. 139; *Lees* v. *Lees*, 6 I. R. Eq. 259; *M'Cormick* v. *Patten*, 5 I. R. Eq. 295; *Re Biel's Estate*, 16 L. R. Eq. 577. [In *Webb* v. *De Beauvoisin*, where the trust was for "payment of debts, testamentary and *other* expenses and legacies under the will," and in *Coven-*

So] where the trust was for "payment of debts, funeral expenses, *and the costs and charges of proving and attending the execution of the will, and the several trusts therein contained*" (*a*), [and where the trust was "to pay debts and *executorship expenses* and probate duty" (*b*),] it was held that the words included costs of administration.

Exoneration of personalty.

24. Where a testator bequeathed "a *leasehold* house and all other his *personal property*" to his wife, and then devised his *real estate* to be sold, the proceeds to be applied in "payment of *funeral and testamentary expenses and debts*," and the "*residue*" to be invested, it was held that the funeral and testamentary expenses and debts were thrown upon the *real estate* in exoneration of the *personal estate*, but that the costs of the special case for taking the opinion of the Court were not "testamentary expenses," and therefore fell upon the personalty (*c*); [but having regard to the present rule, it is conceived that this case would not now be followed on the question of costs.]

Trust to pay costs of trust.

25. A trust in a will of real and personal estate to pay out of a fund of personal estate directed to be set apart, the expenses of probate and "the *execution of the trusts* of the will," was held not to authorize the trustees to apply the fund in payment of any other expenses than those which would be payable by the *executors* in that character, and therefore not to authorize the application of the personal estate in payment of the expenses incurred in the execution of trusts declared of the testator's *real* estate (*d*).

try v. *Coventry*, 2 Dr. & Sm. 470, where the trust was "to pay funeral and testamentary and *legal* expenses," it was held that the words included costs of administration.]

(*a*) *Alsop* v. *Bell*, 24 Beav. 451, see p. 469.

[(*b*) *Sharp* v. *Lush*, 10 Ch. D. 468.]

(*c*) *Gilbertson* v. *Gilbertson*, 34 Beav. 354.

(*d*) *Lord Brougham* v. *Lord Poulett*, 19 Beav. 119; and see *Sanders* v. *Miller*, 25 Beav. 154.

CHAPTER XXV.

HOW A TRUSTEE MAY OBTAIN HIS DISCHARGE FROM THE OFFICE.

We shall conclude the subject of the *Office* of Trustee by considering in what manner he may divest himself of that character.

How the trust may be relinquished.

The only modes by which he can accomplish this object are the following: *First*, He may have the universal consent of all the parties interested; *Secondly*, He may retire by virtue of a special power contained in the instrument creating the trust, [or a statutory power applicable to the trust;] or, *Thirdly*, He may obtain his release by application to the Court.

First. By consent.

Trustee may retire with consent of *cestuis que trust.*

1. As no *cestui que trust* who concurs in a breach of trust by the trustee can afterwards call him to account for the mischievous consequences of the act, it follows, that where *all* the *cestuis que trust*, being *sui juris*, lend their joint sanction to the trustee's dismissal, they are precluded from ever holding him responsible on the ground of delegation of his office (*a*).

All must concur.

2. But the trustee must first satisfy himself that *all* the *cestuis que trust* are parties, for even in the case of a numerous body of creditors the consent of the majority is no estoppel as against the rest (*b*).

Cestuis que trust not *sui juris.*

3. And the *cestuis que trust* who join must be *sui juris*, not *femes covert* or infants, who have no legal capacity to consent. But a *feme covert* is considered to be *sui juris* as to her separate estate where there is no restraint against anticipation (*c*); and as to *real estate* she can, with the consent of her husband, bind her interest by an assurance under the Fines and Recoveries Act.

Not in existence.

4. If the parties interested in the trust fund be not all in existence, as where the limitation of the property is to children unborn, it is clear, that as the trustee cannot have the sanction

(*a*) *Wilkinson* v. *Parry*, 4 Russ. 276, *per* Sir J. Leach.

(*b*) See *supra*, p. 549, note (*e*).

(*c*) See *infra*, Chap. xxvii. s. 6.

of all the parties interested, he cannot with safety be discharged from the trust.

Secondly. A trustee may retire by virtue of a special power contained in the original instrument, [or a statutory power applicable to the trust.]

Trustee may retire under a power.

1. The person who creates the trust may mould it in whatever form he pleases, and may therefore provide, that on the occurrence of certain events and the fulfilment of certain conditions, the original trustee may retire, and a new trustee be substituted (1).

Usual form of the power.

2. The form of power most commonly in use has been, that in case the trustees appointed by the instrument of trust, or to be appointed under the power (*a*), or any of them, shall "die or be abroad for twelve calendar months, or be *desirous of being discharged from*, or refuse, decline, or become incapable (*b*) to act in the trusts," it shall be lawful for the *cestui que trust* to whom the power may be given, or (as the proviso is frequently worded) for the surviving or continuing trustee (*c*), or the executors (*d*) or administrators of the survivor, by deed or writing, to nominate

(*a*) The best modern forms contained the additional words, "*or by the Court of Chancery or other competent authority*," in order to obviate the break in the chain of trusteeship which would otherwise have been occasioned by a resort to the Court, but the addition is now unnecessary [for that purpose; see 44 & 45 Vict. c. 41, s. 33; but see *Cecil* v. *Langdon*, 28 Ch. Div. 1, where the power authorized the appointment of new trustees in the place of those originally appointed or *to be appointed under the power*, and the Court held that the power came to an end when new trustees were appointed by the Court, so that thenceforth the statutory power was alone available, and that a fetter imposed on the exercise of the former power did not affect the latter.]

(*b*) "Unfit" may be usefully added; see p. 741 *infra*.

(*c*) The best forms provide that a refusing or retiring trustee shall, *if willing to execute the power*, be deemed to be a continuing trustee. As to the object of this addition, see p. 746, *infra*. But it is attended with this inconvenience, that if the refusing or retiring trustee do not join, evidence may be called for that he was *not willing*. Sometimes the power is given to the surviving, continuing, or *other* trustee, an addition which has been found useful in practice. See *Lord Camoys* v. *Best*, 19 Beav. 414.

(*d*) Better to say "*acting* executors or executor or administrators or administrator," as otherwise if several executors be appointed, and one only proves, it may be objected (though the objection may be untenable) that the

(1) Every instrument where there is a continuing trust of an active character, *should*, of course, until the modern Acts, have contained a power of appointment of new trustees, but, singularly enough, Lord Thurlow omitted to insert one in his own will, of which Lord Eldon and two others were named trustees. The defect was supplied by a private Act of Parliament, 15th June, 1809 (49 G. 3. cap. clxxv.), by which power was given to the Court of Chancery, in case any of the three trustees "should die, or be desirous of being discharged from, or should refuse, or decline, or become incapable to act in the trusts," to appoint a new trustee in a summary way upon petition.

some other person to be a trustee; and the power then proceeds to declare that the trust estate shall forthwith be vested jointly in the persons who are in future to compose the body of trustees; and that the new or substituted trustee shall, either before or after the trust estate shall have been so vested, be capable of exercising all the same powers as if he had been originally named in the settlement.

Several sets of trustees.

3. It often happens that in a settlement there are several sets of trustees—a term of 99 years for instance is vested in A. and B., and a term of 500 years in C. and D., and there is a limitation to E. and F. for the life of a person, with powers of sale and exchange, &c., and then a power of appointment of new trustees is given to "the surviving or continuing trustees or trustee." If A. die who can appoint in his place? Is the power in B. as the survivor in that particular trust, or in B., C., D., E. and F. jointly as the survivors of the trustees *en masse?* This doubt has occasionally in practice led to expense, which might easily have been avoided by a few words in the power declaratory of the intention, as by limiting the power to "the surviving or continuing trustees or trustee *of the class in which any such vacancy or disqualification shall occur.*"

Lord Cranworth's Act.

4. Lord Cranworth's Act provided against the omission of a power of appointment of new trustees in any instrument of trust, and also against defects in the power, by enacting generally, by the 27th section, that "whenever any *trustee*, either original or substituted, and whether appointed by the Court of Chancery or otherwise, should die or desire to be discharged from, or refuse or become unfit or incapable to act in the trusts," it should be lawful for the person nominated for that purpose by the instrument creating the trust, or if there should be no such person, or he should be unable or unwilling to act, then "for the surviving or continuing trustees or trustee for the time being, or the acting executor or administrator of the last surviving *and* continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees," and the Act gave the usual directions for vesting the trust estate (*a*); and the following section made the Act apply to the case of a trustee dying in the testator's lifetime. But it will be observed that

other executors must actually renounce before the acting executor can exercise the power, see *White* v. *M'Dermott*, 7 Ir. R. C. L. 1; *Worthington* v. *Evans*, 1 S. & S. 165; *Clarke* v. *Parker*, 19 Ves. 1; see *post*, p. 739, note (*e*).

(*a*) 23 & 24 Vict. c. 145, s. 27.

the Act did not provide for the case of a trustee *going abroad*, and it cannot be safely assumed, until a decision, that the word "*refuse*" was meant to include a *disclaimer* (for a disclaiming trustee never was a trustee (*a*)); and its operation was, by the 34th section of the Act, restricted to instruments *inter vivos* executed after the passing of the Act (*28th August*, 1860), and to wills and codicils made, confirmed, or revived after that date.

Two trustees in place of one.

It has been held that the donee of the power under this Act could appoint two trustees in the place of an only trustee appointed by the settlor's will (*b*).

[Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 31.]

[5. The above provisions of Lord Cranworth's Act have, however, been repealed by the Conveyancing and Law of Property Act, 1881 (*c*), and their place supplied by sect. 31, which enacts, that "where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses, or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for that purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act (*d*), then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees." And the Act authorizes an increase or reduction in the number of trustees, so that "except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust, unless there will be at least two trustees to perform the trust;" and provides for the vesting of the trust property; and makes the provisions of the section relative to a trustee who is dead include the case of a person nominated trustee of a will but dying in the testator's

(*a*) In *Viscountess D'Adhemar* v. *Bertrand*, 35 Beav. 19, it was assumed that a disclaiming trustee was within the Act, and it was held that an appointment of a new trustee by the continuing trustee under the Act did not take away the general jurisdiction of the Court to appoint in proper cases an additional trustee; and see *Re Jackson's Trusts*, 16 W. R. 572; 18 L. T. N.S. 80; and *post*, p. 738.

(*b*) *Re Breary*, W. N. 1873, p. 48.

[(*c*) 44 & 45 Vict. c. 41; and see *Re Lloyd's Trusts*, 57 L. J. N.S. Ch. 246, in which case it was held by North, J., that where a special Act incorporated section 27 of Lord Cranworth's Act with a qualifying proviso requiring that every new trustee should be appointed with the sanction of the Court of Chancery, the effect of the repeal was to repeal the proviso.]

[(*d*) *E.g.*, where the power was vested in husband and wife who were living apart and were unable to agree; *Re Sheppard's Trusts*, W. N. 1888, p. 234.]

lifetime, and those relative to a continuing trustee include a refusing or retiring trustee; and the section applies to trusts created either before or after the commencement of the Act.

It would seem, however, that the section only authorizes an increase in the number of trustees when an appointment is being made to supply a vacancy in the trusteeship, and that if a mere addition of a trustee is required recourse must be had to the Trustee Act (*a*).

[Contrary intention.]

The section applies only so far as a contrary intention is not expressed in the instrument, if any, creating the trust; but where a power of appointing new trustees had been given by a settlement, made in 1849, to "the surviving or continuing trustees or trustee," which they or he were required to exercise with the consent of the tenant or tenants for life or in tail for the time being entitled in possession, it was held that the fetter imposed by the settlement did not apply to an appointment under the powers of the Act, and that the continuing trustee could appoint new trustees under the Act; the power in the settlement having in the events which had happened ceased to be exercisable (*b*).

[Section when applicable.]

It would seem that an appointment under this section may be made by the personal representative of a sole trustee (*c*), but it appears to be doubtful whether the section applies where the sole trustee or all the trustees of a will have predeceased the testator (*d*).

Where an appointment is made under the Act in the place of a trustee who has been out of the United Kingdom for more than twelve months, the concurrence of such trustee in the appointment is not necessary unless he is willing and competent to concur, and the onus of showing that he was willing and competent is upon the person disputing the validity of the appointment (*e*).

[Events not contemplated by settlement.]

A settlement made in 1878 contained a declaration that the husband and wife during their joint lives should have power to appoint new trustees of the settlement. After the Conveyancing and Law of Property Act, 1881, came into operation, the husband and wife executed a deed appointing a new trustee in the place

[(*a*) *Re Gregson's Trusts*, 34 Ch. D. 209.]

[(*b*) *Cecil* v. *Langdon*, 28 Ch. Div. 1.]

[(*c*) *Re Shafto's Trusts*, 29 Ch. D. 247.]

[(*d*) *Re Orde*, 34 Ch. Div. 271; *Re Ambler's Trust*, 59 L. T. N.S. 210; *Re Lightbody*, W. N. 1885, p. 3. The section applies to the case of a lunatic tenant for life being one of the trustees, and the person nominated by the settlement to appoint new trustees; *Re Blake*, W. N. 1887, p. 173.]

[(*e*) *Re Coates to Parsons*, 34 Ch. D. 370.]

of one of the trustees who had *remained out of the United Kingdom for more than twelve months*, and it was held that the appointment was valid under sect. 31 of the Act; and North, J., observed, "the intention of sect. 31 is that, whenever a person has been nominated by the instrument creating the power as the person to appoint new trustees, he has the power of filling up any vacancy occurring under the provisions of the section" (*a*).

It will be observed, however, that the husband and wife were in this case nominated to fill up vacancies in the trusteeship generally, and not only in certain specified events, and the observations of the learned judge must be read by the light of the existing circumstances, and the decision is no authority that where the settlement has given the power of appointing new trustees in certain special events to A., he is by the Act empowered to appoint new trustees in any other event not mentioned in the settlement, but falling within sect. 31. The proper construction of the Act would seem to be that in such a case the power of appointing new trustees is in the surviving or continuing trustees or trustee, or the personal representatives of the last surviving or continuing trustee.

[Settled Land Act, 1890.]

6. It was open to doubt whether the section applied to trustees appointed for the purposes of the Settled Land Act (*b*), but now by the Settled Land Act, 1890 (*c*), it is provided that all the powers and provisions contained in the Conveyancing Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, whether appointed by the Court or by the settlement, or under provisions contained in the settlement.

[Costs of application under Act.]

7. The representatives of a deceased trustee do not, by declining to exercise the statutory power of appointment, render themselves liable to the costs of an application to the Court to appoint new trustees (*d*).]

Whether a new trustee is actually such until transfer of the estate to him.

8. The words contained in the ordinary form which expressly confer all powers on the new trustee before the estate has been conveyed, show that a doubt has been felt by the profession, whether in the absence of these words the powers could be

[(*a*) *Re Walker and Hughes' Contract*, 24 Ch. D. 698.]

[(*b*) *Re Wilcock*, 34 Ch. D. 508; *Re Kane's Trusts*, 21 L. R. Ir. 112.]

[(*c*) 53 & 54 Vict. c. 70, s. 17; see *ante*, p. 609.]

[(*d*) *Re Sarah Knight's Will*, 26 Ch. Div. 82.]

exercised until after *conveyance*, and the late Vice-Chancellor of England, in a case where the words referred to did not occur, but there was simply a power of nomination and no direction for a conveyance, expressed his opinion to be that the person to be appointed was not invested with the character of trustee until he had both been nominated to the office by the donee of the power, and the *trust property* had also been duly conveyed or assigned (*a*). But in a more recent case before Sir John Romilly, M.R. (*b*), where A. and B. were appointed trustees of a settlement, and after a lapse of 18 years A. disclaimed, and B. was desirous of retiring, and the donee of the power nominated C. in the place of A., and D. in the place of B., and B. professed to assign the trust fund (consisting of a share of 3,000*l.* in the hands of trustees of another settlement) to C. and D., who filed their bill without their *cestuis que trust* to have the trust fund paid to them, it was objected against the validity of the appointment that A. had acted, and that consequently B. could not alone pass the trust fund, and that therefore the appointment of trustees was incomplete; but the Master of the Rolls held that, whether A. had acted or not, his disclaimer was a wish to retire, and that C. and D. were duly appointed, and were entitled to call for payment of the trust fund: that the *appointment* of new trustees and the *conveyance* of the trust property to them were *two distinct and separate matters*, and that the transfer could only take place when the appointment was complete; and that various difficulties would arise from holding that the transfer of the trust fund was necessary to perfect the appointment. And in a subsequent case before the same judge, where there was the usual power of appointment of new trustees, with a direction for the conveyance of the trust estate, and the donee of the power appointed a new trustee in the place of a deceased trustee, but the trust estate was not conveyed, and the surviving trustee and new trustee then sold the estate and signed a receipt for the purchase-money, it was held that the purchaser acquired a good title (*c*). It would appear, therefore, that at the present day an actual conveyance of the legal estate, unless the power be specially worded, is not essential to the valid appointment of new trustees.

Noble *v.* Meymott.

[In one case it was held that a renewed lease of part of a

(*a*) *Warburton* v. *Sandys*, 14 Sim. 622.

(*b*) *Noble* v. *Meymott*, 14 Beav. 471.

(*c*) *Welstead* v. *Colvile*, 28 Beav. 537.

testator's property made to four persons by the direction of the donee of the power of appointing new trustees of the will, coupled with a statement in the lease that the four lessees were "the present trustees" of the will, operated as an exercise of the power of appointing new trustees (*a*).]

Mode of vesting trust estate.

9. Should the trust estate consist of Bank Annuities, or other property transferable in the books of any company, then by one and the same deed the donee of the power may nominate the new trustee, and the old and new trustee may execute a declaration of trust of the stock or other property intended to be transferred, and after the execution of the deed the stock may be transferred into their joint names accordingly. If the trust estate consisted of *chattels real, or other personal estate legally assignable,* two deeds, until a modern Act, were necessary. By the first, the old trustee assigned the chattel interest to A., and then A. by indorsement re-assigned it to the old and new trustees as joint tenants. But now, by Lord St. Leonards' Act (*b*), a person may assign personal property by law *assignable,* including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another, so that in such cases one deed will now be sufficient (1); [and the power has, by the Conveyancing and Law of Property Act, 1881 (*c*), been extended to things in action.] If the trust estate be of a *freehold* nature, and by the terms of the instrument of trust the whole legal estate is to be vested in the trustees, there needs, in general, no other machinery than a simple conveyance under the Statute of Uses; for the old trustee may convey the lands to the joint *use* of himself and the new trustee, and the statute will operate to transfer the possession. In *settlements which invested the trustees with powers,* the established form of the proviso [was] thought to

[(*a*) *Re Farnell's Settled Estates,* 33 Ch. D. 599.]

(*b*) 22 & 23 Vict. c. 35, s. 21.

[(*c*) 44 & 45 Vict. c. 41, s. 50.]

(1) The Act does not authorize an assignment by a person to himself (as by an executor to himself as legatee), nor by himself and another or others to himself, as by two co-executors to one of them as trustee, for in the first case he has the legal estate already and a declaration will shift the equitable interest, and in the second case so far as he has not the legal estate in himself the other or others can assign it or release it independently of the Act. The operation of the Act is limited to property *assignable at law,* for mere equitable interests shift according to the intention, and no legislative interference was required as to them.

occasion the necessity of resorting to the use of two deeds (*a*); but the prevalent and better opinion is, that a simple conveyance from the old trustee to the use of the old and new trustees will be sufficient (*b*).

[New mode of vesting the trust property in new or continuing trustees.]

[10. By the Conveyancing and Law of Property Act, 1881, sect. 34, a new and simple method of transferring trust property without conveyance or assignment has been introduced, which is now generally adopted where applicable. That section provides that, where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

But the section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

It is to be observed that the declaration of vesting can only be made by the *deed by which a new trustee is appointed*, and the section will not apply in cases where the appointment is made otherwise than by deed. The expression "the persons who by virtue of the deed become and are the trustees for performing the trust," is not happily worded, but the intention of the legislature doubtless was to vest the trust property in the persons who immediately upon the execution of the deed of appointment are the trustees for performing the trust, and it is conceived that this intention is sufficiently expressed.]

Stamps on appointment of new trustees.

11. By [54 & 55 Vict. c. 39], the appointment of a new trustee requires a 10*s. stamp*, and by s. 62 "every instrument and every *decree or order* of any Court, or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is *transferred* to or *vested* in any person, is to be charged with duty

[(*a*) For the reasoning on which this view was grounded, see the last edition of this work, pp. 651, 652.]

(*b*) See Sugd. Powers, 884, note (1), 8th ed.; Davidson's Preced. vol. 3, p. 521, and vol. 4, 609, 2nd ed.

as a conveyance or transfer of property. Provided that a conveyance or transfer made for effectuating the appointment of a new trustee, is not to be charged with any higher duty than 10s." By sect. 4 "An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each matter." [Where by an order of the Charity Commissioners new trustees were appointed of a charity, and a vesting order was also made, it was held, under the corresponding provisions in the Stamp Act, 1870 (*a*), that two duties of 10s. each were payable, one in respect of the appointment, and the other in respect of that part of the order which vested the trust estate in the new trustees (*b*). And on the same principle it would seem that a double duty is payable in the ordinary case of an appointment of new trustees by deed with a consequent transfer of the estate.

[Trustee retiring under recent Act without appointing a new trustee.]

12. Prior to the Conveyancing and Law of Property Act, 1881, a trustee could not retire from the trust without seeing that a new trustee was appointed in his place, unless the settlement contained a special power authorizing him to do so, a circumstance which seldom occurred; but by sect. 32 of that Act it is enacted that—

(1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees, and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

The section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust; but it applies to trusts created either before or after the commencement of the Act.

By sect. 34, Where a deed by which a retiring trustee is discharged contains a declaration by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, to the effect that any estate or interest in any land

[(*a*) 33 & 34 Vict. c. 97, ss. 8, 78.]

[(*b*) *Hadgett* v. *The Commissioners of Inland Revenue*, 3 Ex. D. 46.]

subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates. But the section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.]

Trustee must see that the power contemplated the precise case.

13. It must be carefully ascertained by the trustee that the circumstances under which he retires from the trust are precisely those which are contemplated in the terms of the proviso; for if the case be not warranted by the power, the trustee who resigns will be made responsible for all the mischievous consequences, just as if he had delegated the office.

Retiring trustee must see to completion of the appointment.

14. And a trustee on retiring must [if a new trustee is to be substituted in his place] be careful not to part with the control of the fund before the new trustee has been actually appointed, for if he transfer it into the name of the intended new trustee and by some accident the appointment fails to be completed, he still remains a trustee, and will be answerable for the trust fund (*a*).

If the old trustee obstinately and perversely, without any sufficient reason, *refuse* to transfer the fund to new trustees duly appointed, he will be visited with the costs occasioned by his wilfulness (*b*).

15. It is somewhat surprising, considering the frequency of this power, how few questions until recent times arose upon its construction.

Sharp *v.* Sharp.

In *Sharp* v. *Sharp* (*c*), heard in the Court of Queen's Bench, the terms in which the power was expressed were as follows:— "In case *either* of the trustees, the said A. and B., shall happen to die, or desire to be discharged from, or neglect, or refuse, or become incapable to act in the trusts, it shall be lawful for the *survivors or survivor* of the trustees *so acting* in the trusts, or the executors or administrators of the last surviving trustee,

(*a*) *Pearce* v. *Pearce*, 22 Beav. 248.
(*b*) *Re Wise's Trust*, 3 Ir. R. Eq. 599.
(*c*) 2 B. & Ald. 405.

by any writing, &c., to nominate a new trustee." Neither of the trustees being willing to act in the trust, they executed a *conveyance* to two other persons intended to be new trustees; and the question was raised, whether the power of appointment had, under the circumstances, been effectually exercised, and it was determined in the negative. Lord Tenterden said that by the word "survivor" he understood merely the trustee "continuing to act;" for it was throughout the intention of the testator, that, in case of the death, or incapacity, or refusal of some *one* of the trustees, the *remaining trustee* who had been named by him and was the object of his confidence, should have the power of associating with himself some other person: but it would be giving a much larger construction to the words than they fairly imported, if the trustees, in the event of the whole class declining to act, were to nominate such other persons as they might think fit. Mr. Justice Bayley observed, that the word "either" was not uselessly introduced: that it was in effect a proviso that if *either* of the trustees named in the will should refuse to act, still the testator should have the benefit of the judgment of the other: that the testator might have had good reason for confining the power to the care of one trustee, for he might have had special confidence in the trustees named by himself, and so long as *either* of those persons acted in the trust he might think his property safe. But if the words were to be read as if they were "*both* or either," the case would be different; for if both the persons should decline to act, the testator might naturally object to their delegating their trust to other persons, and might then have thought it better that his property should be left to the care of a Court of equity: that under the words of the power the testator meant by the word "*acting*" to designate those who had taken upon themselves to perform some of the trusts mentioned in the will, and that he did not contemplate one who *in limine refused to act:* that the word "*survivor*" must therefore mean the "*continuing*" trustee, as contradistinguished both from those who might refuse to act, and those who might be desirous to discontinue acting.

"Refusing or declining" includes "disclaiming."

16. If *one* trustee *disclaims*, may the continuing trustee appoint another, or do the words of the power, "if any trustee shall *refuse or decline*" apply, not to the case of a *disclaimer*, but only to *a refusal after having acted?* Although the point decided in *Sharp* v. *Sharp* was as stated above, yet from the language of

the judges it appears that, had only one trustee disclaimed, the other might have exercised the power; and such, it is presumed, is clearly the rule where there is nothing to narrow the meaning of the words "refusing or declining." There generally follows in the power a direction that the estate "vested in the trustee so refusing or declining" shall be transferred to the new trustee; and hence it has been argued, that as no estate vests in a disclaiming trustee, the power did not contemplate such a case. However, there seems to be but little weight in the argument; for when it is said that the words "if any trustee shall refuse or decline" apply to disclaimer, it is not meant that they do not also apply to a subsequent refusal. At all events, therefore, the direction for the transfer of the estate is not nugatory (*a*).

"Refusing" or "declining" means also after having acted.

17. On the other hand, it has been doubted whether the words "refusing" or "declining" may not refer exclusively to disclaimer, and have no application to the case of a trustee who, *after having accepted* the trust, *refuses* to act any longer in it. This proposition is also thought to be untenable (*b*), though some recent cases have an opposite tendency (*c*).

Payment into Court is "declining."

18. It has been held that a *payment of the trust money into Court*, under the Trustee Relief Act, stamps the trustee with the character of a "*refusing* or *declining* trustee" (*d*)

Power to executors and administrators.

19. If a power of appointing new trustees be given to a person, his executors and administrators, and the donee of the power dies, having appointed three executors, one of whom renounces, the *acting* executors can exercise the power (*e*).

[Limited administration for purpose of appointing new trustees.]

[20. In a case in Ireland, where the power of appointing new trustees was given to the acting executors or administrators of the last surviving trustee, and the last surviving trustee was dead, but there was no legal personal representative of his estate, and the persons entitled to take out letters would not do so, the Court of Probate granted administration to the guardian of the

(*a*) *Re Roche*, 1 Conn. & Laws. 306; *Walsh* v. *Gladstone*, 14 Sim. 2; *Mitchell* v. *Nixon*, I Ir. Eq. Rep. 155; *Crook* v. *Ingoldsby*, 2 Ir. Eq. Rep. 375; *Viscountess D'Adhemar* v. *Bertrand*, 35 Beav. 19.

(*b*) *Travis* v. *Illingworth*, 2 Dr. & Sm. 344.

(*c*) See *Re Woodgate's Settlement*, and *Re Armstrong's Settlement*, 5 W. R. 448.

(*d*) *Re Williams's Settlement*, 4 K. & J. 87.

(*e*) *Earl Granville* v. *McNeile*, 7 Hare, 156. The Reporter speaks of the third executor as "declining," but renunciation is meant, as assumed by the judgment, and expressly stated; 13 Jur. 252. It would seem, from the principle laid down by the Court, that, had the third executor declined only to act as executor without actual renunciation, the judge would have arrived at the same conclusion: and see *ante*, p. 213.

infant *cestuis que trust*, limited to the purpose of appointing himself and A. B. new trustees of the settlement, and to the purpose of transferring to, and vesting in, such new trustees the trust funds (*a*).]

Death of the trustee in the testator's lifetime.

21. Suppose a testator to appoint two trustees with the *usual power of appointment* of new trustees, and a trustee *dies in the testator's lifetime*, can the surviving trustee appoint a new trustee? The late Vice-Chancellor of England in one case expressed a doubt upon it (*b*), and in a subsequent case decided in the negative (*c*); but this was a narrow construction of the power, and it has since been ruled that a trustee who has survived the testator may appoint a new trustee in the place of one who predeceased the testator (*d*).

Morris v. Preston.

22. In *Morris* v. *Preston* (*e*), the proviso was, that "in case of the death of any or either of the two trustees during the lives of the husband and wife or the life of the survivor, the husband and wife or the survivor should, *with the consent of the surviving co-trustee or co-trustees*, nominate and appoint a new trustee or trustees, and that upon such nomination or appointment the *surviving co-trustee* should convey and assign the trust estates in such manner as that the *surviving trustee and trustees*, and such person or persons so to be nominated and appointed, should be jointly interested in the said trusts in the same manner as such *surviving trustee* and the person so dying would have been in case he were living." Both the trustees died, and the wife, who survived her husband, executed an appointment of two new trustees in the place of the deceased trustees. A purchaser took the objection, that, as the proviso clearly contemplated the case of *one* trustee surviving, an appointment of new trustees after the decease of *both* the original trustees was not warranted by the power. The purchaser abandoned the objection at the hearing without argument—a circumstance much to be regretted, as a judgment from Lord Eldon would have thrown great light upon the subject. However, the case as it stands has been said by the Lord Chancellor of Ireland to be of great authority—viz. in favour of the validity of the appointment (*f*).

[(*a*) *Re Jackson*, 7 L. R. Ir. 318.]

(*b*) *Walsh* v. *Gladstone*, 14 Sim. 2.

(*c*) *Winter* v. *Rudge*, 15 Sim. 596.

(*d*) *Re Hadley*, 5 De G. & Sm. 67; *Nicholson* v. *Wright*, 26 L. J. N.S. Ch. 312, *S. C. nomine Nicholson* v. *Smith*, 3 Jur. N. S. 313; *Noble* v. *Meymott*, 14 Beav. 477. As regards the statutory power conferred by 23 & 24 Vict. c. 145, s. 27, the doubt was guarded against by express enactment; see sect. 28; [as is also the case as regards the statutory power conferred by 44 & 45 Vict. c. 41, s. 31.]

(*e*) 7 Ves. 547.

(*f*) *Re Roche*, 1 Conn. & Laws. 308.

Power to tenant for life with the surviving or continuing trustee.

23. In another case, where two trustees had been appointed by the settlement, and the power was, "that if either of the trustees should die, or reside beyond the seas, or become incapable or *unfit to act* in the trusts, it should be lawful for the tenants for life, *together with the surviving or continuing or acting trustee for the time being,* to nominate a new trustee, and that *the trust estate should thereupon be vested in the newly appointed trustee, jointly with the surviving or continuing trustee,*" upon the trusts of the settlement; and one trustee died and the other became bankrupt; on the suggestion by counsel that there was *no surviving or continuing trustee,* and therefore the power was gone, the Lord Chancellor of Ireland observed, "That happens in many cases without the power being affected. The construction is not so straitlaced as all that" (*a*).

Bankrupt trustee is "unfit."

24. It was ruled in the same case, that a trustee who became *bankrupt* was "unfit" within the words of the power. But if the power be worded "in case the trustee shall become *incapable* to act," without the addition of the words "or unfit," a bankrupt trustee is not within the description, for by "incapable" is meant *personal incapacity* and not pecuniary embarrassment (*b*). And a *bankrupt,* who has obtained a first-class *certificate,* [and has since the bankruptcy made a fresh start in life and has ceased to be impecunious,] cannot be regarded as unfit to be a trustee (*c*). [But the mere fact that the bankruptcy arose from misfortune, and not from any fault on the part of the bankrupt, does not remove his unfitness unless it can also be shown that since his bankruptcy he has become a person of means (*d*).]

Trustee resident abroad.

25. The Court held in one case that a trustee who went to reside permanently *abroad,* came within the description of a trustee "*incapable to act*" (*e*), but this seems scarcely in harmony with correct principle (residence abroad being rather a question of unfitness than incapacity), and cannot be reconciled with other authorities (*f*). And the Court has since intimated an opinion that incapacity means *personal* incapacity (*g*).

(*a*) *Re Roche,* 1 Conn. & Laws. 306; 2 Dru. & War. 287.

(*b*) *Re Watt's Settlement,* 9 Hare, 106; *Turner* v. *Maule,* 15 Jur. 761; *Re East,* 8 L. R. Ch. App. 735.

(*c*) *Re Bridgman,* 1 Dr. & Sm. 164.

[(*d*) *Re Adams' Trust,* 12 Ch. D. 634; and see *Re Barkers' Trust,* 1 Ch. D. 43; *Re Hopkins,* 19 Ch. Div. 61.]

(*e*) *Mennard* v. *Welford,* 1 Sm. & G. 426; *S. C.* 1 Eq. Rep. 237; and see *Re Bignold's Settlement Trusts,* 7 L. R. Ch. App. 223.

(*f*) *Withington* v. *Withington,* 16 Sim. 104; *Re Harrison's Trusts,* 22 L. J. N.S. Ch. 69; and see *Re Watt's Settlement,* 9 Hare, 106; *O'Reilly* v. *Alderson,* 8 Hare, 104.

(*g*) *Re Bignold's Settlement Trusts,* 7 L. R. Ch. App. 223.

"Unable" to act.

26. If the power provide that if any one of three trustees become "unable" to act, "the *trustees or trustee for the time being*, whether continuing or declining to act," may appoint a new trustee, the two trustees who remain capable can appoint a new trustee in the place of a lunatic trustee (*a*).

Temporary absence.

27. If the settlement provide that a trustee shall cease to be such "on *departing the United Kingdom* from whatever cause or motive or under whatever circumstances," the clause nevertheless does not apply to a mere *temporary absence* with the intention of returning (*b*).

[Appointment of person to be trustee when he returns to England.]

[But where a person resident abroad is appointed by a testator to be trustee "if and when he shall return to England," and eight years after the testator's death he comes to England for his health, remains for six months, and then returns to his home abroad, he has fulfilled the condition, and, in the absence of evidence that he had dissented from or disclaimed the trusteeship, the trust estate vests in him (*c*).]

Two trustees retiring, and appointing a single successor.

28. If there be *two trustees* of a settlement, and both be anxious to retire from the trust at one and the same time, they would not be justified in putting the property under the control of a *single trustee* appointed in their *joint places* (*d*).

Single trustee retiring and appointing two to succeed.

29. And, *vice versâ*, [until the recent Act, a *single* trustee, had he wished to retire, could not have appointed] *more than a single trustee* in his place; for though, in the substitution of more trustees than one, he would be chargeable rather with too much than too little caution, yet he ought not to clog the estate with unnecessary machinery. The idea of the settlor may have been, that by increasing the number of the trustees the vigilance of each, individually, would be diminished. "A great number," observed Lord Mansfield, "may not do business better than a smaller, and it would be attended with more expense" (*e*). [But now by the Conveyancing and Law of Property Act, 1881, unless a contrary intention is expressed in the instrument creating the trust, the number of trustees may, on the appointment of a new trustee, be increased, and the section applies to trusts created either before or after the commencement of the Act (*f*).

D'Almaine *v.* Anderson.

30. Independently of the recent Act] the power may be so

(*a*) *Re East*, 8 L. R. Ch. App. 735.
(*b*) *Re Moravian Society*, 26 Beav. 101.
[(*c*) *Re Arbib*, (1891) 1 Ch. (C. A.) 601.]
(*d*) *Hulme* v. *Hulme*, 2 M. & K. 682.
(*e*) *Rex* v. *Lexdale*, 1 Burr. 448; *Ex parte Davis*, 2 Y. & C. C. C. 468; 3 Mont. D. & De G. 304; and see *Re Breary*, W. N. 1873, p. 48.
[(*f*) 44 & 45 Vict. c. 41, s. 31.]

specially worded as to authorize the substitution of *several* trustees in the place of *one* or of *one* in the place of *several*. Thus, where a testator appointed two trustees, and directed "that if the trustees thereby appointed, or to be appointed as thereinafter mentioned, should die, &c., it should be lawful for the surviving or continuing trustee *or trustees* for the time being, or the executors or administrators of the last surviving or continuing trustee, to appoint one *or more* person *or persons* to be a trustee *or trustees* in the room of the trustee or trustees so dying, &c., and thereupon the trust estates should be vested in the new trustee *or trustees*, jointly with the surviving or continuing trustee *or trustees*, *or solely*, as occasion should require," and the surviving trustee appointed *two* trustees in the room of the deceased trustee, the late Vice-Chancellor of England held that such a case was immediately contemplated by the proviso (*a*).

[31. So where a testator appointed four trustees and declared that "as often as his first or future trustees or any of them should die, &c., he empowered the surviving or continuing trustees or trustee, or if there should be no such trustee, then the retiring or renouncing trustees or trustee, and if there should be no such last mentioned trustee then the executors or administrators of the last deceased trustee, by any deed to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, &c.; and upon the appointment of every such new trustee all the trust estates, monies and premises should be thereupon vested in such *new trustee* or trustees either *solely* or jointly with the surviving or continuing trustee or trustees, as occasion should require;" and two of the trustees died and one renounced, and the surviving trustee appointed a single co-trustee, the M. R. said "he was not aware of any rule making it compulsory on the donees of a power appointing new trustees to keep up the full number of trustees except in the case of a charity. If the testator wished the number to be kept up, he must expressly say so. In that case it was clear from [Reduction in number of trustees authorized.]

(*a*) *D'Almaine* v. *Anderson*, V. C. Feb. 1, 1841, MS.; in *Meinertzhagen* v. *Davis*, 1 Coll. 335, the special form of the power was held to authorize the appointment of three trustees in the place of two; in *Emmet* v. *Clarke*, 3 Giff. 32, three trustees were held to have been well appointed in the place of four; and in *Hillman* v. *Westwood*, 3 Eq. Rep. 142, the Court thought that two trustees could be appointed in the place of one; and see *Corrie* v. *Byrom*, V. C. Wigram, 26 April, 1845, M.S.; [the facts of which case are stated in the last edition of this work, p. 660, note (*a*);] and *Re Breary*, W. N. 1873, p. 48.

the words of the will that the testator contemplated the possibility of a single trustee acting alone." And he held that the appointment was valid (*a*). So where one trustee disclaimed, and the other retired, the appointment of a single trustee under the power in Lord Cranworth's Act was supported (*b*).

Court does not limit itself to original number.

32. And where the Court itself is appointing new trustees, it does not at the present day, though doubts appear to have been formerly felt on the point (*c*), consider itself bound to fill up the precise number only mentioned in the instrument of trust. It has added two new trustees to the two original trustees (*d*), appointed four where the testator originally appointed three (*e*), three where the testator originally appointed two (*f*), and two where the testator originally appointed one (*g*). In these cases the number has been increased, but if the original number was excessive the Court may also reduce it (*h*). If, however, two were originally appointed, the Court for security will not, at least where money is concerned, substitute one only (*i*).

Trustee should be within the jurisdiction.

33. In general the new trustees appointed under a power should be persons amenable to the *jurisdiction of the Court*, but where the personal property of a lady was settled on her marriage with a foreigner, whose domicile was in *America* at the time of the marriage, the subsequent appointment of three *Americans* to be trustees was decided to be justifiable (*j*). But though the parties who have a *power of appointment* may exercise it in this way, the *Court* in substituting trustees by its own jurisdiction has refused to appoint new trustees who are *out of the jurisdiction* (*k*). [However, in a recent case where all the parties interested were of age, and they were all resident either in Australia or New Zealand, the Court appointed two persons resident in Australia new trustees of a settlement (*l*),

[(*a*) *Cunningham and Bradley's Contract for Sale to Wilson*, W. N. 1877, p. 258; *West of England and South Wales District Bank* v. *Murch*, 23 Ch. D. 138.]

[(*b*) *West of England and South Wales District Bank* v. *Murch*, 23 Ch. D. 138.]

(*c*) *Devey* v. *Peace*, Taml. 78.

(*d*) *Re Boycott*, 5 W. R. 15.

(*e*) *Plenty* v. *West*, 16 Beav. 356.

(*f*) *Birch* v. *Cropper*, 2 De G. & Sm. 255.

(*g*) *Plenty* v. *West*, 16 Beav. 356; *Re Tunstall's Will*, 4 De G. & Sm. 421; *Grant* v. *Grant*, 34 L. J. Ch. 641.

[(*h*) *Re Fowler's Trusts*, W. N. 1886, p. 183; 55 L. T. N.S. 546; but see *Re Gardiner's Trusts*, 33 Ch. D. 590.]

(*i*) *Re Ellison's Trusts*, 2 Jur. N. S. 62; *Porter's Trust*, 2 Jur. N. S. 349; and see *Re Roberts*, 9 W. R. 758.

(*j*) *Meinertzhagen* v. *Davies*, 1 Coll. 335; [and see *Re Smith's Trusts*, 20 W. R. 695; *Re Cunard's Trusts*, 48 L. J. N.S. Ch. 192; 27 W. R. 52; but see *Re Long's Settlement*, 17 W. R. 218; *Re Austen's Settlement*, 38 L. T. N.S. 601.]

(*k*) *Re Guibert*, 16 Jur. 852.

[(*l*) *Re Drewe's Settlement Trusts*, W. N. 1876, p. 168.]

and the same course has been adopted in other cases where some of the *cestuis que trust* have been infants (*a*). But it is only in very exceptional circumstances that such an appointment will be made, and in a recent case where three trustees were appointed, two of whom were out of the jurisdiction, the Court required the two to undertake, in case the power of appointing new trustees should become exercisable by them or either of them, not to appoint any new trustee resident out of the jurisdiction without the consent of the Court (*b*); and the Court refused to authorize money arising under the Settled Land Act to be sent out to executors in America for investment (*c*).]

One of two trustees retiring and appointment of the co-trustee.

34. Should *one* of two trustees be desirous of retiring, of course he cannot do so without the *substitution of another* in his place (*d*), and the power of appointment of new trustees would not authorize the appointment of the *continuing trustee* as *sole* administrator of the trust (*e*); for this would, in effect, amount to a relinquishment of the trust without the appointment of any successor (*f*).

Appointment of one trustee in the place of several.

35. [Independently of the power conferred by the recent Act (*g*),] a *surviving trustee* cannot be advised (though it has been sometimes done), to vest the trust estate in himself, and a new trustee appointed in the place of *one* of *several deceased trustees*, but should refuse to part with the property unless the original number of trustees be restored. Still less could the *representative* of the last surviving trustee be advised to vest the property in a *single new trustee* nominated in the place of one only of the several *deceased trustees*. And where a settlement constitutes *three trustees* with a power of appointment of new trustees in the usual form, and two die, the *survivor* should refuse to retire in favour of a *single new trustee* appointed in his place, for, as the original settlement provided three trustees to execute the trust, the donee of the power should not execute the power partially, but should restore the original number (*h*). In a trust for *sale*, if this precaution were not observed, a purchaser on a sale by the new trustee might give trouble by objecting to the title (*i*). The strongest ground for supporting the

[(*a*) *Re Liddiard*, 14 Ch. D. 310; and see the cases cited, p. 744, note (*j*).]

[(*b*) *In re Freeman's Settlement Trusts*, 37 Ch. D. 148.]

[(*c*) *Re Lloyd*, 54 L. T. N.S. 643; W. N. 1886, p. 37.]

(*d*) *Adams* v. *Paynter*, 1 Coll. 532.

(*e*) *Wilkinson* v. *Parry*, 4 Russ. 272; see *post*, p. 755.

(*f*) *Attorney-General* v. *Pearson*, 3 Mer. 412, *per* Lord Eldon.

[(*g*) 44 & 45 Vict. c. 41, s. 31.]

(*h*) See *Barnes* v. *Addy*, 9 L. R. Ch. App. 244; but see *Forster* v. *Abraham*, 17 L. R. Eq. 351.

(*i*) See *Earl of Lonsdale* v. *Beckett*,

sale would be, that probably many titles depend on the validity of such an execution of the power, and in recent cases the appointment has been supported (*a*). *Fieri non debuit, factum valet.* Where the power in the will was "to appoint *one or more* new trustee or trustees in the room of the *trustee or trustees* so dying," and both trustees died, and the donee of the power appointed a single trustee in the place of both, the appointment was established (*b*).

[44 & 45 Vict. c. 41.]

[36. Now, by the Conveyancing and Law of Property Act, 1881 (*c*), sect. 31, sub-sect. (3), on an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.]

Rectification of bad appointment.

37. If A. and B. be trustees, with a power of appointment of new trustees limited to "the acting trustees or trustee, or the executors or administrators of the surviving trustee," and then A. dies, and B. retires and appoints C. a trustee in his *own* place, and afterwards dies and appoints an executor, who as the donee of the power for the time being appoints C. and D. in the place of A. and B., the two new trustees are properly appointed, and can sign receipts; for either the original appointment of C. was good, and the subsequent appointment of D. [having been made with the concurrence of C.] filled up the number, or the original appointment of C. was invalid, and then the appointment of both C. and D. by the donee of the power was effectual (*d*).

[Concurrence of retiring trustee not necessary.]

[38. Where the power of appointing new trustees is given to the surviving or continuing trustees or trustee, and a trustee retires, his concurrence is not necessary in the appointment of a new trustee in his place, but such appointment rests with the other trustees or trustee who do not retire (*e*).]

A surviving trustee appointing two trustees in the place of himself and the deceased trustee.

39. It sometimes happens where the power of appointment of new trustees is limited to the "*surviving* or *continuing* trustee,"

4 De G. & Sm. 73; *Meinertzhagen* v. *Davis*, 1 Coll. 344.

(*a*) *Re Pool Bathurst's Estate*, 2 Sm. & G. 169; *Reid* v. *Reid*, 30 Beav. 388; and see *Re Fagg's Trust*, 19 L. J. N.S. Ch. 175.

(*b*) *Wood* v. *Ord*, M. R. 1st July, 1793, MS.

[(*c*) 44 & 45 Vict. c. 41.]

(*d*) *Miller* v. *Priddon*, 1 De G. M. & G. 335.

[(*e*) *Re Norris*, 27 Ch. D. 333; *Travis* v. *Illingworth*, 2 Dr. & Sm. 344; *Re Coates to Parsons*, 34 Ch. D. 370; but see *Re Glenny and Hartley*, 25 Ch. D. 611.]

that one trustee *dies*, and then the other wishing to retire proposes to appoint two new trustees at the same time in the place of himself and the deceased trustee. A doubt has, however, been suggested whether the word *surviving* must not be read as applicable only to an appointment in the room of a *deceased* trustee; and, as the word *continuing* cannot include *retiring*, the safer course is for the *surviving* trustee first to appoint a person in the room of the deceased trustee, and then the person so substituted may, as the *continuing* trustee, appoint a new trustee in the place of the trustee desirous of retiring (*a*).

Case of both trustees wishing to retire.

40. And if there be *two* trustees, and a power of appointing new trustees be given to "the surviving or continuing *trustees or trustee*," it has been held that they cannot both *retire* at the same time, but that there must be two successive appointments, as in the case last mentioned (*b*); and if there be *three trustees* with the like power and *two* die, and the surviving trustee wishes to retire, then he is not a *continuing* trustee, and therefore he cannot retire and appoint two others in the place of *himself* and a deceased trustee (*c*).

[But under the Conveyancing and Law of Property Act, 1881, the provisions of the Act relative to the appointment of new trustees by a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of those provisions (*d*); and a retiring trustee can, accordingly, under the Act appoint new trustees in the place of himself and a deceased trustee, or in the place of himself alone if he was originally the sole trustee.]

Power to "other trustee."

41. Where four trustees were appointed originally, and the power was to the surviving or continuing or *other* trustee to appoint, it was held that the survivor of the four trustees who desired himself to be discharged, could, by force of the words

(*a*) See *Nicholson* v. *Wright*, 26 L. J. N.S. Ch. 312; *S. C. nom. Nicholson* v. *Smith*, 3 Jur. N. S. 313. But see *Pell* v. *De Winton*, 2 De G. & J. 17.

(*b*) *Stones* v. *Rowton*, 17 Beav. 308; *S. C.* 1 Eq. Rep. 427.

(*c*) *Travis* v. *Illingworth*, 2 Dr. & Sm. 344; [*Re Norris*, 27 Ch. D. 333. *Travis* v. *Illingworth* has been directly called in question by V. C. Bacon in the recent case of *Re Glenny and Hartley*, 25 Ch. D. 611, in which the V. C. expressed his opinion that the retiring trustees could execute the power. It is, however, to be observed that the power in that case contained special words, showing that the words "continuing trustees" were not used in their strict sense, but as including trustees who were being discharged, and on the general question the argument of the V. C. does not seem to be so well founded as that of V. C. Kindersley in *Travis* v. *Illingworth*, and has since been disapproved of, *Re Norris*, and *Re Coates to Parsons*, 34 Ch. D. 370.]

[(*d*) 44 & 45 Vict. c. 41, s. 31, sub-s. (6).]

"other trustee," appoint four new trustees in the place of himself and three others (*a*).

Power to donees to appoint "other" persons.]

42. Where the power was to the husband and wife or the survivor, and after the decease of such survivor, the continuing trustees or trustee, or if no continuing trustee, the retiring or refusing trustees or trustee, or the executors or administrators of the last acting trustee, to appoint any "other" person or persons to be a trustee or trustees in the place of a trustee or trustees dying, or going to reside abroad, or desiring to retire, or refusing or becoming incapable to act, it was held that the terms of the power required that the trustee or trustees to be appointed should be some person or persons "other" than the person or persons making the appointment (*b*).

Power to "acting trustees."

43. Where persons are nominated trustees in a will, and a power of appointing new trustees is given to the "acting" trustees, should all the trustees disclaim, the power of appointment is gone, and the *hiatus* in the trust can only be filled up by the Court. It has, occasionally, been suggested that the trustees, instead of disclaiming, should accept the trust to the extent of exercising the power only, and should, by virtue of it, appoint new trustees (*c*); but it is conceived that trustees who availed themselves of the office for the purpose only of introducing other parties into the trust would be rather "refusing" than "acting" trustees, and that the exercise of the power, under such circumstances, would be nugatory, and might involve the outgoing trustees in serious liabilities.

Power to the "said trustees."

44. The power of appointment is sometimes given "to the *said trustees*," and then the question arises whether a sole survivor can appoint. It is conceived that "the said trustees" means the persons or person representing the trust for the time being under the settlement, and that the survivor can therefore exercise the power.

Appointment of a *cestui que trust* or near relative of *cestui que trust* as trustee.

45. On a change of trustees it is not uncommonly proposed to appoint one of the *cestuis que trust* to that office, but such an arrangement is evidently irregular, as each *cestui que trust* has a right to insist that the administration of the property should be confided to the care of some third person whose interest would not tend to bias him from the line of his duty. Should proceedings be instituted for the removal of the *cestui que trust*, and the substitu-

(*a*) *Lord Camoys* v. *Best*, 19 Beav. 414.

[(*b*) *Re Skeat's Settlement*, 42 Ch. D. 522.]

(*c*) See *Sharp* v. *Sharp*, 2 B. & Ald. 415; and *Re Hadley*, 5 De G. & Sm. 67, where power was expressly given to a declining trustee.

tion of some indifferent person as trustee, the costs might be thrown upon the parties who had improperly filled up the trust (*a*). But it is presumed that this rule affects the parties to the trust only, and that if a *cestui que trust* who has been appointed a trustee sell real estate under a power of sale, he may sign a receipt, and that the purchaser is not bound to look to the proper exercise of the discretion in such a case (*b*). *Cestuis que trust* are not absolutely *incapacitated* from being trustees, as the Court itself under special circumstances appoints a *cestui que trust* a trustee (*c*). The question is merely one of relative fitness. *A fortiori*, the circumstance of near *relationship* to the *cestui que trust* creates no absolute disqualification for the office of trustee, though Sir John Romilly, M.R., objected, where it could be avoided, to appoint relatives as trustees (*d*).

[46. The Court will not appoint the tenant for life (*e*), or the solicitor of the tenant for life (*f*), to be a trustee for the purposes of the Settled Land Act, 1882; and has even refused to appoint two brothers trustees, and required two *independent* persons to be appointed (*g*).] [Appointment of tenant for life.]

47. The question has often been asked, whether the donee of the power can appoint himself a trustee, and, as no one can be judge in his own case, such an appointment has been regarded as open to objection (*h*); [and it has recently been decided, in a case where property was settled on trusts in favour of a married woman, and she and her husband were empowered to appoint new trustees, that such power being fiduciary the husband and wife could not validly exercise it by appointing the husband and another person to be trustees (*i*).] Should, however, the execution of the trust have been committed to trustees and the survivor of them, his *executors and administrators*, and the trustees die, and the power of appointment is in the executor of the survivor, here it may be said that as by the terms of the trust the executor was declared to be a proper person to execute the trust, the executor has the settlor's warrant for the appointment of *himself* and Whether donee of power can appoint himself trustee.

(*a*) See *Passingham* v. *Sherborn*, 9 Beav. 424.

(*b*) See *Reid* v. *Reid*, 30 Beav. 388; *Forster* v. *Abraham*, 17 L. R. Eq. 351.

(*c*) *Ex parte Clutton*, 17 Jur. 988; *Ex parte Conybeare's Settlement*, 1 W. R. 458; *Forster* v. *Abraham*, 17 L. R. Eq. 351.

(*d*) *Wilding* v. *Bolder*, 21 Beav. 222; and see *ante*, p. 40.

[(*e*) *Re Harrop's Trusts*, 24 Ch. D. 717.]

[(*f*) *Re Kemp's Settled Estates*, 24 Ch. Div. 485.]

[(*g*) *Re Knowles' Settled Estates*, 27 Ch. D. 707.]

(*h*) See *ante*, p. 344 [and *Tempest* v. *Lord Camoys*, 58 L. T. N.S. 221, 223.]

[(*i*) *Re Skeat's Settlement*, 42 Ch. D. 522.]

another. It may still, however, be observed, that the exercise of every power should be regulated by the circumstances as they stand at the time, and that the limitation to executors *à priori* cannot dispense with the discretion to be applied afterwards.

Of severing a trusteeship.

48. Where estates of a different description, or held under a different title, or limited upon different trusts, have been vested in the same trustees by the settlor, and there is a single power of appointment of new trustees in the usual form, it [was at one time thought] that there was no authority for afterwards dividing the trust by the appointment of one set of new trustees to execute the trusts of the one estate, and a distinct set of new trustees to execute the trusts of the other (*a*); and it [was even held in one case] upon a petition under the Trustee Acts, that the Court had no jurisdiction to make such an order (*b*). [But where there was no opposition to the order, the Court in several subsequent cases appointed new trustees under the Trustee Acts of one of several trusts held under the same instrument without dealing with the other funds (*c*); and in an administration action it was held by Fry, J., that the Court had jurisdiction to appoint separate sets of trustees (*d*). Now, by the Conveyancing Act, 1882 (*e*), it is enacted, that on an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and this section applies to trusts created either before or after the commencement of the Act. And the appointment may be made even although in certain events the trusts of the several properties may become identical (*f*).

In a recent case it was held that under this section an appointment of a separate set of trustees can only be made when an appointment of new trustees of the whole property is being made, and that the section does not enable the existing trustees of the whole property to retire from the trusts as to part, by means of an appointment of new trustees of that part (*g*). But such an

(*a*) See *Cole* v. *Wade*, 16 Ves. 27; *Re Anderson*, Ll. & G. *t.* Sugd. 29.

(*b*) *Re Dennis's Trusts*, 12 W. R. 575; 3 N. R. 636.

[(*c*) *Re Cotterill's Trusts*, W. N. 1869, p. 183; *Re Cunard's Trusts*, 48 L. J. N.S. Ch. 192; 27 W. R. 52, and the cases there cited; [*Re Paine's Trusts*, 28 Ch. D. 725; *Re Moss's Trusts*, 37 Ch. D. 513.]

[(*d*) *Re Grange*, 29 W. R. 502; 44 L. T. N.S. 469.]

[(*e*) 45 & 46 Vict. c. 39, s. 5.]

[(*f*) *Re Hetherington's Trusts*, 34 Ch. D. 211.]

[(*g*) *Savile* v. *Couper*, 36 Ch. D. 520; and previously so decided in Ireland, *Re Nesbitt's Trusts*, 19 L. R.

appointment can be made by the Court under the powers of the Trustee Act (*a*).]

Directory powers.

49. The proviso is sometimes of such a directory character as to authorize the appointment of new trustees upon one event, without the intention of confining the exercise of the power to the occurrence of that event exclusively. Thus, where six trustees were empowered, *when reduced to three*, to fill up the number, and all died but one, it was held competent to the survivor to execute the appointment (*b*). So, where the original number of trustees was twenty-five, and they were directed, *when reduced to fifteen*, to proceed to nominate others, it was determined that, when seventeen remained, the survivors *might* elect, but when reduced to only fifteen they were *compellable* to elect (*c*). It should be observed that these were cases of *charitable* trusts, in which a greater latitude of construction is allowed than in ordinary trusts (*d*).

Tenant for life disposing of his life estate.

50. If a tenant for life has a *power* of appointing new trustees and *sells his life interest*, the power [is not thereby destroyed, but is still exercisable with the consent of the person to whom the beneficial interest has been aliened (*e*). So if the tenant for life] has only *mortgaged* his life interest, he may not be able to appoint a trustee behind the back of the mortgagee, but there can be no objection to such an exercise of the power, if it be done with the consent of the mortgagee.

[It has recently been held (*f*) that the power is exercisable by the tenant for life, even without the consent of the alienee, but it is submitted that this must be subject to the implied condition that there is nothing in the appointment prejudicial to the interest of the alienee. This condition has been expressly recognized in several of the earlier cases (*g*), and is in accordance with sound principle; and it is conceived that, notwithstanding the

(Ir.) 509; but see *Re Moss's Trusts*, 37 Ch. D. 513.]

[(*a*) *Re Moss's Trusts*, 37 Ch. D. 513; and see *Re Paine's Trust*, 28 Ch. D. 725.]

(*b*) *Attorney-General* v. *Floyer*, 2 Vern. 748; and see *Attorney-General* v. *Bishop of Lichfield*, 5 Ves. 825; but see *Foley* v. *Wontner*, 2 J. & W. 245.

(*c*) *Doe* v. *Roe*, 1 Anst. 86.

(*d*) See *ante*, p. 677.

(*e*) *Alexander* v. *Mills*, 6 L. R. Ch. App. 124. See *Holdsworth* v. *Goose*, 29 Beav. 111, and cases cited Ib.; *Nelson* v. *Seaman*, 1 De G. F. & J. 368; *Lord Leigh* v. *Ashburton*, 11 Beav. 470; *Eisdell* v. *Hammersley*, 31 Beav. 255; *Walmesly* v. *Butterworth*, Coote on Mortgages, App. 3rd Ed. p. 572; *Warburton* v. *Farn*, 16 Sim. 625.

[(*f*) *Hardaker* v. *Moorhouse*, 26 Ch. D. 417.]

[(*g*) *Alexander* v. *Mills*, 6 L. R. Ch. App. 124; *Holdsworth* v. *Goose*, 29 Beav. 111; *Eisdell* v. *Hammersley*, 31 Beav. 255; and see *Re Cooper*, 27 Ch. D. 565; and cf. 45 & 46 Vict. c. 38, s. 50.]

recent case of *Hardaker* v. *Moorhouse*, it will be the wiser course to procure the consent of the alienee to the appointment.]

Trustee cannot retire in consideration of a *premium*, or in favour of another who intends to commit a breach of trust.

51. Advantage cannot be taken of the power for the purposes of profit; and therefore if the donee of the power appoint a person a trustee in consideration of *a sum of money* paid by him for the office, the appointment cannot stand (*a*). And if a trustee refuse, when solicited, to commit a breach of trust himself, but declares his willingness to resign in favour of some other person less scrupulous, the Court, acting upon the principle of *qui facit per alium facit per se*, will hold the trustee who retires responsible for the misbehaviour of the trustee he has substituted (*b*). And upon principle it would seem that a bond of indemnity given to the retiring trustee would be a very doubtful security against the consequences of the act, for the bond itself if found to be infected with fraud could afford no just ground for action (*c*). However, in a recent case, it was held by the Court of Exchequer that the common law Courts have no such cognizance of breaches of trust as to treat a bond of indemnity against an act amounting in equity to a breach of trust as necessarily containing anything *illegal* (*d*).

Improper appointment by donee of power.

52. If a tenant for life, with a power of appointment of new trustees, *appoint improper persons* to the trust, he will be personally liable for the costs of a suit for removing the objectionable trustees (*e*).

Result where a new trustee is ineffectually appointed.

53. If a new trustee be *ineffectually appointed*, the old trustees may exercise the powers given to them by the instrument of trust, notwithstanding the ineffectual attempt (*f*). But if a trustee retire upon the appointment of a new trustee, and from want of the proper formalities being observed the appointment is not legal, the old trustee cannot lie by for a long interval and then exercise a power by mere concurrence in the deed, without *bonâ fide* exercising his own judgment and discretion (*g*).

Lis pendens.

54. If the *administration of the trust* be in the hands of the *Court*, the donee of the power cannot exercise it without having first obtained the Court's approbation of the person proposed (*h*).

(*a*) *Sugden* v. *Crossland*, 3 Sm. & G. 192.

(*b*) *Norton* v. *Pritchard*, Reg. Lib. B. 1844, 771; *Le Hunt* v. *Webster*, 8 W. R. 434; reversed 9 W. R. 918; *Clark* v. *Hoskins*, 36 L. J. N.S. Ch. 689; *Palairet* v. *Carew*, 32 Beav. 567.

(*c*) See Shep. Touch. 132, 371.

(*d*) *Warwick* v. *Richardson*, 10 M. & W. 284; and see *Lord Newborough* v. *Schröder*, 7 C. B. 342; *Dugdale* v. *Lovering*, 10 L. R. C. P. 196.

(*e*) *Raikes* v. *Raikes*, 32 Beav. 403.

(*f*) *Warburton* v. *Sandys*, 14 Sim. 622; *Miller* v. *Priddon*, 1 De G. M. & G. 335.

(*g*) *Lancashire* v. *Lancashire*, 2 Ph. 657; 1 De G. & Sm. 288.

(*h*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Attorney-General* v. *Clack*,

However, if the old trustees do appoint without the leave of the Court, the act is not to be considered as altogether void in itself, but it puts the burthen upon them of proving, and that by the strictest evidence, that what was done was perfectly right; and also saddles them with the costs of that proof. If the act was not proper, of course the appointment will be cancelled (*a*).

How the costs are to be borne.

55. On the appointment of a new trustee under a power, the *costs*, [including those of the donee of the power (*b*),] fall on the *corpus* of the trust estate. In strictness the costs of appointing new trustees should be governed by the same principles as the payment of fines on admission to copyholds (*c*). But on the appointment of new trustees by the Court the costs are always thrown upon the estate, and the practice in Court regulates the practice out of Court (*d*). Where there is no fund readily available the costs are often paid by the tenant for life.

Inrolment in case of charity.

56. On the appointment of new trustees of a *charity*, the conveyance of real estate which is already in mortmain need not be *inrolled* (*e*).

Power of new trustees.

57. Where new trustees are appointed under a power, it is presumed that they can exercise all the *powers* given to the *original trustees* in that character; but in penning a power of appointment of new trustees, all questions should be obviated by an express direction that the new trustees shall have the same powers as if originally appointed (*f*).

Attested copies.

58. A trustee upon transferring the trust estate to a newly appointed trustee is not allowed to charge it with the expense of an *attested copy* of the settlement where he has already an ordinary copy, or with the expense of a *duplicate* of the deed of new appointment, though he is entitled to an examined copy of it. The *extra* evidence is considered as incurred for the satisfaction of the trustee from an excess of caution, and, if required, must be paid for by himself (*g*).

Inquiries to be made by incoming trustee.

59. If newly appointed trustees *omit to inquire of a retiring trustee* whether he has notice of any charge, and then having no

1 Beav. 467; *Peatfield* v. *Benn*, 17 Beav. 552; *Middleton* v. *Reay*, 7 Hare, 106; *Kennedy* v. *Turnley*, 6 Ir. Eq. Rep. 399; [*Re Gadd*, 23 Ch. D. 134; and see *ante*, p. 694.]

(*a*) *Attorney-General* v. *Clack*, 1 Beav. 473, *per* Lord Langdale; and see *Cafe* v. *Bent*, 3 Hare, 249.

[(*b*) *Harvey* v. *Olliver*, W. N. 1887, p. 149; 59 L. T. N.S. 249.]

(*c*) See *ante*, p. 421.

(*d*) *Palmer's Settlement*, V. C. Kindersley, 18 April, 1857; *Carter* v. *Sebright*, 26 Beav. 376; see *post*, p. 756.

(*e*) *Ashton* v. *Jones*, 28 Beav. 460; and see Shelf. Mortm. 130.

[(*f*) In appointments under the statutory powers this is expressly provided for; 23 & 24 Vict. c. 145, s. 27; 44 & 45 Vict. c. 41, s. 31.]

(*g*) *Warter* v. *Anderson*, 11 Hare, 301; *S. C.* 1 Eq. Rep. 266.

notice, they distribute the fund to the prejudice of the incumbrancer, they will not be liable to him on the ground that it was their duty to have made inquiry of the retiring trustee, in which case they would have known of the incumbrance (*a*). [But new trustees are bound to look into the documents relating to the trust to ascertain of what incumbrances their predecessors have had notice (*b*).]

60. Under sect. 5 of 22 & 23 Vict. c. 61, the Court has jurisdiction where a final decree of nullity of marriage or dissolution of marriage has been made to extinguish or vary the power of appointing new trustees of the settlements made by the parties to the marriage (*c*).

Thirdly. Of the discharge of the trustee by the authority of the Court.

Suit to be discharged from the trust.

1. The trustee may, in every proper case, although the contrary appears to have been at one time supposed (*d*), get himself discharged from the office on application to the Court. A power of appointment of new trustees is very frequently omitted in settlements, or the donee of the power either cannot or will not exercise it, and were there no means by which a trustee could ever denude himself of that character, it would operate as a great discouragement to mankind to undertake so arduous a task.

Where no new trustee can be found.

2. Where *no new trustee can be found* willing to act, the trustee's right to be discharged must depend upon the circumstances of the case. "It is a mistake," observed Lord St. Leonards, "to suppose that a trustee who is *entitled to be discharged* is bound to show to the Court that another person is ready to accept the office; the Court will at once refer it to the Master to appoint a new trustee. But if no one can be found who will accept the trust, the Court may find itself obliged to keep the old trustee before the Court, but will take care to protect him in the meantime" (*e*). This was said in a case where the trustee, from the conduct of the *cestui que trust*, could claim to be discharged; but if a trustee wish to retire from mere *caprice*, it is not clear that the Court can or will discharge him, unless another trustee can be found in substitution (*f*). It is certain that the

(*a*) *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80.

[(*b*) *Hallows* v. *Lloyd*, 39 Ch. D. 686, 691.]

[(*c*) *Oppenheim* v. *Oppenheim*, 9 P. D. 60; *Maudslay* v. *Maudslay*, 2 P. D. 256.]

(*d*) *Hamilton* v. *Fry*, 2 Moll. 458.

(*e*) *Courtenay* v. *Courtenay*, 3 Jon. & Lat. 533; and see *Forshaw* v. *Higginson*, 20 Beav. 487.

(*f*) *Ardill* v. *Savage*, 1 Ir. Eq. Rep. 79.

Court cannot divest him of the *estate* before some one can be found to take it, and even as to the *office* it is not unreasonable, that if a man once engages to undertake it, he shall not retire from it without any reason, and so leave the estate without a trustee. But a trustee may, in a proper case, relieve himself from the liabilities of the office by submitting the administration of the trusts to the jurisdiction of the Court (*a*). In a case where there was a power of appointing new trustees, with a direction that the number might be augmented or reduced, and one of the three trustees wished to retire, but no new trustee could be found, the Court, under the Trustee Acts, appointed the two continuing trustees to be the sole trustees (*b*); [but in similar cases the Court now refuses to make the order, and requires a new trustee to be appointed, unless the whole of the fund is immediately divisible (*c*); or the trustees undertake to bring the trust funds immediately into Court (*d*).]

How application to be discharged from the trust should be made.

3. Formerly the application to the Court to be discharged from the trust was in general made by *bill*, in order to give the Court an opportunity of examining into the merits of the case (*e*); but if a suit were already pending, the trustee might then solicit his dismissal by *petition* or *motion* (*f*). It was formerly not the custom of the Court to look through the proceedings, but a reference was ordered to the Master (*g*). Under the present practice the Court, except in cases of special difficulty, usually appoints a trustee without a reference to chambers, and without a suit, under the provisions of the Trustee Acts.

Part of the trust estate lost.

4. If part of the original trust estate is *supposed to be lost*, or is *not forthcoming*, the Court will not appoint new trustees of the *residue*, so as to make them *partial trustees* only, but will appoint them *trustees generally;* and, if required, will at the

(*a*) See *Forshaw* v. *Higginson*, 20 Beav. 485; *Gardiner* v. *Downes*, 22 Beav. 397.

(*b*) *Re Stokes' Trusts*, 13 L. R. Eq. 333. [The order in this case was prefaced thus, "A. and B. by their counsel desiring to retire, &c., in order that A. and B. may be appointed to act alone as trustees, &c." See Seton on Decrees, 4th ed. p. 540; and this case was followed in *Re Tatham's Trust*, W. N. 1877, p. 259; *Re Harford's Trusts*, 13 Ch. D. 135; *Re Shipperdson*, W. N. 1880, p. 155; *Re Northrop*, W. N. 1880, p. 184; but since the contrary decisions in *Re Colyer*, 50 L. J. N.S. Ch. 79; and *Re Aston*, 23 Ch. Div. 217, a similar order is not likely to be made; *Re Lamb's Trusts*, 28 Ch. D. 77.]

[(*c*) See cases in last note, and *Re Martyn*, 26 Ch. Div. 745; *Davies* v. *Hodgson*, 32 Ch. D. 225; *Re Gardiner's Trusts*, 33 Ch. D. 590.]

[(*d*) *Davies* v. *Hodgson*, 32 Ch. D. 225.]

(*e*) See *Ex parte Anderson*, 5 Ves. 243; *Re Fitzgerald*, Ll. & G. *t.* Sugd. 22; *Re Anderson*, Ib. 29.

(*f*) —— v. *Osborne*, 6 Ves. 455; —— v. *Robarts*, 1 J. & W. 251.

(*g*) —— v. *Osborne*, 6 Ves. 455.

same time, for the protection of the trustees, direct an inquiry whether any part of the trust fund has been lost, and what steps should be taken for its recovery (*a*).

Costs.

5. The *costs* where the trustee retires from *caprice* or *without sufficient reason* must be borne by himself (*b*); but where he retires from necessity, or on good and sufficient ground, they will be thrown upon the trust estate (*c*). Where the trust was originally a simple one, but has become embarrassing from its complications, the trustee may commence an action to be relieved, and will be allowed his costs, for although he might have paid the trust fund into Court under the Trustee Relief Act, this would not have saved him from being sued, except as to the particular sum paid into Court (*d*).

Application by representative of deceased trustee.

6. A distinction was taken by Lord Langdale between the case where the same person who accepted the trust comes to be relieved from it, in whom it would be caprice to relinquish the trust without any sufficient reason, and the case where on that person's death, the trust devolves on his *representative* by operation of law, and the *representative* applies to the Court (*e*). And where the *executor* of a trustee declined to act as trustee, and a bill was filed against him to have new trustees appointed, and that the executor might pay the costs, the Court said the executor had a perfect right to decline acting in the trusts, and allowed him his costs (*f*).

Complication of the trust by the acts of the tenant for life.

7. Where the settlement contained a power of appointment of new trustees, and the tenant for life having incumbered his life-estate with annuities and other charges, the original trustees were desirous of relieving themselves from the difficulties of their situation by retiring from the trust, and the tenant for life who was the donee of the power could not find any person to undertake the trust, the costs of the suit which the trustees had instituted for their discharge were thrown exclusively upon the fund of the *tenant for life* (*g*).

Executor cannot be discharged.

8. An *executor* is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged, even by the Court, from

(*a*) *Bennett* v. *Burgis*, 5 Hare, 295.
(*b*) *Howard* v. *Rhodes*, 1 Keen, 581; *Porter* v. *Watts*, 16 Jur. 757; *Hamilton* v. *Fry*, 2 Moll. 458.
(*c*) *Greenwood* v. *Wakeford*, 1 Beav. 581; *Forshaw* v. *Higginson*, 20 Beav. 486; *Courtenay* v. *Courtenay*, 3 Jon. & Lat. 529; *Gardiner* v. *Downes*, 22 Beav. 395; see *ante*, p. 753.
(*d*) *Barker* v. *Peile*, 2 Dr. & Sm. 340.
(*e*) 1 Beav. 582; and see *Aldridge* v. *Westbrooke*, 4 Beav. 212.
(*f*) *Legg* v. *Mackrell*, 1 Giff. 165; 2 De G. F. & J. 551.
(*g*) *Coventry* v. *Coventry*, 1 Keen, 758.

his *executorship*. When the funeral and testamentary expenses, debts, and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character and *becomes a trustee* in the proper sense, and may then be discharged from the office like any other trustee.

PART III.

THE CESTUI QUE TRUST.

CHAPTER XXVI.

IN WHAT THE ESTATE OF THE CESTUI QUE TRUST PRIMARILY CONSISTS.

HAVING concluded the subject of the *estate* and *office* of the trustee, it follows next that we investigate the nature and properties of the *Estate* of the *cestui que trust;* and in the present chapter we shall inquire in what the estate of the *cestui que trust* primarily consists, *First,* In the *simple* trust; and *Secondly,* In the *special* trust.

SECTION I.

OF THE CESTUI QUE TRUST'S ESTATE IN THE SIMPLE TRUST.

IN the *simple* trust the equitable ownership is compounded of the Pernancy of the profits and the Disposition of the estate—the *jus habendi* and *jus disponendi* (*a*).

First. The equitable owner is entitled to the pernancy of the profits.

Cestui que trust entitled to possession of lands.

1. In a trust of lands the *cestui que trust* may compel the trustee to put him in possession of the estate (*b*); and if the *cestui que trust* be ejected from the possession by the trustee, the *cestui que trust* may compel the trustee to account not only for the rents actually received, but for the whole rents legally demandable from the tenants (*c*).

(*a*) *Smith* v. *Wheeler*, 1 Mod. 17, *per* Pemberton, J.

(*b*) *Brown* v. *How*, Barn. 354; *Attorney-General* v. *Lord Gore*, Id. 150, *per* Lord Hardwicke.

(*c*) *Kaye* v. *Powel*, 1 Ves. jun. 408.

Rule applicable only to simple trust.

2. The rule which gives the *cestui que trust* the possession is applicable only to the simple trust in the strict sense, for where the *cestui que trust* is not exclusively interested, but other parties have also a claim, it rests in the discretion of the Court whether the actual possession shall remain with the *cestui que trust* or the trustee, and if possession be given to the *cestui que trust*, whether he shall not hold it under certain conditions and restrictions (*a*).

Blake v. Bunbury.

Thus a testator devised all his real estate to trustees in fee, upon trust to convey the same for a term of 500 years (the trusts of which were to raise certain *annuities* and *sums in gross*), and subject thereto to the use of A. for life with remainders over. A. filed a bill, praying to be let into possession. At the hearing of the cause a general account was directed of the testator's estates and of the charges upon them, and the plaintiff further desired that he might be let into *immediate possession;* but Lord Thurlow said, "It is impossible for me to let him into possession till I have the accounts before me, and even till the trusts are executed, unless, as he now offers, he pays into Court a sum sufficient to answer all the purposes of the trust. The Court, perhaps, has let a tenant for life into possession, where it has seen that the best way of performing the trusts would be by letting him into possession, as where an annuity of 100*l.* a year is charged upon an estate of 5000*l.* a year; but till the account is taken I do not know but the purposes of the trust may take up the whole, and if I was to do it now, perhaps I should only have to resume the estate" (*b*). The accounts were afterwards taken, and the plaintiff was let into possession on giving *security* to the amount of 10,000*l.* to abide the order of the Court as to the annuities and other incumbrances (*c*).

Tidd v. Lister.

In another case (*d*), a testator devised and bequeathed all his real and personal estate to trustees upon trust to pay his funeral expenses and debts, to keep the buildings upon the estate insured against fire, to satisfy the premiums upon two policies of insurance on the lives of his two sons, to allow his said sons an annuity of sixty guineas each, and subject thereto upon

(*a*) *Jenkins* v. *Milford*, 1 J. & W. 629; *Baylies* v. *Baylies*, 1 Coll. 537; and see *Denton* v. *Denton*, 7 Beav. 388; *Pugh* v. *Vaughan*, 12 Beav. 517; *Hoskins* v. *Campbell*, W. N. 1869, p. 59; *Etchells* v. *Williamson*, W. N. 1869, p. 61.

(*b*) *Blake* v. *Bunbury*, 1 Ves. jun. 194. See the case more fully stated, Ib. 514; 4 B. C. C. 21.

(*c*) *S. C.* 1 Ves. jun. 514, 4 B. C. C. 28.

(*d*) *Tidd* v. *Lister*, 5 Mad. 429.

trust for his daughter for life with remainders over; and the personal estate having sufficed to discharge the funeral expenses, debts and annuities, the daughter, who was then a *feme covert*, filed a bill praying to be let into possession upon securing the amount of the premiums of the policies: but Sir J. Leach said that if a testator, who gave in the first instance a beneficial interest for life only, thought fit to place the direction of the property in other hands, which was an obvious means of securing the provident management of that property for the advantage of those who were to take in succession, a Court of equity ought not to disappoint that intention by delivering over the estate to the *cestui que trust* for life, unprotected against that bias which he must naturally have to prefer his own interest to the fair right of those who were to take in remainder. There might be cases in which it was plain from the *expressions in the will*, that the testator did not intend the property should remain under the personal management of the trustees; there might be cases in which it was plain from the *nature of the property*, that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of a family residence. There might be very special cases in which the Court would deliver the possession of the property to the *cestui que trust* for life, *although the testator's intention appeared to be that it should remain with the trustees;* as, where the personal occupation of the trust property was beneficial to the *cestui que trust;* in which case the Court, by taking means to secure the due protection of the property for the benefit of those in remainder, would in substance be performing the trust according to the intention of the testator. And his Honour, considering that there was no such ground of exception in the case before him, refused the application (*a*).

[Accumulation directed for payment of mortgages.]

[In a recent case a testator directed an accumulation of rents for the purpose of paying off mortgages, and that the tenant for life under the will should not receive any part of the rents until the mortgages were paid off; the mortgagees sold the estates comprised in their mortgages, and the proceeds being insufficient to pay them in full, the balance was paid out of the accumulations; and it was held that the tenant for life was entitled to be let into possession of the estates remaining unsold, and to receive the surplus accumulations (*b*).]

[(*a*) And see *Re Bentley*, 54 L. J. N.S. Ch. 782; 33 W. R. 610.]

[(*b*) *Norton* v. *Johnstone*, 30 Ch. D.

Cestui que trust for her separate use.

3. In one case a *feme covert* was entitled to her *separate use* for her life, and it was not thought incompatible with the nature of such an estate that she should be put into possession, though the claim was opposed by the trustees (*a*). A tenant for life cannot claim possession as a *right*, but only at the discretion and by the sufferance of the Court; and therefore, where trustees were directed as managers of the estate to pay insurances and repairs and other necessary outlays, and apply the net annual income to the separate use of a person for life, it was held that such tenant for life was not a person "entitled to possession or receipt of the rents and profits" for life within the meaning of the Leases and Sales of Settled Estates Act, and could not therefore grant leases under the Act. Such a power would in fact *pro tanto* neutralize the powers of management vested in the trustees (*b*).

Cestui que trust cannot recover the possession at law.

4. Until a recent Act, to be noticed presently, the *cestui que trust's* right to the possession was recognized, we must remember, in a Court of *equity* only; for in a Court of *law* the *cestui que trust* was merely tenant at will (*c*), and this tenancy was determinable at any time on *demand of possession* by the trustee, though not before such demand (*d*). The doctrines advanced by Lord Mansfield in the last century were long ago over-ruled. It was maintained in his day, that a *cestui que trust*, a plaintiff in ejectment, could not be nonsuited by a term outstanding in his trustee (*e*); and that a trustee, a plaintiff in ejectment, could not recover against his own *cestui que trust* (*f*). It was even

649; following *Tewart* v. *Lawson*, 18 Eq. 490.]

(*a*) *Horner* v. *Wheelwright*, 2 Jur. N. S. 367; and see *Hoskins* v. *Campbell*, W. N. 1869, p. 59; *Taylor* v. *Taylor*, 20 L. R. Eq. 297; [*Re Bentley*, 54 L. J. N.S. Ch. 782.]

(*b*) *Taylor* v. *Taylor*, 20 L. R. Eq. 297. [But see observations of L. J. James in *Taylor* v. *Taylor*, 3 Ch. Div. 147; and see *Vine* v. *Raleigh*, 24 Ch. D. 238; where it was held that if an estate is vested in trustees, and there is not for the time being any person beneficially entitled to the rents and profits, the trustees are the persons who may under the 23rd section of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), apply to the Court to exercise the powers conferred by the Act; and a distinction was drawn between the language of that section and that of the 46th section, under which the person entitled to the possession or to the receipt of the rents and profits of the settled estates for an estate for life, &c., *either in his own right or in right of his wife* (words pointing to a *beneficial* ownership) is authorized to grant leases for twenty-one years; and see *Re Bentley*, 54 L. J. N.S. Ch. 782; 33 W. R. 610.]

(*c*) *Garrard* v. *Tuck*, 8 C. B. 231; *Melling* v. *Leak*, 1 Jur. N. S. 759; *Parker* v. *Carter*, 4 Hare, 400; *Perry* v. *Shipway*, 1 Giff. 1; and see *Geary* v. *Bearcroft*, O. Bridgm. 486–490; Bac. Us. 5; *Doe* v. *Jones*, 40 B. & Cr. 718; *Doe* v. *M'Kaeg*, 10 B. & Cr. 721; *post*, Chap. xxx. s. 1.

(*d*) *Doe* v. *Phillips*, 10 Q. B. 130.

(*e*) *Lade* v. *Holford*, B. N. P. 110. The doctrine is said to have originated with Mr. Justice Grundy.

(*f*) *Armstrong* v. *Peirse*, 3 Burr. 1901.

decided that, where a term had been created for securing an annuity, and subject thereto upon trust to attend the inheritance, the tenant of the freehold was entitled to recover the possession (provided he claimed subject to the charge), notwithstanding the legal term was outstanding in a trustee upon trusts that were still unsatisfied (*a*). Such at least were the doctrines in cases of *clear* trusts: for where the equity was at all *doubtful*, the rights of the parties were even then referred to the proper tribunal (*b*). "Lord Mansfield," as Lord Redesdale observed, "had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same Courts" (*c*). From the time of Lord Mansfield, and until the recent Act, it was established:—*First*, that a *cestui que trust* could not recover in ejectment (*d*), unless a surrender to him of the legal estate could be reasonably presumed (*e*), (which, of course, could not be where the circumstance of the outstanding legal estate appeared on the declaration or special case (*f*),) and the *cestui que trust* had no alternative but to bring his action in the name of the trustee, who was to be indemnified against the costs (*g*): *Secondly*, that the trustee, as the tenant of the legal estate, might recover in ejectment from his own *cestui que trust* (*h*); and the *cestui que trust* had no defence to the action at law, but must have had recourse to an injunction in equity (*i*), and the clause in the Common Law Procedure Act, 1854, which authorized an equitable defence at law, did not apply to ejectment (*j*). However, a lessee under a *feme covert* entitled to her separate use might protect himself by equitable plea against trespass by the husband, in whom the legal estate was vested (*k*).

36 & 37 Vict. c. 66.

5. Now, generally, by 36 & 37 Vict. c. 66, s. 24, equitable

(*a*) *Bristow* v. *Pegge*, 1 T. R. 758, note (*a*); overruled by *Doe* v. *Staple*, 2 T. R. 684.

(*b*) *Doe* v. *Pott*, Doug. 695, *per* Lord Mansfield; *Goodright* v. *Wells*, Id. 747, *per eundem*.

(*c*) *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 66.

(*d*) *Doe* v. *Staple*, 2 T. R. 684; see *Barnes* v. *Crow*, 4 B. C. C. 10 & 11; *Doe* v. *Sybourn*, 7 T. R. 3; *Goodtitle* v. *Jones*, 7 T. R. 45, and following pages; *Doe* v. *Wroot*, 5 East, 138.

(*e*) *Doe* v. *Sybourn*, 7 T. R. 2; see *Doe* v. *Staple*, 2 T. R. 696; *Goodtitle* v. *Jones*, 7 T. R. 45, and following pages; *Roe* v. *Reade*, 8 T. R. 122.

(*f*) *Goodtitle* v. *Jones*, 7 T. R. 43; see *Doe* v. *Staple*, 2 T. R. 696; *Roe* v. *Reade*, 8 T. R. 122.

(*g*) *Annesley* v. *Simeon*, 4 Mad. 390; and see *Reade* v. *Sparkes*, 1 Moll. 11; *Jenkins* v. *Milford*, 1 J. & W. 635; *Ex parte Little*, 3 Moll. 67.

(*h*) See *Roe* v. *Reade*, 8 T. R. 122, 123.

(*i*) *Shine* v. *Gough*, 1 B. & B. 445.

(*j*) *Neave* v. *Avery*, 16 C. B. 328, and see *Smith* v. *Hayes*, 1 I. R. C. L. 333; *Clarke* v. *Reilly*, 2 I. R. C. L. 422.

(*k*) *Allen* v. *Walker*, 5 L. R. Ex. 187.

defences are to be recognized in all the Courts, so that for the time to come the full merits, both at law and in equity, will be administered in the same action.

Leases by a *cestui que trust.*

6. As a tenant is not allowed to dispute his landlord's title, if a *cestui que trust*, having only an equitable estate, grant a lease, then, as between lessor and lessee, the lessor may distrain and exercise the other rights of a landlord in the same way as if at the date of the demise he had been the legal owner (*a*). The title of the lessor might be such, that on his death the person claiming under him could not prove the devolution of the estate without showing upon the pleadings that at the date of the lease the lessor's interest was equitable, and in such a case it is presumed the estoppel would not apply, and the remedy would be in equity (*b*). But if there be no difficulty upon the pleadings, the persons claiming under the lessor, as, for instance, his trustee in bankruptcy, had always the same benefit of the rule as the lessor had (*c*).

Notice to quit.

7. If the trustees put the *cestui que trust* in possession, and the *cestui que trust* grants a lease and afterwards serves a notice on the lessee to quit, the *cestui que trust* is the agent of the trustees for the purposes of the notice, and an ejectment by the trustees can be sustained as if the notice had been given by themselves (*d*).

Injunction between tenants in common.

8. If there be *two cestuis que trust* tenants in common, and one of them be put into possession, and cuts timber, and becomes insolvent, the other *cestui que trust* can obtain an injunction (*e*).

Possession of the title deeds.

9. The *title deeds* of an estate form no part of the usufructuary enjoyment; and therefore if a person vests an estate in trustees upon particular trusts, one of which is to receive the rents and pay them over to the settlor for life, and the deeds are *delivered into their possession, they* have a right to the custody of them for the benefit of all parties interested (*f*), and should the *settlor* obtain them from the trustees, and thereby be enabled to deal with the estate as absolute owner, the trustees, if it appeared they had acted fraudulently, or under such gross negligence as amounted to constructive fraud, would be held personally respon-

(*a*) *Alchorne* v. *Gomme*, 2 Bing. 54; *Blake* v. *Foster*, 8 T. R. 487; *Parker* v. *Manning*, 7 T. R. 537.

(*b*) See *Noke* v. *Awder*, Co. Eliz. 373, 436. See 2 Lord Raymond, 1553.

(*c*) *Parker* v. *Manning*, 7 T. R. 537.

(*d*) *Jones* v. *Phipps*, 3 L. R. Q. B. 567.

(*e*) *Smallman* v. *Onions*, 3 B. C. C. 621.

(*f*) See *Garner* v. *Hannyngton*, 22 Beav. 630; *Stanford* v. *Roberts*, 6 L. R. Ch. App. 307.

sible for the consequences (*a*). However, a tenant for life, if the estate be *legal*, is entitled to the custody of the deeds (*b*), and may bring an action of detinue (*c*), or, unless he has shown that he cannot be safely trusted with the deeds (*d*), may take proceedings in equity for the recovery of them (*e*); and as equity follows law, the Court, in the absence of special trusts requiring the possession of the deeds by the trustees, will not take the deeds from the tenant for life who has got possession of them (*f*); and where the tenant for life in equity is *not the settlor*, and therefore cannot by suppressing the settlement make a title to the fee simple, has ordered the deeds to be delivered to the tenant for life in equity (*g*), subject of course to the remainderman's right to production and inspection to a reasonable extent (*h*), [and has required him to undertake not to part with them without the consent of the trustees, and to produce them to the trustees upon all reasonable occasions (*i*)]. Where the legal estate, whether of freeholds, copyholds, or leaseholds, is vested in a trustee or executor in trust, not for certain persons entitled in succession, but for *cestuis que trust* entitled absolutely in possession, the *cestuis que trust*, or if they are infants, their guardians, may institute proceedings to have the deeds delivered up to them. But as to *leaseholds*, an *executor* may hold the deeds until all debts have been paid and the personal estate cleared (*j*).

(*a*) See *Evans* v. *Bicknell*, 6 Ves. 174.

(*b*) In *Foster* v. *Crabb*, 12 C. B. 136, the Court seems to have approved the rule laid down in early times, that whoever first gets possession of the deeds, whether tenant for life or in remainder, keeps them. But see *Garner* v. *Hannyngton*, 22 Beav. 627; *Webb* v. *Webb*, 1 Eden, 8; *Duncombe* v. *Mayer*, 8 Ves. 320; [*Leathes* v. *Leathes*, 5 Ch. D. 221;] and Sugd. Vend. and P. 14th edit. p. 445, note (1).

(*c*) *Allwood* v. *Heywood*, 1 N. R. 289.

(*d*) See *Jenner* v. *Morris*, 1 L. R. Ch. App. 603.

(*e*) *Garner* v. *Hannyngton*, 22 Beav. 627.

(*f*) *Taylor* v. *Sparrow*, 4 Giff. 703, 9 Jur. N. S. 1226; and see *Denton* v. *Denton*, 7 Beav. 388.

(*g*) *Langdale* v. *Briggs*, 8 De G. M. & G. 391. In one case where deeds had been deposited in Court, and the tenant for life (whether legal or equitable is not clear) asked that the deeds might be delivered out to him, the Court refused, observing that "The Court never interfered as to the possession of deeds between a father, tenant for life, and a son entitled in remainder, but that in the case of a stranger tenant for life, the Court would interfere:" *Warren* v. *Rudall*, 1 J. & H. 1. But this, as observed by V. C. Stuart, was a mere *obiter dictum*; *Taylor* v. *Sparrow*, 9 Jur. N. S. 1227; [and has since been expressly disapproved of, *Leathes* v. *Leathes*, 5 Ch. D. 221.]

(*h*) *Davis* v. *Dysart*, 20 Beav. 405; *Pennell* v. *Dysart*, 25 Beav. 542.

[(*i*) *Re Burnaby's Settled Estates*, 42 Ch. D. 621.]

(*j*) *Smith* v. *Pavier*, V. C. Wood, 18 July, 1852. In this case J. Smith devised freeholds and leaseholds for long terms to Wade and Pavier and their heirs to the use of Joel Smith for life with remainder to Wade and Pavier to preserve contingent remainders, with remainder to the children of Joel Smith (who were infants at the filing

[The trustee in bankruptcy of the husband of a legal tenant for life (not entitled to the property as separate estate), has not an absolute right to the custody of the title deeds during the coverture; but where the circumstances require it, they will be ordered to be brought into Court for safe custody (*a*).]

Cestuis que trust entitled to inspect documents.

10. *Cestuis que trust* have a right at all seasonable times to *inspect* the documents relating to the trust (*b*), and at their own expense to be furnished with *copies* of them, and the rule extends to *cases* submitted and *opinions of counsel* taken by the trustees for their guidance in the discharge of their duty, for as the expense falls upon the trust estate, it stands to reason that the *cestuis que trust* may see the opinions and cases for which they pay. But the right does not arise until the relation of trustee and *cestui que trust* has been established to the satisfaction of the Court (*c*).

Custody of deeds may be committed to *one* of the trustees.

11. As the deeds and documents relating to the trust cannot be held by *all* the trustees (unless they be deposited with bankers with a direction not to part with them except on the authority of the whole number), co-trustees have been held to be justified in committing the custody of the deeds to one of themselves; and where the deeds are a security for money, the possession by the one is no implied authority from the co-trustee to him who holds them to receive the principal money secured (*d*).

Privileges of *cestui que trust*.

12. Upon the principle that the *cestui que trust* is *in foro conscientiæ* entitled to the pernancy of the profits, he has been invested by the express language of some statutes, and by the equitable construction of others, with the various privileges conferred by the legislature upon the legal tenants of real estate.

Qualification of *cestui que trust* to be a juror.

13. By 6th Geo. 4. c. 50, s. 1, Every man between the ages of 21 and 60, residing in any county in England, who shall have in his own name or *in trust for him* within the same county 10*l.* by the year, above reprises, in real estate, &c., &c., is qualified to serve as a *juror* (*e*).

of the bill) and the heirs of their bodies, with remainders over, including limitations to Wade and Pavier to preserve contingent remainders, who were also executors. Wade and Pavier took possession of the title deeds on the testator's death, and held them during the life of Joel Smith. On his death the infant children by their next friend, with two other persons as co-plaintiffs (being their guardians appointed by the Court) filed their bill against Pavier the surviving executor for delivery of the deeds, and their being no allegation of unpaid debts, the delivery of the deeds to the two guardians was ordered.

[(*a*) *Ex parte Rogers*, 26 Ch. Div. 31.]

[(*b*) *Re Cowin*, 33 Ch. D. 179.]

(*c*) *Wynne* v. *Humberston*, 27 Beav. 421.

(*d*) *Cottam* v. *Eastern Counties Railway Company*, 1 J. & H. 243; *Goldney* v. *Bower*, cited Ib. 247.

(*e*) And see Co. Litt. 272 a, 272 b.

As to right of *cestui que trust* to vote for a coroner.

14. The right of election of *coroner* was formerly vested in the *freeholders* of the county; and the privilege of voting must, it is conceived, have belonged originally to the *legal* freeholder. Under 58th Geo. 3. c. 95, s. 2, the right to vote was confined to trustees or mortgagees in actual possession or receipt of the rents and profits, and a *cestui que trust* or mortgagor in possession was entitled to vote; but upon the repeal of 58 Geo. 3. c. 95, by 7 & 8 Vict. c. 92, this provision was not re-enacted, and the *equitable owner* had no right to vote (*a*). [But now under the Local Government Act, 1888 (*b*), coroners are no longer elected by the county freeholders, but are appointed by the county council.]

Right of *cestui que trust* to sport under the old law.

15. By the Game Act, 22 & 23 Car. 2. c. 25, s. 3, persons were disqualified from sporting unless they had *lands and tenements*, &c., of the clear value of 100*l. per annum*; and it was decided that a *cestui que trust* of lands to that amount was within the intention of the Act; Lord Mansfield observing, that "the privilege was given to *property*, and the *cestui que trust* was *substantially* the owner and the trustee only *nominally*" (*c*). By the provisions of the late Game Act no qualification is now necessary (*d*).

Right of *cestui que trust* to vote at election for members of Parliament.

16. By 6th Vict. c. 18, s. 74, "no trustee of lands or tenements shall in any case have a right to vote in any such election, (*i.e.* for a Member of Parliament) for or by reason of any trust estate therein, but the *cestui que trust* in actual possession, or in the receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee, shall and may vote for the same notwithstanding such trust" (*e*).

[Protector of the settlement.]

[17. The person entitled to the beneficial enjoyment of the rents and profits of the settled property, under a settlement made *since* the Fines and Recoveries Act, is the protector of the settlement under section 22 of the Act, as *owner* of the prior estate, and not the trustees in whom the legal estate is vested; and in a settlement made *before* the Act, if the estates are equitable the beneficial owner is also protector (*f*).]

Income and corpus distinguished.

18. The question frequently arises, both in construing Acts of Parliament which speak of a limited amount of *income* and

(*a*) *Regina* v. *Day*, 3 Ell. & Bl. 859.
(*b*) [51 & 52 Vict. c. 41.]
(*c*) *Wetherell* v. *Hall*, Cald. 230.
(*d*) 1 & 2 W. 4. c. 32.
(*e*) See *Wallis* v. *Birks*, 5 L. R. C. P. 222; and see *ante*, p. 247.
[(*f*) *Re Dudson's Contract*, 8 Ch. Div. 628; *Re Ainslie*, 51 L. T. N.S. 780; and see *ante*, p. 424.]

also in determining the relative rights of *tenants for life and remaindermen*, what is *income* and what is *corpus*, and it has been held that the tenant for life of a manor is entitled to the fines payable on all customary grants (*a*), or on admissions (*b*), and where leaseholds are annually renewable, the tenant for life of the reversion is entitled to the annual fines for renewal (*c*); [and where leaseholds for lives are perpetually renewable on the dropping of the lives, the tenant for life of the reversion is entitled to the heriots and fines for renewal, as they are of the nature of casual profits accruing during his tenancy for life (*d*).] So a tenant for life is entitled to underwood and thinnings of plantations in ordinary course (*e*), and to rents and royalties payable under the lease of an open mine (*f*), or of a brickfield, whether the lease was granted by the testator or by the trustee of his will under a power in the will (*g*), and to the produce of gravel, loam, peat, or bog-earth got annually according to the usual custom (*h*). But a tenant for life is not entitled to trees in woodlands not cut periodically according to custom, though cut for the sake of improving the growth of the rest (*i*).

[Mines and timber.]

[19. Under the Settled Land Act, 1882, a tenant for life, whether impeachable for waste or not, can now grant mining leases of mines either opened or unopened, and is entitled if impeachable for waste to one-fourth part of the rents, and if not impeachable for waste to three-fourth parts of the rents (*j*). And as a tenant for life although impeachable for waste, has a right to continue the working of open mines, he will be entitled, if a lease is granted of such mines under the powers of the Act, to three-fourths of the rents. Under the same Act a tenant for life impeachable for waste, may on obtaining the consent of the trustees of the settlement or an order of the Court, cut and sell timber, ripe and fit for cutting, and is entitled to one-fourth part of the net proceeds, but the remaining three-fourths are to go as capital (*k*).

[Loss on business held in trust for persons successively.]

20. Where a business was held in trust for successive tenants for life, and remaindermen, and was carried on by a receiver and manager at a loss during the life of the first tenant for life, it

(*a*) *Earl Cowley* v. *Wellesley*, 35 Beav. 640.
(*b*) S. C. 35 Beav, 641.
(*c*) *Milles* v. *Milles*, 6 Ves. 761.
[(*d*) *Brigstocke* v. *Brigstocke*, 8 Ch. Div. 357.]
(*e*) *Earl Cowley* v. *Wellesley*, 35 Beav. 635.
(*f*) S. C. 35 Beav. 639.
(*g*) S. C. 35 Beav. 638.
(*h*) S. C. 35 Beav. 639.
(*i*) S. C. 35 Beav. 635.
[(*j*) Sects. 6, 11.]
[(*k*) Sect. 35.]

was held that the loss must be made good out of the profits earned during the life of the next tenant for life and not out of the corpus (*a*); but the adjustment of the relative rights of tenant for life and remainderman in such a case necessarily depends on the construction of the particular will (*b*).

[Bonus.] 21. Where a bonus dividend is declared by a company out of accumulated profits it is a question of fact (which it is often very difficult to determine) whether such bonus is to be regarded as capital or income, and where in such a case it appeared that the company had not paid or intended to pay any sum as dividend, but intended to appropriate the undivided profits as an increase of their capital, it was held that the tenant for life was not entitled to the bonus, but that it must be treated as capital (*c*). But the mere fact that the profit is carried to a reserve fund is not sufficient to show that it has been appropriated as capital (*d*).]

Succession duty. 22. The tenant for life of an estate must bear the expense of *accounts* necessary to be taken for the discharge of the *succession duty* payable by the tenant for life as successor (*e*), and must discharge the *rates* and *taxes* payable during his life (*f*).

Fencing. 23. The expenses of *fencing* newly acquired enclosures will fall upon the corpus (*g*).

Cestui que trust's possession of chattels. 24. Hitherto we have spoken of the *cestui que trust's* right to the pernancy of the profits in respect of *lands*. In trusts of *chattels personal*, as where heirlooms are vested in a trustee upon trust for the persons successively entitled under the limitations of a strict settlement, the *cestui que trust* for the time being is equally entitled to the use and possession of the goods during the continuance of his interest; and upon the ground of this right the goods are not forfeited on the bankruptcy of the tenant

[(*a*) *Upton* v. *Brown*, 26 Ch. D. 588; but see *Gow* v. *Foster*, 26 Ch. D. 672, the decision in which seems to have turned on the wording of the will and not on any general principle; and see *Re Millichamp*, 52 L. T. N.S. 758.]

[(*b*) See *Gow* v. *Foster*, 26 Ch. Div. 672, 677; *Re Millichamp*, 52 L. T. N.S. 758.]

[(*c*) *Bouch* v. *Sproule*, 12 App. Cas. 385, and cases there cited; and see *Re Bramley*, 55 L. T. N.S. 145; *Re Alsbury*, 45 Ch. D. 237; *Re Northage*, 60 L. J. N.S. Ch. 488, 64 L. T. N.S. 625]; where a declaration of bonus dividend and issue of new shares to the amount thereof being regarded as separate transactions the tenant for life was held entitled to the dividend.]

[(*d*) *Re Alsbury*, 45 Ch. D. 237, 247; commenting on *Bouch* v. *Sproule*, *ubi supra*.]

(*e*) *Earl Cowley* v. *Wellesley*, 35 Beav. 642.

(*f*) *Fountaine* v. *Pellet*, 1 Ves. jun. 337, see 342.

(*g*) *Earl Cowley* v. *Wellesley*, 35 Beav. 641.

for life, though left in the possession of the bankrupt by permission of the legal owner, for they are left with him *according to the title* (*a*); [and possession by the *cestui que trust* in accordance with the trust instrument is in law the possession of the trustee, who can maintain an action against a wrongdoer for the conversion of the chattels (*b*).]

Household goods.

25. In a bequest to a person of the use of *household goods*, it seems the legatee may use them in his own or in any other person's house, and either alone or promiscuously with other goods, or, it is said, may let them out to hire (*c*); but, where the chattels are *heirlooms annexed to a house*, and their continuance in the mansion is evidently a constituent part of the trust, they cannot be let to hire except together with the house itself (*d*). Of course the use of the chattels by the tenant for life does not enable him to *pawn* them beyond the extent of his own interest (*e*).

[Heirlooms.]

[26. By the Settled Land Act, 1882, s. 37, a tenant for life may sell personal chattels settled as heirlooms, and the money arising by the sale is to be capital money under the Act, and to be dealt with accordingly, or it may be invested in the purchase of other chattels to be settled and held on the same trusts. But no sale or purchase of chattels under the section is to be made without an order of the Court (*f*).]

Stock in the funds.

27. Where the trust fund consists of *stock*, the *cestui que trust* is usually put in possession of the dividends by a *power of attorney* from the trustee to the *cestui que trust's* bankers, with a written authority from the trustee to the bankers to credit the *cestui que trust* with the dividends as and when received, by which arrangement the trustee is spared the trouble of repeated personal attendances at the Bank of England, and the entries in the books of the private bankers are sufficient evidence of the receipt. In cases where the *cestui que trust* is *tenant for life*, this course seems free from objection; but where his interest is one which may *determine in his lifetime*, some risk is incurred of the power of attorney and authority being acted upon by the bankers after the determination of the *cestui que trust's* estate; and it is conceived that the trustee would be liable to the other *cestuis que trust* for any misappropriation thus taking place. The trustee must be careful to see that the

(*a*) See *supra*, p. 257.

[(*b*) *Barker* v. *Furlong*, (1891) 2 Ch. 172, citing *White* v. *Morris*, 11 C. B. 1015.]

(*c*) *Marshall* v. *Blew*, 2 Atk. 217.

(*d*) *Cadogan* v. *Kennet*, Cowp. 432; [and see *Re Brown's Will*, 27 Ch. D. 179.]

(*e*) *Hoare* v. *Parker*, 2 T. R. 376.

[(*f*) As to this section see *ante*, p. 632.]

power of attorney extends only to the receipts of the *dividends*, and not to the *sale of the stock* itself; otherwise, if the bankers sell out the stock and the proceeds are misapplied, the trustee will be answerable (*a*).

Secondly. Of the *jus disponendi.*

Cestui que trust's right of disposition of the legal estate.

1. The *cestui que trust* may call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs (*b*). If the trustee refuse to comply, and the *cestui que trust* institutes proceedings to compel him, the trustee will be visited with the costs (*c*), unless there was some reasonable ground for his refusal (*d*), or he acted *bonâ fide* under the advice of counsel (*e*); and the trustee has been made to pay costs, though the *cestui que trust,* instead of filing a *bill,* might have enforced a conveyance by a summary process of a *petition* (*f*). But a trustee has a right to be satisfied by the fullest evidence that the party requiring the conveyance is the exclusive *cestui que trust* (*g*); and a *cestui que trust* cannot call for the conveyance of a larger legal estate than he has equitable: an equitable tenant in *tail,* for instance, cannot call for a conveyance of the legal *fee-simple* (*h*). And Lord Eldon was of opinion that a *cestui que trust* could not require the trustee to divest himself from time to time of *different parcels* of the trust estate; for the trustee had a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper" (*i*). And a trustee, like a mortgagee, cannot be called upon to convey the estate by any other words or description than that by which the

(*a*) See *Sadler* v. *Lea*, 6 Beav. 324.

(*b*) *Payne* v. *Barker*, Sir G. Bridgm. Rep. 24.

(*c*) *Jones* v. *Lewis*, 1 Cox, 199; *Willis* v. *Hiscox*, 4 M. & Cr. 197; *Thorby* v. *Yeats*, 1 Y. & C. C. C. 438; *Penfold* v. *Bouch*, 4 Hare, 271; *Firmin* v. *Pulham*, 2 De G. & Sm. 99; *Palairet* v. *Carew*, 32 Beav. 565; and see *Campbell* v. *Home*, 1 Y. & C. C. C. 664.

(*d*) *Goodson* v. *Ellisson*, 3 Russ. 583; *Poole* v. *Pass*, 1 Beav. 600.

(*e*) *Angier* v. *Stannard*, 3 M. & K. 556; and see *Devey* v. *Thornton*, 9 Hare, 232; *Field* v. *Donoughmore*, 1 Dru. & War. 234; [*Stott* v. *Milne*, 25 Ch. Div. 710.]

(*f*) *Watts* v. *Turner*, 1 R. & M. 634.

(*g*) *Holford* v. *Phipps*, 3 Beav. 434, and see *Etchells* v. *Williamson*, W. N. 1869, p. 61.

(*h*) *Saunders* v. *Neville*, 2 Vern. 428. But though this point may have been mooted in the case and ruled as reported, yet the principal question in the cause was a different one, viz. whether under the circumstances the plaintiff was entitled to call for a conveyance of the legal estate even to him, and "the heirs of his body." See note by Raithby, correcting the text from the Reg. Book.

(*i*) *Goodson* v. *Ellisson*, 3 Russ. 594. But if the *cestuis que trust* of a fund, as tenant for life and remainderman, assign part of the fund, it is conceived that the trustee cannot refuse to transfer that part to the assignee. The owner of an aliquot share has a separate claim in respect of it: *Smith* v. *Snow*, 3 Mad. 10.

conveyance was made to himself (*a*). And a trustee cannot be compelled to execute a conveyance containing inaccurate recitals; but where all the *cestuis que trust* are parties, he cannot insist on the insertion of recitals against the wishes of his *cestuis que trust* (*b*); and a trustee in whom any property is vested which is liable to *succession duty*, must see that the duty is satisfied or he becomes personally liable (*c*). Succession duty.

[2. Where property is disposed of by the beneficial owner under the provisions of the Settled Land Act, 1882, as by the 20th section he is empowered to convey the property for the estate, or interest the subject of the settlement, and can therefore pass the legal estate (*d*), if comprised in the settlement, without the concurrence of the trustees, it is conceived that the trustees would not be compelled to join in the assurance.] [Under the Settled Land Act.]

3. A trustee for the *separate use* of a married woman with *restraint of anticipation*, holds upon a special trust during the coverture; but if the husband die, the trust for the separate use is suspended and the *feme* has an absolute power of disposition, though on a future coverture the separate use and non-anticipation clause, if not prevented by previous disposition, would revive. The trustee, therefore, after the death of the husband, holds upon a simple trust for the *feme*, and is bound at her direction to convey the legal estate to her (*e*). Trustee for separate use.

4. It not unfrequently happens that when property is held upon trust for a tenant for life, with a power of appointment among his children, and in default of appointment for the children, the trustee is called upon to make a conveyance by the joint direction of the parent and such of the children as are the appointees, and the trustee has a shrewd suspicion that *undue influence* has been used, or that there is an *underhand bargain* in derogation of the rights of the other children, who take nothing by the appointment. In these cases, if the nature of the transaction be such as to show on the face of it that there is good ground for suspicion, the trustee will, on refusing to convey, be protected by the Court, and be entitled to his costs (*f*). But, although it may be the duty of the trustee to make enquiry as Fraudulent appointments.

(*a*) *Goodson* v. *Ellisson*, *ubi supra*.

(*b*) *Hartley* v. *Burton*, 3 L. R. Ch. App. 365.

(*c*) 16 & 17 Vict. c. 51, s. 44; [and see 52 Vict. c. 7, ss. 6, 12.]

[(*d*) As to the effect of a conveyance by a tenant for life who has incumbered his life estate; see *Re Sebright's Settled Estates*, 33 Ch. Div. 439; and *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 338, 342; 41 Ch. Div. 375, 376.]

(*e*) *Buttanshaw* v. *Martin*, Johns. 89.

(*f*) *Hannah* v. *Hodgson*, 30 Beav. 19; *King* v. *King*, 1 De G. & J. 663.

to the *bonâ fides* of the transaction, yet, if he cannot prove any *mala fides*, the mere *possibility* of fraud or undue influence will not be sufficient, and if a trustee decline to convey without any better reason, he will have to bear the costs of a suit for compelling him, though he will still be entitled to his charges and expenses properly incurred not being costs in the cause (*a*).

Enquiry into a collateral trust.

5. Trustees who are bound to make a conveyance of their trust estate, cannot justify their refusal to convey by alleging a duty to *enquire into another trust* recited in their trust deed, but which is wholly distinct from the trust in question (*b*).

Delivery of possession to remainderman.

6. Where the legal estate is vested in trustees for A. for life, with remainder to B., and on the death of A. application for a conveyance is made by B., the trustees sometimes object that they cannot convey until they have recovered all the *arrears of rent* that accrued in the lifetime of A. (*c*). In such a case the trustees are, at all events, bound to use due diligence, and must not from their *laches* postpone the rights of the remainderman. But the better course would be to give the trustees an *indemnity* on delivery of possession, or an *undertaking* to receive the arrears and account for them to the tenant for life's estate.

Trustee's conveyance.

7. The 4th section of 8 & 9 Vict. c. 106, enacts that the word "*grant*" shall not imply any covenant in law except so far as the same may, by force of any Act of Parliament, imply a covenant; and therefore, whatever may have been the case formerly, a conveying trustee cannot now draw any liability upon himself by the use of the word grant *alone*. But, as to lands in *Yorkshire*, it must be remembered that the Yorkshire Registry Acts (*d*) gave the force of covenants for title to the combined words "*grant, bargain, and sell.*" And by the Lands Clauses Consolidation Act, the word "*grant*" in conveyances by *companies* within the provision of the Act is made to carry with it the ordinary covenants for title (*e*).

[By the Conveyancing and Law of Property Act, 1881, the use of the word "grant" is rendered unnecessary for the conveyance of hereditaments, corporeal or incorporeal,

(*a*) *Firmin* v. *Pulham*, 2 De G. & Sm. 99; *Campbell* v. *Home*, 1 Y. & C. C. C. 664.

(*b*) *Palairet* v. *Carew*, 32 Beav. 564.

(*c*) See Bacon's Abridg. "Distress." This claim was made by the trustees in *Hogg* v. *Jones*, reported upon another point, 32 Beav. 45, and M. R. ordered delivery of possession to the remainderman, on his undertaking in effect to use due diligence in receiving the arrears and handing them over.

(*d*) 6 Anne, c. 35, ss. 30, 34; 8 G. 2. c. 6, s. 35. [Repealed as from the 1st January, 1885, by 47 & 48 Vict. c. 54.]

(*e*) 8 & 9 Vict. c. 18, s. 132.

whether in instruments before or after the commencement of the Act (*a*).]

Trustee to bar dower.

8. Before the abolition of tortious conveyances, a trustee to bar dower was or was not called upon to join in a conveyance, according to the circumstances of the case. Where a power of appointment was exercised besides the ordinary conveyance, his joining was dispensed with; but where, no power being exercised, the whole fee could not be passed without his concurrence, he was made a party (*b*). Where the deed creating the uses to bar dower was dated before 8 & 9 Vict. c. 106, s. 4, so that a forfeiture might by possibility have occurred, it was held by V. C. Stuart that a purchaser was still entitled to call for the concurrence of the trustee to bar dower. The Vice-Chancellor, however, considered that the objection taken by the purchaser to the title, which was founded on the non-concurrence of the dower trustee, who was absent in Australia, was frivolous and vexatious, and had an extremely slight foundation, and on that account refused to give the purchaser any costs (*c*). On appeal, the Lord Chancellor and L. J. Knight Bruce seem to have considered the objection altogether untenable, though they did not distinctly decide the point (*d*). The practical result is, that for the future a purchaser cannot be advised to require the concurrence of the trustee to bar dower.

A series of equitable interests.

9. In general there are *no intermediate steps* of the *equitable interest*, so that if A. be trustee for B., who is trustee for C., A. holds in trust for C., and must convey the estate as C. directs (*e*). But if any special confidence or discretionary power be reposed in B., which requires him to have the legal estate, he may then call upon the original trustee to execute a transfer to himself (*f*). And if a fund be vested in trustees in trust for a *feme covert* for life for her separate use, with remainder upon such trusts as she may by will appoint, and she by will gives legacies, and disposes of the residue and appoints executors, the original trustees are bound to transfer the fund to the executors to be administered by them (*g*); [and where the original trustees,

[(*a*) 44 & 45 Vict. c. 41, s. 49.]

(*b*) See Sug. Pow. 8th ed. p. 193, *et seq.*

(*c*) *Collard* v. *Roe*, 4 Jur. N.S. 431.

(*d*) Ib. 4 De G. & J. 525.

(*e*) *Head* v. *Lord Teynham*, 1 Cox, 57; and see —— v. *Walford*, 4 Russ. 372.

(*f*) *Wetherell* v. *Wilson*, 1 Keen, 86; *Cooper* v. *Thornton*, 3 B. C. C. 96, 186; *Woods* v. *Woods*, 1 M. & Cr. 409; *Angier* v. *Stannard*, 3 M. & K. 571; *Onslow* v. *Wallis*, 16 Sim. 483, 1 Mac. & G. 506; —— v. *Walford*, 4 Russ. 372; *Poole* v. *Pass*, 1 Beav. 600.

(*g*) *Re Philbrick's Trust*, 13 W. R. 570; and see *Hayes* v. *Oatley*, 14 L. R. Eq. 1.

instead of transferring the fund to the executors, paid it into Court under the Trustee Relief Act, they were made to pay the costs of the petition for getting the fund out of Court (*a*). But if the donee of a *special* power of appointment appoint the fund to trustees in trust for the objects of the power, the trustees so nominated cannot call for a transfer of the fund (*b*).]

Trustees for appointees.

10. Where trustees hold a fund *upon such trusts* as a person by an instrument to be executed in a particular manner may *appoint*, they must of course be careful in transferring it to the appointees to see that all the formalities attending the power have been duly observed, for if the execution of it be not regular, the trustees (except in those cases where Courts of equity aid a defective execution) will be personally liable for the fund to the parties claiming in default of the execution of the power (*c*).

Costs.

11. The *costs* incurred by the trustee in relation to the conveyance must be paid by the *cestui que trust*, or, which is the same thing, must be discharged out of the trust estate.

SECTION II.

OF THE CESTUI QUE TRUST'S ESTATE IN THE SPECIAL TRUST.

Cestui que trust's estate in special trust.

1. THIS may be said to be, The right to enforce in equity the specific execution of the settlor's intention to the extent of that *cestui que trust's* particular interest. The other parties entitled may express a desire that the trust should be differently administered; but if such a divergence from the donor's will would prejudice or injuriously affect the rights of any one *cestui que trust*, that *cestui que trust* may compel the trustees to adhere strictly and literally to the line of duty prescribed to them (*d*).

Special trust may be converted into a simple trust.

2. If there be only one *cestui que trust*, or there be several *cestuis que trust*, and all of *one mind* (in each case *sui juris*), the specific execution may be stayed, and the *special* trust will

[(*a*) *Re Hoskin's Trusts*, 5 Ch. D. 229, 6 Ch. Div. 281; but see as to this case *Turner* v. *Hancock*, 20 Ch. Div. 303.]

[(*b*) *Busk* v. *Aldam*, 19 L. R. Eq. 16; *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 17; but see *Scotney* v. *Lomer*, 29 Ch. D. 535, where North, J., was of the opposite opinion. *Scotney* v. *Lomer* was affirmed on appeal, 31 Ch. Div. 380, but on different grounds from those upon which North, J., based his judgment, and the Court of Appeal do not seem to have questioned the authority of *Busk* v. *Aldam*.]

(*c*) *Hopkins* v. *Myall*, 2 R. & M. 86; *Cocker* v. *Quayle*, 1 R. & M. 535; *Reid* v. *Thompson*, 2 Ir. Ch. Rep. 26.

(*d*) See *Deeth* v. *Hale*, 2 Moll. 317.

then acquire the character of a *simple* trust; for whatever modifications of the estate the settlor may have contemplated, through whatever channel he may have originally intended his bounty to flow, the *cestuis que trust*, as the persons to be eventually benefited, are in equity, from the creation of the trust, and before the trustees have acted in the execution of it, the absolute beneficial proprietors. Thus if a fund be given to trustees upon trust to accumulate until A. attains *twenty-four*, and then to transfer the gross amount to him, A., on attaining *twenty-one*, may, as the person exclusively interested, call for the immediate payment (*a*). So if real estate be devised with a direction that the devisees are not to have the enjoyment until they attain the age of *twenty-five years*, unless there be a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property until the age mentioned, but that some other person is to have the enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold that, as to the previous rents and profits, there has been an intestacy—the Court does not hesitate to strike out of the will the direction as to non-enjoyment, and gives the property at once to the devisees as the absolute owners (*b*). So if a legacy be bequeathed to trustees upon trust to purchase an *annuity*, the intended annuitant, if *sui juris*, may claim the legacy without going through the form of investment (*c*); and if a fund be vested in trustees in trust for the *personal* support, clothing, and maintenance of A., an adult, A. is exclusively entitled to the benefit of the fund, and if he become bankrupt, it passes to his trustee in bankruptcy (*d*), [and even an express contract by the *cestuis que trust* with the settlor and the trustees not to put an end to the special trust will not prevent their subsequently determining the trust, if there is no other person interested in or entitled to insist on the enforcement of the contract (*e*).]

3. To illustrate this subject further, where a conveyance had been made to trustees upon trust to sell, and with the proceeds

Land to be sold and proceeds paid to A. A is equitable owner of the land.

(*a*) *Josselyn* v. *Josselyn*, 9 Sim. 63; *Saunders* v. *Vautier*, 4 Beav. 115; Cr. & Ph. 240; and see *Curtis* v. *Lukin*, 5 Beav. 147; *Rocke* v. *Rocke*, 9 Beav. 66; *Magrath* v. *Morehead*, 12 L. R. Eq. 491.

(*b*) *Gosling* v. *Gosling*, Johns. 265.

(*c*) *Dawson* v. *Hearn*, 1 R. & M. 606, and cases there cited; *Re Browne's Will*, 27 Beav. 324.

(*d*) *Younghusband* v. *Gisborne*, 1 Coll. 400, and see *ante*, p. 102.

[(*e*) *Re Hale and Clarke*, 55 L. J. N.S. Ch. 550; 34 W. R. 624; 55 L. T. N.S. 151.]

to purchase other lands to be settled on the daughters of W. J. as tenants in common in tail, with remainder to them in fee, and the daughters levied a fine of the *lands to be sold* to the uses and upon the trusts of their respective marriage settlements, the question was, whether the entail had been effectually barred; and Sir W. Grant said, "In the lands to be sold they (the daughters) had no interest, legal or equitable, *expressly* limited to them: but the equitable interest in those lands must have resided somewhere: the trustees themselves could not be the beneficial owners; and if they were mere trustees, there must have been some *cestuis que trust*. In order to ascertain *who* they are, a Court of equity enquires for whose benefit the trust was created, and determines that those who are the objects of the trust have the interest in the thing which is the subject of it. Where money is given to be laid out in land, to be conveyed to A., though there is no gift of the money to him, yet in equity it is his, and he may elect not to have it laid out: so, on the other hand, where land is given upon trust to sell, and pay the produce to A., though no interest in the land is expressly given to him, in equity he is the owner, and the trustee must convey as he shall direct: *if there are also other purposes for which it is sold, still he is entitled to the surplus of the price, as the equitable owner subject to those purposes; and if he provide for them he may keep the estate unsold.* The daughters by electing to keep this estate have acquired the fee, and it was discharged of every trust to which it had been subject" (*a*).

Special trust proceeds till countermanded by the *cestui que trust.*

4. But *until* the *cestui que trust* or the joint *cestuis que trust* countermand the specific execution, the special trust will proceed; as if lands be devised to trustees upon trust to sell, and pay the proceeds to A., the property will remain personal estate in A. until he discharge the character impressed upon it by electing to take it as land (*b*).

Accounts.

5. As an incident to the beneficial enjoyment by the *cestui que trust* of his interest, he has a right to call upon the trustee for accurate *information* as to the state of the trust (*c*). Thus, in a trust for sale and payment of debts, the party entitled subject to the trust may say to the trustee, What estates have you sold? What is the amount of the monies raised? What debts have been

(*a*) *Pearson* v. *Lane*, 17 Ves. 101.

(*b*) See *Walter* v. *Maunde*, 19 Ves. 429.

(*c*) *Springett* v. *Dashwood*, 2 Giff. 521; *Walker* v. *Symonds*, 3 Sw. 58, *per* Lord Eldon; *Newton* v. *Askew*, 11 Beav. 152; *Gray* v. *Haig*, 20 Beav. 219; *Burrows* v. *Walls*, 5 De G. M. & G. 253.

paid? &c. (*a*). It is therefore the bounden duty of the trustee to keep clear and distinct *accounts* of the property he administers, and he exposes himself to great risks by the omission (*b*). It is the *first duty*, observed Sir T. Plumer, of an accounting party, whether an agent, a trustee, a receiver, or an executor (for in this respect they all stand in the same situation), to be *constantly ready with his accounts* (*c*).

Sanction of co-trustee's accounts.

6. Not only is a trustee bound to render accurate accounts, but if he stand by and sanction the rendering of *improper accounts* by a defaulting trustee, he becomes liable himself for the misrepresentation (*d*).

Legatee.

7. A *legatee*, as being a quasi *cestui que trust*, is entitled to have a satisfactory explanation of the state of the testator's *assets* and an inspection of the *accounts*, but not to require a copy of the accounts at the expense of the estate (*e*).

(*a*) *Clarke* v. *Ormonde*, Jac. 120, *per* Lord Eldon.

(*b*) *Freeman* v. *Fairlie*, 3 Mer. 43, *per* Lord Eldon.

(*c*) *Pearse* v. *Green*, 1 J. & W. 140; and see *Hardwicke* v. *Vernon*, 14 Ves. 510; *White* v. *Lincoln*, 8 Ves. 363; *Turner* v. *Corney*, 5 Beav. 515; *Anon*, 4 Mad. 273; *Jeffreys* v. *Marshall*, 23 L. T. N.S. 548; 19 W. R. 94; *Underwood* v. *Trower*, W. N. 1867, p. 83; [In an action for money had and received the agent is, since the Judicature Acts, chargeable with interest from the date of refusal by him to pay; *Harsant* v. *Blaine*, 56 L. J. Q. B. 511.] As to the costs of suits arising out of a refusal to render accounts, see *Springett* v. *Dashwood*, 2 Giff. 521, and the cases there cited; *Kemp* v. *Burn*, 4 Giff. 348; *Wroe* v. *Seed*, 4 Giff. 425; *Payne* v. *Evens*, 18 L. R. Eq. 356; *Heugh* v. *Scard*, 33 L. T. N.S. 659; 24 W. R. 51; and *Jeffreys* v. *Marshall*, *ubi supra*. In taking accounts against the trustee after a long lapse of time, the Court will show every indulgence it can to the trustee for enabling him to clear his accounts, *Banks* v. *Cartwright*, 15 W. R. 417. [And trustees (though one of them be a solicitor), on being requested by a person who claims to be interested as a *cestui que trust* to furnish accounts, are entitled to demand that they shall be guaranteed against the expense, *Re Bosworth*, 58 L. J. Ch. 432.]

(*d*) *Horton* v. *Brocklehurst* (No. 2), 29 Beav. 504.

(*e*) *Ottley* v. *Gilby*, 8 Beav. 602.

CHAPTER XXVII.

PROPERTIES OF THE CESTUI QUE TRUST'S ESTATE.

We shall next enter upon the properties of the *cestui que trust's* estate as affected by the *acts of the cestui que trust*, or by *operation of law.*

SECTION I.

OF ASSIGNMENT.

Under this head we shall treat: *First.* Of the *assignable quality* of an equitable interest; *Secondly.* Of the rule that the assignee of an equity is *bound by all the equities* affecting it; *Thirdly.* Of *Notice* to the trustee; and, *Fourthly.* Of the rule *Qui prior est tempore potior est jure.*

First. Of the *assignable quality* of an equitable interest.

General rule.

1. It may be laid down as a general rule that an equitable interest may be assigned, though it be a mere possibility (*a*), and that either with or without the intervention of the trustee (*b*). And the assignee of the *cestui que trust* may call upon the trustee to clothe the equitable interest with the legal estate, and on his refusal may by suit compel a conveyance without making the assignor a party (*c*). But a mere right to sue a trustee for an alleged breach of trust, and which right is not annexed to any transfer of the trust estate, or any part thereof, is not assignable, or at least will not pass by a deed for 5s. consideration so as to enable the nominal purchaser to sue in respect of it (*d*).

(*a*) *Courthope* v. *Heyman*, Cart. 25; *Warmstrey* v. *Tanfield*, 1 Ch. Rep. 29; *Goring* v. *Bickerstaff*, 1 Ch. Ca. 8; *Cornbury* v. *Middleton*, Ib. 211, *per* Judges Wyld and Rainsford; *Burgess* v. *Wheate*, 1 Eden, 195, *per* Sir T. Clarke; 21 Vin. Ab. 516, pl. 1; *Smith* v. *Grant*, W. N. 1874, pp. 78, 120.

(*b*) *Philips* v. *Brydges*, 3 Ves. 127, *per* Lord Alvanley.

(*c*) *Goodson* v. *Ellisson*, 3 Russ. 583; *Jones* v. *Farrell*, 1 De G. & J. 208.

(*d*) *Hill* v. *Boyle*, 4 L. R. Eq. 260; [but see *Re Park Gate Wagon Co.*, 17 Ch. Div. 234.]

Restraint of alienation.

2. A restriction *against alienation* (except in the case of a married woman) will have no more effect in equitable than in legal interests, but will be rejected as contravening the policy of the law (*a*), but in a limitation to the separate use of a *feme covert,* in order to give full effect to the estate itself, a clause against anticipation *during the coverture* is allowed (*b*).

Equitable interest in land.

3. As to *lands*, the transfer of an equitable interest might before the Statute of Frauds have been made by parol, but now by the 9th section of the Act all grants and assignments of any trust or confidence are required to be in *writing signed by the party granting or assigning the same*, or else are utterly void. A writing, therefore, is all that is necessary, but it is the practice to employ the same species of instrument, and the same form of words in the transfer of equitable as of legal estates.

8 & 9 Vict. c. 106.

4. By the Act to amend the Law of Real Property (*c*) it is enacted that an assignment of a chattel interest in lands not being copyhold shall be void *at law* unless made by *deed*, but it is conceived that this enactment affects *legal* interests only, and that the legislature cannot have intended to require a more solemn instrument for the assignment of an equitable chattel interest than for the conveyance of the equitable fee.

Equitable entail.

5. The power of an equitable *tenant in tail* to dispose of the equitable fee simple has been differently viewed at different periods. At common law all inheritable estates were in fee simple, and it was the statute *de donis* (*d*) that first gave rise to entails and expectant remainders. As this statute was long prior to the introduction of uses, had equity followed the analogy of the common law only, a trust limited to A. and the heirs of his body, and in default of issue to B. would have been construed a fee simple conditional and the remainder over would have been void; but the known legal estates of the day, whether parcel of the common law or ingrafted by statute, were copied without distinction into the system of trusts, and, equitable entails indisputably existing, the question in constant dispute was, by what process they were to be barred. After much fluctuation (*e*), it was finally established by Lord Hardwicke, that as entails with expectant remainders had gained a footing in trusts by analogy to the statute *de donis*, a Court of equity

(*a*) *Snowdon* v. *Dales*, 6 Sim. 524; *Green* v. *Spicer*, 1 R. & M. 395; *Graves* v. *Dolphin*, 1 Sim. 66; *Brandon* v. *Robinson*, 18 Ves. 429; *Rochford* v. *Hackman*, 9 Hare, 480.

(*b*) See *infra*, Chap. xxvii., s. 6.

(*c*) 8 & 9 Vict. c. 106, s. 3.

(*d*) 13 Ed. 1. st. 1, c. 1.

(*e*) See an account of the fluctuation in 3rd edit. pp. 601-604.

was bound to follow the analogy throughout, and therefore that a tenant in tail of a trust could not bar his issue, or the remainderman, except by an assurance analogous to one which would have been a bar had the entail been of the legal estate.

Summary of the law before the Fines and Recoveries Act.

6. The doctrines of equity, as finally settled upon this principle, were as follows:—

a. For a good *equitable recovery* there must have been an *equitable tenant to the præcipe*, that is the beneficial owner (*a*) of the first equitable freehold must necessarily have concurred (*b*).

β. An equitable recovery was a bar to *equitable* only and not to *legal* remainders (*c*).

γ. An equitable recovery was not vitiated by the circumstance that the *equitable tenant to the præcipe* had also the *legal freehold* (*d*).

δ. An *equitable remainder* was well barred, though it was vested in a person who *had also the legal fee* (*e*).

Fines and Recoveries Act.

7. At the present day, by the operation of the Fines and Recoveries Act (*f*), the *equitable* tenant in tail may dispose of (*g*) the equitable fee by the same modes of assurance and with the same formalities as if he were tenant in tail of the *legal* estate.

Inrolment of disentailing deed of copyholds.

8. A deed to bar the entail of an equitable interest in *copyholds* must, though not so *expressly* enacted, be entered on the court rolls *within six calendar months* from the date thereof (*h*).

Estates *pur autre vie.*

9. An estate *pur autre vie* was not even at law within the statute *de donis;* but a *quasi* entail (an estate of a most anomalous character) was introduced into legal estates, and was thence imported into trusts. The present doctrine of the Court appears to be this.

a. If *quasi* tenant in tail in equity, with remainder over, be in *possession*, he may at any time, by a simple conveyance, dispose of the absolute interest, as against the issue, and the remainderman, and may even bind them in equity by his contract.

(*a*) *Penny* v. *Allen*, 7 De G. M. & G. 425.

(*b*) *North* v. *Williams*, 2 Ch. Ca. 64, *per* Lord Nottingham; *Highway* v. *Banner*, 1 B. C. C. 586; and see *Wickham* v. *Wickham*, 18 Ves. 418.

(*c*) *Philips* v. *Brydges*, 3 Ves. 128, *per* Lord Alvanley; *Salvin* v. *Thornton*, Amb. 585; *S. C.* 1 B. C. C. 73, note.

(*d*) *Philips* v. *Brydges*, 3 Ves. 126, *per* Lord Alvanley, 2 Ch. Ca. 49; *Marwood* v. *Turner*, 3 P. W. 171; *Goodrick* v. *Brown*, 2 Ch. Ca. 49; *S. C.* Freem. 180.

(*e*) *Philips* v. *Brydges*, 3 Ves. 120; *Robinson* v. *Comyns*, Cas. *t.* Talb. 164, *S. C.* 1 Atk. 172.

(*f*) 3 & 4 Will. 4. c. 74.

[(*g*) A mere declaration of trust is not a disposition within the meaning of the Act, *Semble: Green* v. *Paterson*, 32 Ch. Div. 95.]

(*h*) *Honywood* v. *Foster*, 30 Beav. (No. 1), 1; [*Green* v. *Paterson*, 32 Ch. Div. 95; *Gibbons* v. *Snape*, 1 De G. & Sm. 621.]

β. But if *quasi* tenant in tail be in *remainder* after a prior estate under the same settlement, he must have the consent of the tenant for life or other precedent freeholder, as otherwise, though he may bind his issue, he cannot destroy the remainder.

γ. If lands held *pur autre vie* be limited to or in trust for A. and the heirs of his body with remainder over, the entirety of the estate is vested in A., and the issue and the remainderman stand in the light of mere special occupants, that is, they have no title *jure suo* to any present interest, but merely take the estate by devolution where the owner has made no disposition.

δ. A limitation in *quasi* entail of an estate *pur autre vie* has been commonly assimilated to an estate in fee-conditional; but the natures of the two estates are not to be confounded. The tenant of a fee-conditional can only aliene after issue born, but tenant in *quasi* entail *pur autre vie* may dispose absolutely as above without reference to the fact of there being issue or not (*a*).

Assignee bound by all equities.

Secondly. The *assignee* of an *equity* is bound by all the *equities* affecting it (*b*).

1. In order to understand the limits of the rule, it will be necessary before entering upon the cases to make a few preliminary remarks.

Application of rule to *choses en action.*

If A. be possessed of a legal *chose in action* (*c*), as if he be obligee of a bond, and assign it in equity for valuable consideration, here at the time of the assignment no equity existed in A.; and yet, as this case is confessedly within the operation of the rule, the maxim might be more accurately expressed by saying that the owner of an equity by assignment is bound by all the equities affecting what is assigned.

Exception as to conflicting equities of persons claiming under assignor.

Again, if A., having a debt due to him, or being entitled to an equitable interest, charges it in favour of B., the equity which remains in A. is the debt or equitable interest subject to the

(*a*) See the law upon this subject collected by Lord St. Leonards in *Allen* v. *Allen*, 1 Conn. & Laws. 427, 2 Dru. & War. 307; and see *Edwards* v. *Champion*, 1 Eq. Rep. 419; *Betty* v. *Humphreys*, 9 I. R. Eq. 332; *Batteste* v. *Maunsell*, 10 I. R. Eq. 97, 314; [*Re Barber's Settled Estates*, 18 Ch. D. 624; *Blackhall* v. *Gibson*, 2 L. R. Ir. 49.]

[(*b*) A right of set-off subsisting between the assignor and the person against whom the equity is enforceable, being a right not attaching to the equity, but personal to the parties, will not affect the assignee, *Beresford* v. *Chambers*, 5 Ir. Eq. R. 482; *Burrough* v. *Moss*, 10 B. & C. 558; *Re Dublin and Rathcoole Railway Company*, 1 L. R. Ir. 98.]

(*c*) *Choses in action* are now made assignable if notice in writing be given to the debtor or trustee, [but they are expressly made subject in the hands of the assignee to the subsisting equities.] See 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

charge. If, therefore, A. afterwards assign the same subject matter to C., it might be thought that C. could take nothing more than the interest of A. subject to the charge. This, however, is not the case, for the priorities of B. and C. will be regulated by the better or inferior equities of the respective parties. The rule does not mean that the assignee of an equity shall be bound by all the equities affecting the assignor as between him and previous purchasers or incumbrancers under the assignor, but only by such as affect the assignor as between himself or his debtor and any persons not claiming under himself. The assignor can indisputably only give what he himself has, but as between two persons claiming through him a conflict of right may well arise. This will be better understood by the instances, exemplifying the rule, to which we now proceed.

Transfer of equitable mortgage.

2. A person taking an equitable mortgage, with *notice of a prior charge*, transfers his mortgage to another who has no notice of the prior charge. The assignee is bound by the equity with which the assignor was affected (*a*).

Transfer of equitable interest obtained by fraud.

3. A. mortgages or sells an equitable interest to B., which mortgage or sale is *fraudulently* obtained, and then B. transfers to C. Here C., whether he has notice of the fraud or not, takes subject to A.'s equity to have the mortgage or sale set aside (*b*).

Trustee or *cestui que trust* debtor to trust estate.

4. A trustee or executor has a beneficial interest, but is a *debtor to the trust or executorship*, and then assigns his beneficial interest to a stranger. The assignee cannot claim the beneficial interest without discharging the debt (*c*). And a similar equity attaches upon an assignee from a *cestui que trust* who is a debtor to the estate (*d*). [And where at the time of the assignment of a legacy, a suit by the legatee was pending to recall the probate, and the suit failed with costs to be paid by the legatee, the executor was allowed to set off the costs against the legacy, notwithstanding the assignment (*e*). But where assets have

(*a*) *Ford* v. *White*, 16 Beav. 120.

(*b*) *Cockell* v. *Taylor*, 15 Beav. 103; *Barnard* v. *Hunter*, 2 Jur. N. S. 1213; *Daubeny* v. *Cockburn*, 1 Mer. 626; see 638; *Parker* v. *Clarke*, 30 Beav. 54; [But as to the last case, see *Bickerton* v. *Walker*, 31 Ch. Div. 151; *French* v. *Hope*, 56 L. J. Ch. 363.]

(*c*) *Clack* v. *Holland*, 19 Beav. 262; *Barnett* v. *Sheffield*, 1 De G. M. & G. 371; *Cole* v. *Muddle*, 10 Hare, 186; *Wilkins* v. *Sibley*, 4 Giff. 442.

(*d*) *Priddy* v. *Rose*, 3 Mer. 86; *Willes* v. *Greenhill* (No. 1), 29 Beav. 376; *Stephens* v. *Venables* (No. 1), 30 Beav. 625; [*Corr* v. *Corr*, 3 L. R. Ir. 435; *Re Moore*, 45 L. T. N.S. 466.]

[(*e*) *Re Knapman*, 18 Ch. D. 300. It must be borne in mind that the right to set-off costs against costs in another matter or against a money payment is, in general, subject to the solicitor's lien, and can only be exercised with his consent, or where his interest will not be prejudiced by the exercise; *Ex parte Cleland*, 2 L. R. Ch.

been set apart and appropriated by executors to meet a trust legacy, no part of the appropriated assets can be retained or impounded to satisfy a debt from the legatee to the general estate of the testator, for the right of the legatee or his assignee is against the holders of the appropriated assets in their character of trustees, while the liability of the legatee is to them in their capacity of executors (*a*).] And where the assignor is a trustee or executor it is immaterial whether the debt to the trust or executorship was contracted before or *after the assignment* of the beneficial interest (*b*), [or whether the beneficial interest of the trustee devolved on him directly under the trust instrument or was derived subsequently by purchase or otherwise (*c*).] But if the assignor did not *become trustee or executor* until *after the date of the assignment* there is no equity against the assignee in respect of a subsequently incurred debt (*d*). If the assignor be a *cestui que trust,* the trustee *after notice* cannot *create* any new charge or right of set-off, *as between him and the assignor,* so as to bind the assignee (*e*).

The right to consolidate mortgages being an equitable right, the assignee of a mortgage can have no better right to consolidate than his assignor (*f*).

Debtor and creditor.

5. A *creditor* transfers his debt to a person who has no notice that part of it has been discharged. The assignee is nevertheless bound by the state of the accounts at the time of the assignment (*g*); and when the assignee does not give notice to the debtor of the assignment so as to dissolve the relation of debtor and creditor between the original parties, the assignee is compelled to allow the payments to the creditor subsequent to the assignment (*h*).

App. 808; *Re Harrald*, 52 L. J: N.S. Ch. 435; 48 L. T. N.S. 352; 53 L. J. N.S. Ch. 505; 51 L. T. N.S. 441. But the lien does not interfere with the right to set-off costs payable out of a trust fund against a debt due to that trust, the lien of the solicitor being itself subject to this equitable right of set-off; *Re Harrald*, 53 L. J. N.S. Ch. 505; 51 L. T. N.S. 441.]

[(*a*) *Ballard* v. *Marsden*, 14 Ch. D. 374.]

(*b*) *Hopkins* v. *Gowan*, 1 Moll. 561; *Morris* v. *Livie*, 1 Y. & C. C. C. 380; [*Re Hervey*, 61 L. T. N.S. 429.]

[(*c*) *Doering* v. *Doering*, 42 Ch. D. 203; *Jacubs* v. *Rylance*, 17 L. R. Eq. 341.]

(*d*) *Irby* v. *Irby*, 95 Beav. 632.

(*e*) *Stephens* v. *Venables* (No. 1), 30 Beav. 625.

[(*f*) *Bird* v. *Wenn*, 33 Ch. D. 215.]

(*g*) *Ord* v. *White*, 3 Beav. 357; *Smith* v. *Parkes*, 16 Beav. 115; *Rolt* v. *White*, 31 Beav. 520; *Re Natal Investment Company*, 3 L. R. Ch. App. 355; [and see *Government of Newfoundland* v. *Newfoundland Railway Company*, 13 App. Cas. 199, 210, 213.]

(*h*) *Norrish* v. *Marshall*, 5 Mad. 475; and see *Stocks* v. *Dobson*, 4 De G. M. & G. 11.

Set-off as affecting assignee.

Cavendish v. Geaves.

6. It was decided in the case of *Cavendish* v. *Geaves* (*a*) that the assignee is liable to the same equities as his assignor, not merely in respect of the actual *payments*, but in regard to the right of *set-off*. In that case Sir John Romilly, M.R., laid down the following canons:—

a. If a *customer* borrow money from his *bankers*, and give a *bond* to secure it, and afterwards on the balance of his general banking account a balance is due to the customer from the same bankers, who are obligees of the bond, a right to set-off the balance against the money due on the bond will exist both at law and in equity.

β. If the firm be altered and the *bond* be assigned by the original obligees to the *new firm*, and *notice* of that assignment be given to the *debtor* (*b*), and if, after this, a balance be due to him from the new firm (the assignees of the bond), then no right of set-off exists at law, because the assignment of the *chose in action* would be inoperative at law, and the obligees of the bond and the debtors on the general account are different persons; but as, in equity, the persons entitled to the bond, and the debtors on the general account are the same persons, a right of set-off exists in equity, and the customer is entitled to set-off the balance due to him against the bond debt due from him.

γ. If the *bond* be assigned to *strangers*, and *no notice* of that assignment be given to the original *debtor* (the obligor of the bond), then his rights remain the same. Thus, if the assignment be made to the stranger before any alteration of the firm, then the right of set-off still remains at law, where the obligees of the bond and the debtors on the general account are the same persons, and in equity also, if the matter of account be brought into Chancery, as the assignees of the *chose in action* would be bound by the equities affecting their assignors.

δ. If *notice* of the assignment be given to the original *debtor*, no right of set-off exists in equity for the *balance subsequently due* by the bankers to the obligor; because the persons entitled to the bond are, as the obligor knew, different persons from the debtors to him on the general account, with whom he had continued to deal.

ε. If the assignment of the bond be made to the *new firm*, with *notice* to the *obligor*, the new firm would, if debtors on the

(*a*) 24 Beav. 163, see 173; [see *Re Dublin and Rathcoole Railway Company*, 1 L. R. Ir. 98.]

(*b*) See as to this, 36 & 37 Vict. c. 66, s. 25.

general account, be liable to the same rights of set-off in equity as if they had been the obligees.

ζ. If after the alteration of the firm and after the assignment of the bond to the new firm, with notice to the debtor or obligor, the *bond* be assigned by the new firm to *strangers*, and *no notice* of that second assignment given to the obligor, then the rights of set-off still remain to him in equity as against the first assignees, of whose assignment he had notice, and the second assignees would in equity be bound by it; because the assignees of the bond take it subject to all the equities which affect the assignors.

Set-off recognized in equity previously to statutes of set-off.

7. It may be observed that the right of *set-off*, though unknown to the common law, was recognized in equity previously to the statutory enactments on the subject. Thus where A. and B. were mutually indebted by *simple contract* dealings, and B. died also indebted to others by simple contract and to one by *specialty*, in such a case, though it was contended that if A. could set-off his own debt, he was to that extent paid in full, in preference to the other simple contract creditors, and at the expense of the specialty creditor, yet a Court of equity presumed an agreement between A. and B. that such set-off should be had, and as B. in his lifetime could not have recovered from A. without the set-off, it held that the personal representative of B. was bound by the same equity (*a*).

Autre droit.

8. Recently the equity jurisdiction in respect of set-off has been chiefly, if not entirely, confined to cases where one or both of the cross demands is or are of an equitable kind (*b*). And it seems to be established that set-off will not be allowed even in equity where the mutual demands are between the parties in different rights; as if A. give a legacy to B., and appoint C. his executor, or executor and residuary legatee, B. may sue C. for the legacy, and C. cannot set-off a debt owing by B. to C. not as executor but in C.'s own right (*c*). [So where an executorship

(*a*) *Downam* v. *Matthews*, Pr. Ch. 580; see *Jeffs* v. *Wood*, 2 P. W. 128; and see 2 G. 2. c. 22; 8 G. 2. c. 24, s. 5; [since repealed by 42 & 43 Vict. c. 59, and 46 & 47 Vict. c. 49; and see 36 & 37 Vict. c. 66, and Rules of Supreme Court, Ord. XIX. r. 3.]

(*b*) See now 36 & 37 Vict. c. 66, and Rules of Supreme Court, Ord. XIX. r. 3.

(*c*) *Whitaker* v. *Rush*, Amb. 407; *Bishop* v. *Church*, 3 Atk. 691; *Freeman* v. *Lomas*, 9 Hare, 109; *Chapman* v. *Derby*, 2 Vern. 117; *Medlicott* v. *Bower*, 1 Ves. 207; *Middleton* v. *Pollock*, 20 L. R. Eq. 29; [*Ballard* v. *Marsden*, 14 Ch. D. 374.] *Cherry* v. *Boultbee*, 4 M. & Cr. 442, which was questioned by V. C. Wigram in *Freeman* v. *Lomas*, 9 Hare, 115, turned on the facts that C. F. Boultbee never proved her debt so as to make it a liability of the assignees, and that T. Boultbee never claimed his certi-

[Set off.]

account was kept with bankers in the joint names of two executors, one of whom was the residuary legatee under the will, but the executorship account had never been wound up so as to make the executors mere trustees for the residuary legatee, on the failure of the bankers it was held that the residuary legatee was not entitled to have another account of his own with the bankers, which was overdrawn, set-off against the executorship account; for "the case could not be brought within the rules of equitable set-off or mutual credit, unless the residuary legatee was so much the person beneficially interested that a Court of equity without any terms or further inquiry would have obliged the other executor to transfer the account into the name of the residuary legatee alone" (*a*). But where, at the time of the failure of a bank, two accounts were standing in the name of a customer, one his private account, which was overdrawn, and the other an executorship account, and the executor, who was also residuary legatee, had assets in his hand independently of the balance at the bank more than sufficient to satisfy the pecuniary legacies and all other claims against the estate, it was held that he was entitled to set-off the one account against the other, on the ground that there was a clear legal right of set-off, and that there were no such equities affecting the monies standing to the executorship account as to prevent the customer from treating the balance as a fund to which he was beneficially as well as legally entitled (*b*). And an executor or administrator] may make such admissions in an action as to preclude himself from objecting to the set-off at the hearing (*c*).

ficate, so that his liability remained, and thus the legacy was owing to one set of persons, viz. the assignees, and the debt *from* another, viz. T. Boultbee. In *Bell* v. *Bell*, 17 Sim. 127, it does not appear whether the creditor had or not proved under the insolvency. If he had, the case could not be supported on the authority of *Cherry* v. *Boultbee*, but if he had not it must stand or fall with that case. It is believed that in a subsequent stage of the suit, V. C. Kindersley decided the other way. See also *Stammers* v. *Elliott*, 3 L. R. Ch. App. 195; *Taylor* v. *Taylor*, 20 L. R. Eq. 159; [*Re Hodgson*, 9 Ch. D. 673, in which case *Cherry* v. *Boultbee* was followed.]

[(*a*) *Ex parte Morier*, 12 Ch. Div. 491.]

[(*b*) *Bailey* v. *Finch*, 7 L. R. Q. B. 34; and see the observations on this case in *Ex parte Morier*, *ubi supra*, where Cotton, L.J., observed, "As I understand it, the principle of the decision (whether right or wrong) was this, not that the fund was a trust fund from the nature of the account, or that the bankers had notice of that, but that they had notice that it was an account against which claims were likely to be made, and that if claims had at the time of the bankruptcy been made against it, they would have prevented the legal right of set-off from arising, but that, as it was not shown there were any equitable claims against the fund, the legal right of set-off could not be interfered with," p. 502.]

(*c*) *Jones* v. *Mossop*, 9 Hare, 568, 576.

And an admission of assets for payment of the legacy will not be material, for the right of set-off exists independently of the amount of the assets (*a*). A legacy to one of the members of a firm may be set-off against a debt owing by the firm (*b*). But a legacy to a married woman, and assigned by her under Malins' Act, cannot be retained by the executor as against the assignee in discharge of a debt by the husband to the testator's estate (*c*).

[Debt statute-barred.]

[And although the remedy for the debt is barred by the statute of limitations, yet as the debt itself still subsists, the executor may deduct the amount of it from the legacy (*d*), as he is entitled to say that the legatee has so much of the assets already in his hands, and consequently is satisfied *pro tanto* (*e*); and in a recent case where residuary *real* and personal estate was given to trustees and executors upon trusts for conversion, payment of debts, and distribution of the proceeds, it was held that beneficiaries, from whom debts, statute-barred, were owing to the testator, were bound to bring the debts into account as against their shares of the proceeds of sale of the residuary real estate, as well as of the personal estate, and it was said that the principle to be deduced from the authorities was that a person who owes an estate money, that is, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without making the contribution which completes it (*f*). But the principle was held inapplicable as to freehold and leasehold properties specifically given to the beneficiaries (*g*).

[Debt due by testator and debt due to executor.]

A mortgagee who had a surplus in his hands after paying himself the mortgage debt was held not to be entitled, as against the executor of the mortgagor, to retain such surplus in satisfaction of an unsecured debt owing to him by the mortgagor (*h*); and North, J., in deciding so, said that there was ample authority

(*a*) *Freeman* v. *Lomas*, 9 Hare, 109.

(*b*) *Smith* v. *Smith*, 3 Giff. 263, see 270.

(*c*) *Re Batchelor*, 16 L. R. Eq. 481; [and see *Re Briant*, 39 Ch. D. 471.]

[(*d*) *Courtenay* v. *Williams*, 3 Ha. 539; *S. C.* on appeal, 15 L. J. N.S Ch. 204; *Coates* v. *Coates*, 10 Jur. N. S. 532; 33 Beav. 249; *Gee* v. *Liddell*, 35 Beav. 629; *Re Cordwell*, 20 L. R. Eq. 644; and see *Cherry* v. *Boultbee*, 4 My. & Cr. 442.]

[(*e*) *Courtenay* v. *Williams*, 15 L. J. N.S. Ch. 208.]

[(*f*) *Re Akerman*, W. N. 1891, p. 132, *per* Kekewich, J.; but this decision is perhaps open to question, for it may be thought that as the executor is the only person who can sue for a debt not statute barred, so must he be the only person who can deduct money in respect of a debt which is statute barred; and that the fund to which the debtors were bound to contribute was the residuary personal estate of the testator, and not the proceeds of sale of the residuary real estate.]

[(*g*) *S. C.*]

[(*h*) *Re Gregson*, 36 Ch. D. 223.]

for the proposition, that "there can be no set-off between a debt due by a testator and a debt accruing to his executor."

A right to damages against an assignor which does not ripen into a debt until after his assignment of a debt due to him, cannot be set-off against the debt due to the assignor and assigned by him (*a*); and a debt due from a liquidating debtor who has not obtained his discharge, cannot, during three years from the close of the liquidation, be set-off against a legacy bequeathed to him (*b*).

[Bankruptcy of debtor or creditor.]

A person who owes a debt to a bankrupt at the time of his bankruptcy and has no right of set-off, cannot acquire such a right by taking an assignment of another debt due to another creditor of the bankrupt (*c*); nor can a creditor who has at the time of the debtor's bankruptcy no right to set-off, acquire such a right by any subsequent transaction (*d*). And where there are mutual dealings between a debtor and his creditors, the line as to set-off must, as a general rule and in the absence of special circumstances, be drawn at the date of the commencement of the bankruptcy (*e*).

[Purchaser completing bankrupt's contract without notice of bankruptcy.]

9. Where a bankrupt before adjudication contracted to sell leasehold property, and received a deposit in respect of the purchase-money, and after the adjudication but before the purchaser had any notice of any act of bankruptcy received the balance of the purchase-money from the purchaser, it was held that the trustee in bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of his paying him the purchase-money. The equity of the purchaser under the contract was to have the property conveyed to him upon payment of the purchase-money to the person to whom the property belonged; and it was the purchaser's misfortune if he paid the money to a person who had ceased to be the owner of the property (*f*).

[Trustees holding on separate trusts.]

10. Where a policy of assurance on the life of H. was taken in the names of trustees, and a settlement was executed binding the policy in the hands of the trustees, but it was expressly provided that nothing in the settlement should vest in the trustees any bonus, and H. obtained possession of and misappropriated part of the trust funds, it was held, in an action by the executrix of H. to recover bonuses, that the trustees held

[(*a*) *Ex parte Theys*, 22 Ch. D. 122; 25 Ch. Div. 587.]

[(*b*) *Re Rees*, 60 L. T. N.S. 260; and see *Re Smith*, 22 Ch. D. 586.]

[(*c*) Per Lord Selborne, L.C., *Ex parte Theys*, 25 Ch. D. 592.]

[(*d*) *Re Gillespie*, 14 Q. B. D. 963.]

[(*e*) *Ex parte Reid*, 33 W. R. 707.]

[(*f*) *Ex parte Babbidge*, 8 Ch. Div 367.]

the bonuses under a resulting trust independently of the settlement, and could not retain them against the losses incurred in respect of the funds misappropriated by H., and that as the claim of the executrix was in respect of money which was never payable to H. personally, but only after his death, while the claim of the trustees was for money due from him in his lifetime, there was no right of set-off on the footing of mutual debts (*a*).

[Shares in companies.]

11. Shares in joint stock and other companies, being by various statutes made transferable at law, rest upon a different footing from ordinary *choses in action* (*b*), and a *bonâ fide* transferee for value of such shares who has completed his legal title to them by registration or otherwise, or, *semble*, who has fulfilled all necessary conditions to give him as between himself and the company "a present, absolute, unconditional right to have the transfer registered, before the company is informed of the existence of a better title" (*c*), will not be bound by the equities which affected the transferor (*d*), but until the transferee has thus acquired the full status of a shareholder (or, *semble*, its equivalent as above indicated), a prior equitable title will prevail against him; and of course even the full legal title will not avail if it is acquired with notice of a prior equitable title (*e*).

[Securities issued by companies.]

In the case of securities issued by companies the following rules seem to apply—

[(*a*) *Hallett* v. *Hallett*, 13 Ch. D. 232; and see *Rees* v. *Watts*, 11 Exch. 410; *Newell* v. *National Provincial Bank of England*, 1 C. P. D. 496.]

[(*b*) The question whether shares are *choses in action* was considered but not decided in *Colonial Bank* v. *Whinney*, 11 App. Cas. 426, 439, *S. C.* 30 Ch. Div. 261, where it was held that shares in an incorporated company, whether *choses in action* or not, were things in action within the meaning of the Bankruptcy Act, 1883, s. 44, sub-s. iii.]

[(*c*) *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20, 29, *per* Lord Selborne. In applying this principle the difficulty would seem to be to ascertain the point of time at which the transferee acquires the right indicated. By the Companies Act, 1862, s. 22, shares are "capable of being transferred in manner provided by the regulations of the company," so that in many cases the solution of the question will turn upon the construction of the company's articles of association, see *Moore* v. *North Western Bank*, (1891) 2 Ch. 599, 603, and cases there cited.]

[(*d*) *Société Générale de Paris* v. *Walker*, *ubi supra*; *Roots* v. *Williamson*, 38 Ch. D. 485; *Moore* v. *North Western Bank*, *ubi supra*; *Briggs* v. *Massey*, 42 L. T. N.S. 49; and as to the general law upon the subject (which it is beyond the scope of this work to enter upon) see Lindley on Companies, 5th ed., p. 475, *et seq.*, and Buckley on Companies, 6th ed., p. 95.]

[(*e*) *Nanney* v. *Morgan*, 37 Ch. D. 346; *Dodds* v. *Hills*, 2 H. & M. 424; and see *Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333, 345, 346; *Simmons* v. *London Joint Stock Bank*, 62 L. T. N.S. 427; 63 L. T. N.S. 789, as showing that a transferee who accepts, by way of pledge from B., blank transfers signed by A., and who afterwards acquires the legal title, may, from the nature of his business and the transaction, be put upon inquiry, and fixed with notice of any infirmity of the authority of B. to pledge the shares.]

(1) Where a company has power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta.*

(2) If the security be legally transferable, such an irregularity and *à fortiori* any equity against the original holder cannot be asserted by the company against a *bonâ fide* transferee for value without notice.

(3) Nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if by the original conduct of the company in issuing the security, or by their subsequent dealing with the transferee he has a superior equity.

(4) Nor can such an equity be set up against an equitable transferee of a security, purporting on the face of it to be legally transferable, who has taken an equitable transfer *bonâ fide* and without notice from a transferor who by reason of notice of the irregularity could not have enforced the security. But in this case the transferee can only recover the amount actually advanced or given by him upon the transfer (*a*)]

Thirdly. Of *Notice* to the Trustee.

Notice.

1. As between *assignor and assignee* notice to the trustee is not necessary for the completion of an assignment (*b*), even though the assignment be voluntary (*c*). Nor is notice necessary for the purpose of making the assignment effectual as against subsequent volunteers (*d*), or as against persons claiming only a *general equity* under the assignor, such as a judgment creditor who obtains a charging order (*e*), or a garnishee order under Order xlv. (*f*), or

[(*a*) *Per* Kay, J., *Re Romford Canal Company*, 24 Ch. D. 85, 92; *Fountaine* v. *Carmarthen Railway Company*, 5 L. R. Eq., 316; *Webb* v. *Commissioners of Herne Bay*, 5 L. R. Q. B. 642; *Re Agra and Masterman's Bank*, 2 L. R. Ch. App. 391; *Re Blakely Ordnance Company*, 3 L. R. Ch. App. 154; *Dickson* v. *Swansea Vale Railway Company*, 4 L. R. Q. B. 44; *Higgs* v. *Northern Assam Tea Co.*, 4 L. R. Ex. 387.]

[(*b*) *Burn* v. *Carvalho*, 4 M. & Cr. 702; *Bell* v. *London and North Western Railway Company*, 15 Beav. 552; *Dufaur* v. *Professional Life Assurance Company*, 25 Beav. 599; *Re Lowe's Settlement*, 30 Beav. 95; [*Gorringe* v. *Irwell India Rubber and Gutta Percha Works*, 34 Ch. Div. 128.]

(*c*) *Donaldson* v. *Donaldson*, Kay, 711.

(*d*) *Justice* v. *Wynne*, 12 Ir. Ch. Rep. 289; *Re Webb's Policy*, 36 L. J. N.S. Ch. 341.

(*e*) *Scott* v. *Hastings*, 4 K. & J. 633; [*Pickering* v. *Ilfracombe Railway Co.*, 3 L. R. C. P. 235; *Robinson* v. *Nesbitt*, Ib. 264; *Gill* v. *Continental Gas Co.*, 7 L. R. Ex. 332; *Punchard* v. *Tomkins*, 31 W. R. 286; *Re Bell*, 54 L. T. N.S. 370; *Re Leavesley*, (1891) 2 Ch. 1.]

[(*f*) *Re General Horticultural Co.*, 32 Ch. D. 512; *Badeley* v. *Consolidated Bank*, 38 Ch. Div. 238; but as to the effect of a Scotch arrestment, which is equivalent to assignment with notice, see *Re Queensland Mercantile Co.*, (1891) 1 Ch. 536.]

equitable execution by the appointment of a receiver subject to existing incumbrances (*a*). But the omission of notice may be followed by very dangerous consequences by the operation of the reputed ownership clause under the bankrupt laws (*b*), or the acquisition of priority by subsequent purchasers or incumbrancers. And if the title be a derivative one, and not one that appears upon the face of the instrument creating the settlement, the trustee may, having neither express nor constructive notice, pay upon the footing of the original title, and in that case he cannot be made to pay over again to the assignee under the derivative title (*c*).

Priority of charge from priority of notice.

2. If the owner of an equitable interest in money or stock, or generally of any *chose in action*, assign it to A., who gives no notice of the transfer to the trustee or debtor, and then for valuable consideration assigns it over again to B., who having had no notice of the prior assignment when he advanced his money, gives notice of his own assignment to the trustee or debtor, in this case B. has priority over A. That a purchaser's notice will secure to him this advantage of priority, has been only settled in modern times. In *Cooper* v. *Fynmore* (*d*), Sir T. Plumer, V.C., decided that mere neglect to give notice would *not* postpone an incumbrancer, but that such *laches* ought to be shown as, in a Court of equity, would amount to fraud; but in *Dearle* v. *Hall* (*e*), and *Loveridge* v. *Cooper* (*f*), nine years after, his Honour, when Master of the Rolls, came to a contrary conclusion, and delivered a very elaborate argument that notice *would* gain priority. His Honour's judgments were affirmed on appeal (*g*), and the doctrine has been recognized in numerous subsequent cases (*h*). [And the same principle applies where the owner of the equitable interest has died after making an assignment, and his *legal personal representative* has made a subsequent assignment of the interest to a purchaser for value

[(*a*) *Arden* v. *Arden*, 29 Ch. D. 702.]

(*b*) 46 & 47 Vict. c. 52, s. 44. [See *ante*, p. 256; and see *Ex parte Arkwright*, 3 Mont. D. & De G. 129; *Bartlett* v. *Bartlett*, 1 De G. & J. 127; *Re Webb's Policy*, *ubi sup.*; *Daniel* v. *Freeman*, 11 I. R. Eq. 233, 638; *Re Irving*, 7 Ch. D. 419; where it was held that the equitable assignment created a trust for the assignee and so took the case out of the order and disposition clause; *Re Power*, 11 L. R. Ir. 93.]

(*c*) *Cothay* v. *Sydenham*, 2 B. C. C. 391; *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91; [and see *Re Lord Southampton's Estate*, *Banfather's Claim*, 16 Ch. D. 178; *Re Lord Southampton's Estate*, *Roper's Claim*, 50 L. J. N.S. Ch. 155.]

(*d*) 3 Russ. 60.

(*e*) 3 Russ. 1.

(*f*) Ib. 30.

(*g*) Ib. 38, 48.

(*h*) *Hutton* v. *Sandys*, 1 Younge, 602, see 607; *Smith* v. *Smith*, 2 Cr. & M. 231; *Foster* v. *Blackstone*, 1 M. & K. 297, see 307. For the principles upon which Sir T. Plumer proceeded, see 3 Russ. pp. 12-14, 20-22.

without notice of the prior assignment (*a*).] But the priority is only gained so far as regards the particular fund as to which notice is given, and if the assignment deals with two distinct funds, and the notice relates only to one of them, the priority gained by the notice will be confined to such fund (*b*).

As against trustees in bankruptcy.

3. This rule as to gaining priority by notice has been held to prevail not only as between two purchasers for value, but also as between a purchaser for value, and the assignees of a bankrupt neglecting to give notice; as, if A. being entitled to an equitable interest become bankrupt, and then assign it to a purchaser for valuable consideration without notice of the bankruptcy, who serves notice on the trustee, the purchaser gains priority over the assignees who gave no notice (*c*). In a case, however, arising under the Bankruptcy Act of 1849, it was held that an assignment, after bankruptcy, to an assignee who gave notice to the trustee before the assignees in bankruptcy, could not prevail against the title of the latter (*d*); [and in a subsequent case (*e*) where the same view was adopted by the Court of Appeal, L. J. Baggallay held that the 141st section of the Act of 1849, which governed the case, applied equally to all bankruptcies under the Act of 1861.] The judgment of the Court was grounded on the strong negative words in the Act (*f*); but similar words occur in the original Bankrupt Act of James I. (*g*), and the principle of the former decisions was that, as regards *equitable interests*, the Act can pass nothing more than the fullest assignment which the bankrupt could have made, and that *assignees by operation of law* cannot in a Court of equity be viewed as under less obligation to give notice than a *particular assignee*, who, generally speaking, is more favoured. It would seem that the rule as to notice cannot be applied as against assignees in bankruptcy where the subject matter of assignment is a *debt which was recoverable at law* by the bankrupt, since in that case the *legal title* vests in the assignees.

[(*a*) *Re Freshfield's Trust*, 11 Ch. D. 198.]

[(*b*) *Mutual Life Assurance Society* v. *Langley*, 32 Ch. Div. 460.]

(*c*) *Re Barr's Trusts*, 4 K. & J. 219; *Re Atkinson*, 4 De G. & Sm. 548; 2 De G. M. &. G. 140; *Re Russell's Policy Trusts*, 15 L.R. Eq. 26; [*Palmer* v. *Locke*, 18 Ch. Div. 381;] and see *infra*, p. 802.

(*d*) *Re Mary Coombe's Will*, 1 Giff. 91.

(*e*) *Re Bright's Settlement*, 13 Ch. Div. 413; see the observations on this case in *Palmer* v. *Locke*, 18 Ch. Div. 381; and in *Re Jakeman's Trusts*, 23 Ch. D. 344.]

(*f*) "And after such appointment (*i.e.* of assignees) neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same," &c.; 12 & 13 Vict. c. 106, s. 141.

(*g*) 1 Jac. 1. c. 15, s. 13.

[4. A solicitor having a lien for costs on a policy of insurance in his possession is under no obligation to give any notice of his lien to the insurance company, for the fact of his having possession of the document is notice to all the world of the only fact (viz. possession) necessary to raise the lien, and he has no right to convert the insurance office into trustees for him, but merely the negative right of retention of the document. A subsequent assignee of the policy who has given notice will accordingly not gain priority (*a*). [Solicitor's lien.]

5. As respects the shares of companies registered under the Companies Act, 1862, it is provided by the 30th section of that Act that no notice of any trust expressed, implied, or constructive shall be entered on the register, and accordingly it has been held that the principle of *Dearle* v. *Hall* (*b*), does not apply to such shares as between the company and a person having an equitable title (*c*). The course which the assignee of an equitable interest in such shares should adopt for his protection is to serve a notice in lieu of *distringas* on the company under 5 Vict. c. 5, s. 5, and Order xlvi. of the Rules of the Supreme Court, which will prevent any legal transfer being made of the shares without notice to the equitable assignee, and will give him an opportunity to obtain an order restraining the transfer (*d*). [Shares in companies.]

It must not, however, be assumed that the directors of a company may safely ignore a notice given to them, and allow shares, which are to their knowledge affected by equitable rights, to be fraudulently transferred so as to destroy such rights. For if knowledge of the fraud can be brought home to the directors they would be liable as parties to the fraud; and in the opinion of Cotton, L.J., "where directors are asked to register a transfer, which from circumstances in fact known to them at the time would be in violation of the rights of others, they cannot either safely to themselves or without disregard of their duty register the transfer without allowing time for inquiry and for the assertion of the equitable rights, if any, inconsistent with the claim to register the transfer;" and in the opinion of Lindley, L.J., "a refusal by directors or an omission on their part to pay attention to a notice given to them by a person having an equitable interest in shares, and requiring the directors not to register

[(*a*) *West of England Bank* v. *Batchelor*, 51 L. J. N.S. Ch. 199; 46 L. T. N.S. 132; 30 W. R. 364.]

[(*b*) 3 Russ. 1.]

[(*c*) *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. Div. 424; *S. C. nomine Société Générale de Paris* v. *Walker*, 11 App. Cas. 20, 30, *per* Lord Selborne; and see *Roots* v. *Williamson*, 38 Ch. D. 485.]

[(*d*) See *post*, Chap. xxxii. s. 1.]

a transfer for such time as might be necessary to allow him to apply for a proper restraining order, would be *primâ facie* improper. Such conduct on the part of directors would be strong evidence of fraud" (*a*).

Thus where a shareholder deposited his share certificates as a security, and the depositees gave notice to the company, the notice was effectual to prevent the company from asserting a right of lien under their articles in respect of money which subsequently became due to them, as the depositees by giving the notice did not seek to affect the company with notice of a trust, but only in their capacity of traders with notice of the interest of the depositees (*b*); and where the directors had by the articles of the company powers in reference to the approval of transfers, and notice of an equitable title was given to them after a transfer was sent in, but before its approval, it was held that they were justified in refusing to proceed further with the transfer until the claimants should obtain the direction of the Court in an action which they at once instituted (*c*).]

Purchase by a trustee without notice of prior charge by the *cestui que trust.*

6. If a *cestui que trust* charge his interest, but gives no notice to the trustee, or gives notice to the trustee who dies so that the notice falls to the ground, and then a trustee subsequently appointed and having no notice of the charge, purchases from the *cestui que trust*, or takes a mortgage of his interest, such trustee stands in the position of an assignee, who, having no notice of the prior charge and giving notice of his own charge, gains a priority (*d*).

Cautions in assignment of equitable interests.

7. The purchaser of an equitable interest in *choses in action* should, for his security, never dispense with the two following precautions: *First*, he should make inquiries of the trustee or debtor whether the equity or claim of the vendor has been made the subject of any prior incumbrance.

[Trustee not bound to answer inquiries.]

[As regards the trustee, however, it is to be noted that he is under no equitable obligation to answer inquiries made by a person about to deal with his *cestui que trust.* Such a person can have no greater rights than the *cestui que trust* himself, and though it is the duty of a trustee to give his *cestui que trust* on

(*a*) *Société Générale de Paris* v. *Walker*, 16 Q. B. Div. at pp. 445, 453. But see the observations of Brett, M.R., p. 440.]

[(*b*) *Bradford Banking Co.* v. *Briggs & Co.*, 12 App. Cas. 29; 31 Ch. D. 19.]

[(*c*) *Moore* v. *North Western Bank*, (1891) 2 Ch. 599, 604.]

(*d*) *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80; *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 572.

demand information with respect to the mode in which the fund has been dealt with, and where it is, yet it is no part of his duty to tell his *cestui que trust* what incumbrancers he has created, nor which of his incumbrancers have given notice of their respective rights. If the trustee thinks fit to answer the inquiry, he is not bound to do more than give an honest answer, that is to say, to do more than answer to the best of his actual knowledge and belief. He may, no doubt, undertake greater responsibility; he may bind himself by a warranty, or he may so express himself as to be estopped from afterwards denying the truth of what he has said; but unless he does one or the other he cannot, consistently with the decision of the House of Lords in *Derry* v. *Peek* (*a*), if he answers honestly, expose himself to liability (*b*).

[Nor to do more than answer honestly.]

Secondly, upon the execution of the assignment, the purchaser should himself give notice of his own equitable title to the trustee or debtor, by means of which he will gain precedence of all prior incumbrancers who have not been equally diligent, and will prevent the postponement of himself to subsequent incumbrancers more diligent than himself; and of course the trustee or debtor will be personally responsible, if, after such notice, he part with the fund to any person not having a prior claim (*c*).

8. Between *choses in action* and *real estate* there is an observable distinction. As regards the former the purchaser knows the legal title is outstanding in a third person, and is therefore bound to give notice of his incumbrance; but in *lands* it often happens that the vendor professes to have the legal ownership in himself, whereas it afterwards appears that it was really vested in some stranger. If the purchaser be not cognizant of the outstanding legal estate, he cannot give notice of his interest, and therefore cannot be held to have forfeited his right by having neglected a precaution that was impossible. On the other hand, to hold that the doctrine of notice does not apply at all to real estate, renders any dealings with equitable interests therein needlessly dangerous. Thus A. is entitled to an equitable interest, of

Notice in respect of real estate.

[(*a*) 14 App. Cas. 337.]

[(*b*) *Law* v. *Bouverie*, 60 L. J. N.S. Ch. 594, *per* Lindley, L.J. His lordship further observed that *Browne* v. *Savage* (1 Drew. 639) is no authority for the proposition that trustees are bound to answer such inquiries; that *Burrowes* v. *Lock* (10 Ves. 470), where the trustee was held liable for loss arising from his misrepresentation that the property was not incumbered, is to be supported as a decision on the ground of estoppel, and so regarded is wholly untouched by *Derry* v. *Peek*; and that *Slim* v. *Croucher* (1 De G. F. & J. 518), fraud on the part of the trustee being in that case negatived, was inconsistent with and therefore overruled by *Derry* v. *Peek*.]

(*c*) *Hodgson* v. *Hodgson*, 2 Keen, 704; *Roberts* v. *Lloyd*, 2 Beav. 376; *Andrews* v. *Bousfield*, 10 Beav. 511.

which the legal estate is in B. upon trusts requiring B. to retain possession of the title-deeds, and not to part with the legal estate. A. conveys his interest to C., who makes no inquiries about incumbrances, and gives no notice to the trustee; A. afterwards, fraudulently concealing the previous assurance, conveys the same interest to D., who makes inquiries of the trustee respecting incumbrances, and gives him notice of his own charge. There seems no sound reason for postponing D. who has taken these precautions to C., who has merely priority in point of time. It is, however, now settled that the incumbrances in such a case are not governed by the law of notice, but rank *primâ facie*, and in the absence of other controlling equities, in order of date (*a*).

Rule as to notice applicable to money charged on land.

[*Secus*, a mortgage debt.]

However, the rule as to notice, though not applicable to estates in land, whether freehold or leasehold, applies when the subject matter is a sum of money to arise from a trust for sale of land (*b*), or which is charged upon land (*c*). [But the case of money charged on land must be distinguished from that of a mortgage debt where the assignees of the debt acquire equitable estates in the mortgaged land; thus where a solicitor held a mortgage of land in his own name as trustee for a client, and deposited the mortgage deed by way of equitable security, the depositees gained no priority over the *cestui que trust* by giving notice to the mortgagors (*d*).]

Second incumbrancer giving notice but making no enquiries.

9. A second incumbrancer who advances his money *without enquiry* as to the existence of previous charges, but afterwards, and before any notice given by the first incumbrancer, gives notice of his own security, obtains thereby priority (*e*). The reason is, that, in the case supposed, non-enquiry by the second incumbrancer is immaterial, since the answer to any enquiry

(*a*) *Lee* v. *Howlett*, 2 K. & J. 531; *Wiltshire* v. *Rabbits*, 14 Sim. 76; and see *Wilmot* v. *Pike*, 5 Hare, 14; *Bugden* v. *Bignold*, 2 Y. & C. C. C. 392; *Rochard* v. *Fulton*, 7 Ir. Eq. Rep. 131; *Rooper* v. *Harrison*, 2 K. & J. 86; *Prosser* v. *Rice*, 28 Beav. 68; *Pease* v. *Jackson*, 3 L. R. Ch. App. 576; *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80; [*Union Bank of London* v. *Kent*, 39 Ch. D. 238, 245; *Re Richards*, 45 Ch. D. 589.] As to the effect of notice upon a transfer of railway shares, see *Dunster* v. *Lord Glengall*, 3 Ir. Ch. Rep. 47.

(*b*) *Lee* v. *Howlett*, 2 K. & J. 531; *The Consolidated Investment, &c., Company* v. *Riley*, 1 Giff. 371; *Foster* v. *Blackstone*, 1 M. & K. 297, 9 Bligh, N.S. 332; [*Arden* v. *Arden*, 29 Ch. D. 702.]

(*c*) *Re Hughes's Trust*, 2 H. & M. 89; [*Daniel* v. *Freeman*, 11 I. R. Eq. 233, 638.]

[(*d*) *Re Richards*, 45 Ch. D. 589.]

(*e*) *Foster* v. *Blackstone*, 1 M. & K. 297; *Foster* v. *Cockerell*, 9 Bligh, N. S. 376; *Timson* v. *Ramsbottom*, 2 Keen, 49; and see *Etty* v. *Bridges*, 2 Y. & C. C. C. 494; *Warburton* v. *Hill*, Kay, 478.

would have been that there were no prior charges, whereas the absence of notice by the first incumbrancer works an *ex post facto* injury to the second, who, if informed at the time of giving his own notice of the existence of the earlier charge, would immediately have exerted himself to obtain repayment of his money (*a*).

Notice to one of several co-trustees.

10. If notice be given to *one of several* co-trustees, it is sufficient as against all subsequent incumbrancers *during the lifetime of that trustee;* for the subsequent incumbrancer should have made enquiry of *all* the trustees, and if he had done so he would have come to a knowledge of the prior charge, so that *here* non-enquiry is material (*b*).

Death of the single trustee to whom notice was given.

11. But if a prior incumbrancer content himself with giving notice to *one* of the trustees, and that trustee *dies*, and a second incumbrancer gives notice of his assignment, then, as the first incumbrancer did not do his utmost to guard against the fraud, and the second incumbrancer had no means in his power of detecting the fraud, the loss will fall on the person who had so far occasioned that he might have prevented it (*c*).

Enquiry by incoming trustees of outgoing trustees.

12. If there be two trustees, and notice be given to *both of them*, and then one dies and the other retires, and new trustees are appointed in the place of both, and the new trustees having no notice of the charge distribute the fund, the incumbrancer cannot hold the *new trustees liable* as for a misapplication on the ground that, when appointed, they ought to have enquired of the retiring trustee whether he had notice of any charge in which case it would have come to their knowledge (*d*).

Where the assignor or assignee is one of the trustees.

13. As the rule requiring notice is not only to prevent the trustees from parting with the fund, but also and more particularly to enable future purchasers to ascertain prior incumbrances, it has been held that where the *assignor*, the party beneficially interested, is also one of the trustees, the notice which he has is not sufficient, as it is so strongly his interest to

(*a*) *Meux* v. *Bell*, 1 Hare, 86, 87.

(*b*) *Smith* v. *Smith*, 2 Cr. & M. 231; *Ex parte Rogers*, 8 De G. M. & G. 271; *Willes* v. *Greenhill* (No. 2), 29 Beav. 387; *S. C.* 4 De G. F. & J. 147; and see *Ex parte Hennessey*, 1 Conn. & Laws. 562; *Wise* v. *Wise*, 2 Jon. & Lat. 412.

(*c*) See *Meux* v. *Bell*, 1 Hare, 73; *Ex parte Hennessey*, 1 Conn. & Laws. 562; *Timson* v. *Ramsbottom*, 2 Keen, 35; [*Re Hall*, 7 L. R. Ir. 180;] but see *Willes* v. *Greenhill* (No. 2), 29 Beav. 387; [but where an option of purchase is given to a lessee by trustees the terms of the instrument must be adhered to, and notice to one of the trustees will not necessarily be notice to all, *Sutcliffe* v. *Wardle*, 53 L. T. N.S. 329.]

(*d*) *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80; [and see *Hallows* v. *Lloyd*, 39 Ch. D. 686, *supra*, p. 754.]

suppress the assignment. But if the *assignee* be one of the trustees, the notice which *he* has is sufficient, for he will of course, for his own protection, take care to apprise future incumbrancers of the assignment to himself (*a*).

[A trustee having himself a charge upon the trust fund is not, in the absence of enquiry, bound to communicate that charge to a person giving him notice of a subsequent charge (*b*); but a trustee concealing his own prior charge would be narrowly watched by the Court, and it is conceived that if by his conduct he had led the subsequent incumbrancer to believe the fund to be unincumbered, he would lose his priority.]

Notice to *all* the trustees, and *all* dying.

14. As an incumbrancer may, by giving notice to one trustee, complete his title for the time, and yet may afterwards by the death of the trustee be displaced; so, if notice be sent to *all* the trustees, and they *all* die, a second incumbrancer, who gives notice to the succeeding trustees, will gain priority. Notice properly given at the time does not make an absolute title, but one liable to be defeated by an alteration of circumstances (*c*). An incumbrancer, therefore, would do well not only to give notice to *all* the trustees in the first instance, but to watch as well as he can the changes in the state of the trust, and to take care, by repeating his notice, that there is never a set of trustees of whom there is not at least *one* who has notice of his charge.

Time of giving notice.

15. Notice of an equitable incumbrance ought to be given to the trustees as early as possible, but if delayed for any length of time, it will be equally efficacious, provided no notice of any other charge has been served in the interval (*d*). Therefore, if the owner of an equitable interest, but who has given no notice to the trustees, contract for the sale of it, the purchaser cannot object to the title on the ground of no notice having been given, unless he can show some intermediate incumbrance; but it is the vendor's duty, by pointing out who have been the trustees from time to time, to furnish full means to the purchaser of enquiring whether or no any such charge has been created (*e*).

Notice to a person *about* to become a trustee.

16. Notice to a person who is *not actual trustee at the time,*

(*a*) *Browne* v. *Savage*, 4 Drew. 635; *Willes* v. *Greenhill* (No. 1), 29 Beav. 376; *S. C.* (No. 2), 29 Beav. 391; [*Newman* v. *Newman*, 28 Ch. D. 674.]

[(*b*) *Re Lewer*, 4 Ch. D. 101; 5 Ch. Div. 61.]

(*c*) *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80; and see *Meux* v. *Bell*, 1 Hare, 97; but see *Etty* v. *Bridges*, 2 Y. & C. C. C. 492; *Browne* v. *Savage*, 4 Drew. 635; *Re Durand's Trusts*, 8 W. R. 33.

(*d*) *Meux* v. *Bell*, 1 Hare, 86, *per* Sir J. Wigram; *Browne* v. *Savage*, 5 Jur. N.S. 1020; and see *Stocks* v. *Dobson*, 4 De G. M. & G. 17.

(*e*) *Hobson* v. *Bell*, 2 Beav. 17.

but who may and probably will become such, confers no right to priority. Thus, where A. had a first charge, and B. the second charge, on the proceeds to arise from the sale of an officer's commission; and B. first, and then A., gave notice of their respective charges to the army agent of the regiment; but both notices preceded the time when the army agent first actually assumed the character of trustee; it was held that A. retained his priority (*a*). [Where an officer retires under "The Regulation of the Forces Act, 1871" (*b*), the amount payable on his retirement, though previously lodged with the army agents and entered in their books under the officer's name, cannot be affected by notice of an incumbrance created by him until after his retirement is gazetted (*c*). But as soon as the retirement is gazetted, the amount lodged becomes the money of the retiring officer in the hands of the army agents, and is liable to set-off in respect of any monies owing by the officer to the army agents (*d*).] [Charge on commission of officer in army.]

17. These cases do not disturb the great principle that an equitable assignment is complete, if notice be given to the person by whom payment of the assigned debt is to be made, whether that person be himself liable, or is merely charged with the duty of making the payment; and it is not material whether the right to receive the money and the consequent obligation to pay is at the time when the notice is given absolute or conditional, so long as the person who receives the notice is himself bound by some contract or obligation at the time when notice reaches him to receive and pay over, or to pay over if he has previously received, the fund out of which the debt is to be satisfied. The cases on the sales of commissions turn upon the fact that the notice was given to a mere *possible* agent before he was an *actual* agent,—before the time when he was in any sense liable to make payment, neither being himself a debtor nor at that time charged with the duty of paying the money in question (*e*). [Cases as to such charges no exception from general rule.]

18. The doctrine of priority by notice applies only in favour of *purchasers;* for as between two *volunteers* notice is not Notice as between volunteers.

(*a*) *Addison* v. *Cox*, 8 L. R. Ch. App. 76; *Buller* v. *Plunkett*, 1 J. & H. 441; *Webster* v. *Webster*, 31 Beav. 393; *Somerset* v. *Cox*, 33 Beav. 634; [*Roxburghe* v. *Cox*, 17 Ch. Div. 520;] and see *Calisher* v. *Forbes*, 7 L. R. Ch. App. 109; *Yates* v. *Cox*, 17 W. R. 20.

[(*b*) 34 & 35 Vict. c. 86.]

[(*c*) *Johnstone* v. *Cox*, 16 Ch. D. 571; 19 Ch. Div. 17.]

[(*d*) *Roxburghe* v. *Cox*, 17 Ch. Div. 520; and see *Webb* v. *Smith*, 30 Ch. Div. 192.]

(*e*) *Addison* v. *Cox*, 8 L. R. Ch. App. 79, *per* L. C. Selborne.

necessary, but *qui prior est tempore potior est jure*, whether the first assignee did or not give notice (*a*).

Simultaneous notices.

19. Where two or more notices are served simultaneously, the incumbrances rank according to their respective dates (*b*).

To whom notice should be given.

20. The notice, written or unwritten (*c*), but better written, should be given to the trustees themselves, [and notice to the solicitors of the trustees will be of no effect unless the solicitors are expressly or impliedly authorized to receive such notices (*d*);] and where there are *two settlements*, one original and the other derivative, the notice should be given to the trustees of the original settlement who hold the property (*e*). Where notice to one trustee would be sufficient, it may be given to one who is not the acting trustee, the law recognizing no distinction between an acting and a passive trustee (*f*). Where the trust fund consists of shares in a *company*, the notice may be sent to the *secretary* (*g*); but notice to A., a *director*, and B., the *actuary*, was in one case considered sufficient (*h*); and, in another, notice to A., one of the directors, and B., an *auditor* (*i*); and in another verbal notice, not casually, but in the way of business, to the *board of directors* (*j*). [But the fact that the secretary or any other officer of the company had casual knowledge, acquired in his individual capacity and not whilst engaged in transacting the business of the company, of any matter, will not affect the company with notice of it (*k*).] It was at one time held that, as notice to a *partner* was notice to the partnership, if by the constitution of an assurance office the person insuring

[Officers of company]

[Partners, &c.]

(*a*) *Justice* v. *Wynne*, 12 Ir. Ch. Rep. 289. This was so laid down by L. C. Brady, and his opinion carries the greater weight with it, as at the original hearing he had thought otherwise; see *S. C.* 10 Ir. Ch. Rep. 489.

(*b*) *Calisher* v. *Forbes*, 7 L. R. Ch. App. 109; [*Johnson* v. *Cox*, 16 Ch. D. 571; 19 Ch. Div. 17.]

(*c*) *Smith* v. *Smith*, 2 Cr. & M. 231; *Ex parte Carbis*, 4 Deac. & Ch. 357, *per* Sir G. Rose; *S. C.* 1 Mont. & Ayr. 695, note, *per eundem*; *Brown* v. *Savage*, 4 Drew. 640; *Re Tichener*, 35 Beav. 317; *Re Agra Bank*, 3 L. R. Ch. App. 555.

[(*d*) *Saffron Walden Second Benefit Building Society* v. *Rayner*, 14 Ch. Div. 406; *Arden* v. *Arden*, 29 Ch. D. 702; and see *Re Durand's Trusts*, 8 W.R. 33;] *Foster* v. *Blackstone*, 1 M. & K. 297, 306; *Rickards* v. *Gledstanes*, 3 Giff. 298; *Wills* v. *Greenhill* (No. 2), 29 Beav. 392.

(*e*) *Bridge* v. *Beadon*, 3 L. R. Eq. 664.

(*f*) *Smith* v. *Smith*, 2 Cr. & M. 233.

(*g*) *Ex parte Stright*, Mont. 502; and see *Alletson* v. *Chichester*, 10 L. R. C. P. 319.

(*h*) *Ex parte Watkins*, 1 Mont. & Ayr. 689; *S. C.* 4 Deac. & Ch. 87; but see *Ex parte Hennessey*, 1 Conn. & Laws. 559.

(*i*) *Ex parte Waithman*, 4 Deac. & Ch. 412; but see *Ex parte Hennessey*, 1 Conn. & Laws. 559.

(*j*) *Re Agra Bank*, 3 L. R. Ch. App. 555; and see *Ex parte Richardson*, Mont. & Ch. 43; *Alletson* v. *Chichester*, 10 L. R. C. P. 319.

[(*k*) *Société Générale de Paris* v. *Tramways Union Company*, 14 Q. B. Div. 424.]

became a partner, the assignment of a policy by him was *ipso facto* notice of it to the society (*a*); but this was going very far, as it was the assignor's interest to suppress the assignment, and the point has since been ruled the other way (*b*). The negotiation for the assignment through a solicitor, who happens to be the local agent of the insurance office, is not notice to the office (*c*). *Incidental* mention of the charge to a *clerk* of the company, though in the office of business, will not be constructive notice to the company itself (*d*); and the fact that the solicitor to the trustees was a creditor under an insolvency, and must have known of the insolvency, was no notice of it to the trustees (*e*). [And in general notice through an agent will not be imputed where the circumstances are such as to raise a conclusive presumption that he would not communicate the fact to his principal (*f*).] [Solicitor, agent, &c.]

21. If the notice be by parol it must be clear and distinct (*g*), [and sufficient to bring to the mind of the trustee an intelligent apprehension of the nature of the dealing with the trust property, so that he may regulate his conduct by it in the execution of the trust (*h*).] Notice must be clear.

22. It was held by Lord Romilly, M.R., that the notice should be given by or on behalf of the *assignee himself*, and that notice to a trustee proceeding from a mere *stranger* would be insufficient (*i*), but the case on appeal was reversed on the ground that the trustee *had received such notice* as he would or should have acted upon (*j*). By whom notice should be given.

23. Where the trustee himself is the assignee or incumbrancer, the transaction necessarily carries notice along with it, and no Where trustee is incumbrancer.

(*a*) *Duncan* v. *Chamberlayne*, 11 Sim. 126; *Ex parte Rose*, 2 Mont. D. & De G. 131, and see *Ex parte Cooper*, Id. 1; *Re Styan*, Ib. 219, and 1 Ph. 105.

(*b*) *Ex parte Hennessey*, 1 Conn. & Laws. 559; *Thompson* v. *Speirs*, 13 Sim. 469; *Martin* v. *Sedgwick*, 9 Beav. 333; and see *Powles* v. *Page*, 3 C. B. 16; *Ex parte Boulton*, 1 De G. & J. 175.

(*c*) *Re Russell's Policy Trusts*, 15 L. R. Eq. 26.

(*d*) *Ex parte Carbis*, 4 Deac. & Ch. 354; *S. C.* 1 Mont. & Ayr. 693, note (*a*).

(*e*) *Re Brown's Trust*, 5 L. R. Eq. 88.

[(*f*) *Cave* v. *Cave*, 15 Ch. D. 639, 644, *per* Fry, J. As to the doctrine of constructive notice generally, see Dart V. & P. 6th ed., 969, *et seq.*; Fisher on Mortgage, 4th ed., 575, *et seq.*]

(*g*) *Re Tichener*, 35 Beav. 317; *Re Brown's Trust*, 5 L. R. Eq. 88.

[(*h*) *Lloyd* v. *Banks*, 3 L. R. Ch. App. 488, 490; *Saffron Walden Second Benefit Building Society* v. *Rayner*, 14 Ch. Div. 406; where it was pointed out by James, L.J., that the cases in which it has been held that notice to a person acting as solicitor was sufficient to take a *chose in action* out of the order and disposition of the assignor cannot be relied on for the purpose under consideration, which stands upon a very different footing.]

(*i*) *Lloyd* v. *Banks*, 4 L. R. Eq. 222, 3 L. R. Ch. App. 488.

(*j*) 3 L. R. Ch. App. 488.

other notice is necessary (*a*). So in the case of a *Joint Stock Bank*, the lien of the bank under the deed of settlement for a debt owing from one of its members, does not require any further notice than that which the bank, the only trustee, already possesses from the relative position of the parties (*b*).

Form of the notice.

24. The notice, if it go into details at all, should set forth the entire amount of the assignee's claim, for it has been held that the trustee is affected by notice only of the amount stated upon the face of the memorandum served, and not by notice of all the contents of the instrument to which the memorandum refers (*c*). But notice of a charge in *general terms*, without expressing any amount in particular, will be sufficient (*d*); and if there be no doubt as to the fund intended, a *mistake* in the description will not vitiate the notice as against a subsequent purchaser, but the Court will not extend the security beyond the amount of the sum mentioned in the notice as intended to be charged (*e*); [and the notice will not be invalidated by an error in an immaterial point, such as the date of the deed of which notice is given (*f*).]

Case of the fund being in Court.

25. Where the fund is in *Court* the step equivalent to notice is the obtaining of a *stop-order* to restrain the transfer of the fund, and as between two assignees the one who first gets a stop-order will have priority (*g*); [though the other may have given prior notice to the trustees of the settlement (*h*); and] though the first stop-order was upon the general fund, and the second stop-order was the first upon the share when carried over to the separate account of the debtor and his incumbrancers (*i*); and trustees in bankruptcy who claim under the order and disposition clause in the Bankruptcy Act will lose the benefit of the transfer to them, if an assignee for value give notice to the Court of his incumbrance before any notice is given of the assignment under the bankruptcy (*j*); but the incumbrancer

(*a*) *Elder* v. *Maclean*, 3 Jur. N. S. 283; *Ex parte Smith*, 4 Deac. & Ch. 579; *Ex parte Smart*, 2 Mont. & Ayr. 60.

(*b*) *Assignees of Dunne* v. *Hibernian Joint Stock Company*, 2 Ir. Rep. Eq. 82.

(*c*) *Re Bright's Trust*, 21 Beav. 430.

(*d*) Ib. 434.

(*e*) *Woodburn* v. *Grant*, 22 Beav. 483.

[(*f*) *Whittingstall* v. *King*, 46 L. T. N.S. 520.]

(*g*) *Greening* v. *Beckford*, 5 Sim. 195; *Swayne* v. *Swayne*, 11 Beav. 463; *Elder* v. *Maclean*, 3 Jur. N.S. 283.

[(*h*) *Pinnock* v. *Bailey*, 23 Ch. D. 497.]

(*i*) *Lister* v. *Tidd*, 4 L. R. Eq. 462; [but where a fund, having been carried over to a separate account, is released from the general questions in the action, a stop-order obtained by a *bonâ fide* creditor of the person entitled to the fund may prevail over a liability of such person to the estate of the testator; *Re Eyton*, (1891) 1 Ch. 458.]

(*j*) *Stuart* v. *Cockerell*, 8 L. R. Eq. 607; and see *supra*, note (*b*), p. 792.

who obtains the first stop-order will not prevail over an incumbrancer who gave the regular notice to the representative of the trust *before the money was paid into Court* (*a*); [nor will he prevail over a prior incumbrancer of whose incumbrance he had notice at the time of making his advance (*b*); but notice of a prior incumbrance acquired after the date of the advance but before the stop-order is obtained, will not prejudice the right to priority (*c*).] And even after the money has been paid into Court, although the *legal* title is in the *Paymaster-General* (*d*), the *trustees* remain such for the purposes of *notice*, and priority may be gained by serving notice upon the trustees (*e*).

[But where part of the trust estate was in Court and part in the hands of the trustees, and a mortgagee gave notice to the trustees but did not obtain a stop-order, and a subsequent incumbrancer both gave notice and obtained a stop-order, the first mortgagee had priority as to the funds in the hands of the trustees, and the subsequent mortgagee had priority as to the fund in Court (*f*).]

Notice to trustee, where fund in Court and neither assignee obtains a stop-order, confers priority.

26. Should an incumbrancer give *notice* to the trustees, but *neglect to obtain a stop-order*, he will still take precedence of a prior incumbrancer, who has neither obtained an order nor given notice, or who had given notice to only one of several trustees, and that trustee had died before the time of the second incumbrance. It is true the second incumbrancer did not adopt every precaution, but he resorted to one which the prior incumbrancer neglected to the detriment of the second incumbrancer, while the first assignee either sent no notice, or one which, by the death of the trustee before the time of the second incumbrance, had become equivalent to no notice (*g*).

Precaution where the fund is in Court.

27. If the trust fund be in Court, the following course should be adopted. The intended assignee should enquire at the Paymaster-General's and search at the entering seat in the Regis-

(*a*) *Livesey* v. *Harding*, 23 Beav. 141; *Brearcliff* v. *Dorrington*, 4 De G. & Sm. 122; and in *Thomas* v. *Cross*, 2 Dr. & Sm. 423, the same doctrine was applied as between two judgment creditors.

[(*b*) *Re Holmes*, 29 Ch. Div. 786.]

[(*c*) *Mutual Life Assurance Society* v. *Langley*, 32 Ch. Div. 460.]

(*d*) *Thorndike* v. *Hunt*, 3 De G. & J. 563.

(*e*) *Thompson* v. *Tomkins*, 2 Dr. & Sm. 8; *Matthews* v. *Gabb*, 15 Sim. 51; *Warburton* v. *Hill*, Kay, 477; *Bartlett* v. *Bartlett*, 1 De G. & J. 127; [but see *Mutual Life Assurance Society* v. *Langley*, 26 Ch. D. 686; 2 Ch. Div. 460, 470.]

[(*f*) *Mutual Life Assurance Society* v. *Langley*, 26 Ch. D. 686; 32 Ch. Div. 460, 470.]

(*g*) *Timson* v. *Ramsbottom*, MS.; *S. C.* 2 Keen, 35, pp. 49 and 50; *Matthews* v. *Gabb*, 15 Sim. 51; [*Re Hall*, 7 L. R. Ir. 180.]

trar's offices whether any stop-order has been made to restrain the transfer of the fund, and *also* enquire of the trustees, whether notice has been given of any prior incumbrance; and, on the completion of his own assignment, he should give notice to the trustees personally, and obtain a stop-order himself, and leave it at the Paymaster-General's office to be noted in the Paymaster's books (*a*). The enquiry at the Paymaster-General's or search at the Registrar's offices is merely for the purchaser's greater satisfaction, and makes no part of his own title, for neither the Paymaster-General nor the Registrar is the trustee, but the Court is the trustee. The stop-order is the effective step, and whether or not previous enquiry or search was made at the offices, is immaterial (*b*).

Case where there is no trustee.

28. It may happen that at the time of the incumbrance there is *no representative* of the trust on whom notice can be served, as if A. be trustee of stock for B., and A. dies intestate, or his executor declines to act. In such a case it has been held, that an incumbrancer gains priority by taking all the precautions that under the circumstances are practicable, as if he serves a [notice in lieu of] *distringas* on the Bank where the stock is standing (*c*).

Purchaser with notice.

29. A purchaser who gives notice, or obtains a stop-order, can gain no priority over an incumbrance of which he *has notice himself*, at the time of his own purchase (*d*).

Judicature Act, 1873, s. 25, sub-s. 6.

30. By 36 & 37 Vict. c. 66, s. 25, sub-s. 6, any absolute assignment of any debt or *legal chose in action* by writing under the hand of the assignor (not purporting to be by way of charge only) (*e*) upon express notice in writing being given to the legal holder of the *chose in action*, is to be effectual in *law* to pass the legal right from the date of such notice, but subject to all the equities which would have been entitled to priority had the Act not passed.

[An assignment may be absolute within this enactment

[(*a*) The Registrar will pass and enter the order, but it is the duty of the assignee to leave it with the Paymaster; and generally as to the practice respecting stop-orders see Rules of the Supreme Court, Ord. 46, RR. 12 & 13; and Seton on Judgments, 5th ed., chap. xxviii. s. 1.]

(*b*) See *Warburton* v. *Hill*, Kay, 478.

(*c*) *Etty* v. *Bridges*, 2 Y. & C. C. C. 486. [See as to the notice which has been substituted in the place of the writ of distringas, Rules of the Supreme Court, Ord. 46, RR. 2 *et seq.*; and *post*, Chap. xxxii. s. 1.]

(*d*) *Warburton* v. *Hill*, Kay, 470; *Re Holmes*, 29 Ch. Div. 786.

[(*e*) As to the meaning of the words "not purporting to be by way of charge only," see *National Provincial Bank* v. *Harle*, 6 Q. B. D. 626; *Burlinson* v. *Hall*, 12 Q. B. D. 347.]

although a trust is thereby created, in respect of the proceeds of the debt or *chose in action*, in favour of the assignor, as in the case of a deed by creditors assigning their debts to a person who is to sue to recover the debts and pay the creditors proportionately out of the money recovered (*a*).

31. The notice of assignment of a policy of assurance which is required to be given by "The Policies of Assurance Act, 1867" (30 & 31 Vict. c. 144) to enable the assignee to sue, is not requisite to complete the title of the assignee as against a subsequent assignee; and accordingly a second incumbrancer who advanced his money with notice of a prior incumbrance, does not, by giving the statutory notice, gain priority over the prior incumbrancer who has neglected to give the notice (*b*).] [Policy of assurance.]

Fourthly. Of the rule *Qui prior est tempore potior est jure.*

1. "The rule," observed V. C. Kindersley (*c*), "is sometimes expressed in this form:—'As between persons having only equitable interests, *qui prior est tempore potior est jure.*' This is an incorrect statement of it; for not only is it not universally true, as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal, as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice, and the first has omitted it. Another form of stating the rule is this:—'As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure.*' But even this enunciation of the rule (when accurately considered) seems to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the word 'equity'? For example, when we say that A. has a better equity than B., it means only that, according to those principles of right and justice, which a Court of equity recognizes and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B. And therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which the Court of equity General rule.

[(*a*) *Comfort* v. *Betts*, (1891) 1 Q. B. (C. A.) 377.]

[(*b*) *Newman* v. *Newman*, 28 Ch. D. 674; and see *Re King*, 14 Ch. D. 179.]

(*c*) *Rice* v. *Rice*, 2 Drew. 77.

would altogether refuse to lend its assistance to either party as against the other. To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this:—'As between persons having only equitable interests, if their equities are *in all other respects* equal (*a*), priority of time gives the better equity; or *qui prior est tempore potior est jure*.'" "Questions of priority between equitable incumbrances," said L. J. Turner, "are in general governed by the rule *qui prior est tempore potior est jure*. The rule, as I conceive, is founded on this principle, that the creation or declaration of a trust vests an estate in the person in whose favour the trust is created or declared. Where, therefore, it is sought to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it" (*b*).

All circumstances to be considered.

2. For ascertaining priorities, the Court directs its attention to the nature and condition of the conflicting equitable interests, the circumstances and manner of their acquisition, and the whole conduct of the respective parties: in short, all the circumstances of the case (*c*). The following instances will suffice for illustration.

Vendor's lien.

3. A vendor has an equitable lien for his purchase-money; but if he deliver the deed of conveyance with a receipt for the purchase-money indorsed and signed, and the purchaser then makes an equitable mortgage of the property by deposit, the equity of the mortgagee, who was deceived by the deed, is better than that of the vendor, who was careless enough to sign the receipt without payment of the money (*d*). But if the mortgagee have notice of the lien, he of course cannot complain, and is bound by it (*e*).

[Receipt by vendor.]

[Receipt signed by mortgagor.]

[And the same principle applies as between a mortgagor who has signed a receipt in full for the mortgage money, part of which remains unpaid, and a transferee of the mortgage who has taken his transfer on the faith of the receipt in full and without notice that part of the mortgage money had not been paid (*f*).]

[(*a*) As to "equal equities," see *Re Ffrench's Estate*, 21 L. R. Ir. 283, 332.]

(*b*) *Cory* v. *Eyre*, 1 De G. J. & S. 167; [*Re Vernon Ewens & Co.*, 32 Ch. D. 165; 33 Ch. Div. 402; *Taylor* v. *Russell*, (1891) 1 Ch. 8, 15.]

(*c*) *Rice* v. *Rice*, 2 Drew. 78, *per* V. C. Kindersley [*National Provincial Bank of England* v. *Jackson*, 33 Ch. Div. 1; and see *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182.]

(*d*) *Rice* v. *Rice*, 2 Drew. 73; *West* v. *Jones*, 1 Sim. N. S. 205; *The Queen* v. *Shropshire Union Canal Company*, 8 L. R. Q. B. 420; [and see now 44 & 45 Vict. c. 41, s. 54.]

(*e*) *Mackreth* v. *Symmons*, 15 Ves. 349.

[(*f*) *Bickerton* v. *Walker*, 31 Ch. Div. 154.]

Possession of title deeds.

4. The possession of the *title deeds* is a circumstance which may give the holder a better equity, provided they have come into his possession from want of due activity on the part of the prior incumbrancer, or through some neglect or default of such incumbrancer (*a*). But the *onus* lies on the holder to establish a case of blamable conduct against the first incumbrancer (*b*); and the second incumbrancer gains no priority if the deeds get into his hands by an accident or by the misconduct of a stranger (*c*), or the wrongful act of the solicitor of the first incumbrancer (*d*), for it is not the doctrine of the Court that in the case of mere equitable interests priority can be obtained through the medium of a breach of trust or duty (*e*). [And an equitable incumbrancer, by getting possession of the title deeds without any default on the part of a person who has previously contracted to purchase the property, does not gain priority over him, but takes subject to his contract (*f*).]

[What conduct as to title deeds will postpone mortgagee.]

[The whole question as to what conduct in relation to the title deeds on the part of a mortgagee who has the legal estate, is sufficient to postpone such mortgagee to a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage, has been fully discussed by the Court of Appeal (Cotton, Bowen and Fry, L.JJ.) in a recent case (*g*); in which the Court, after reviewing and classifying the earlier cases, arrived at the following conclusions:—

"(1) That the Court will postpone the prior legal estate to a subsequent equitable estate—(A), where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of

(*a*) *Layard* v. *Maud*, 4 L. R. Eq. 397; see *Rice* v. *Rice*, 2 Drew. 80; *Waldron* v. *Sloper*, 1 Drew. 200; *Perry-Herrick* v. *Attwood*, 25 Beav. 205, 2 De G. & J. 21; *Pease* v. *Jackson*, 3 L. R. Ch. App. 576; *Briggs* v. *Jones*, 10 L. R. Eq. 92; *Re Russell Road Purchase-moneys*, 12 L. R. Eq. 78; [*Clarke* v. *Palmer*, 21 Ch. D. 124; *Re Lambert's Estate*, 11 L. R. Ir. 534; 13 L. R. Ir. 234; *Lloyd's Banking Company* v. *Jones*, 29 Ch. D. 221;] and see *Ratcliffe* v. *Barnard*, 6 L. R. Ch. App. 652; [*Spencer* v. *Clarke*, 9 Ch. D. 137; *Farrand* v. *Yorkshire Banking Company*, 40 Ch. D. 182; *Taylor* v. *Russell*, (1891) 1 Ch. 8, 19.]

(*b*) *Allen* v. *Knight*, 5 Hare, 272, 11 Jur. 527; *Dixon* v. *Muckleston*, 8 L. R. Ch. App. 155; [*Union Bank of London* v. *Kent*, 39 Ch. D. 238.]

(*c*) *Rice* v. *Rice*, 2 Drew. 83.

(*d*) *Cory* v. *Eyre*, 1 De G. J. & S. 149; [*Bradley* v. *Riches*, 9 Ch. D. 189; *Re Vernon Ewens & Co.*, 32 Ch. D. 165; 33 Ch. Div. 402.]

(*e*) *Cory* v. *Eyre*, 1 De G. J. & S. 170; [*Re Vernon Ewens & Co.*, 32 Ch. D. 165; 33 Ch. Div. 402; *Taylor* v. *Russel*, (1891) 1 Ch. 8 (C. A.); and see *Harpham* v. *Shacklock*, 19 Ch. Div. 207.] But see *The Queen* v. *Shropshire Union Canal Company*, 8 L. R. Q. B. 420; 7 L. R. H. L. 496; [*Bradley* v. *Riches*, 9 Ch. D. 189.]

[(*f*) *Flinn* v. *Pountain*, 58 L. J. Ch. 389.]

[(*g*) *Northern Counties of England Fire Insurance Company* v. *Whipp*, 26 Ch. Div. 482, 491.]

the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot be otherwise explained; (B), where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate.

But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner" (*a*). And in a recent case it was held by Kay, J., in a carefully reasoned judgment, that this principle applies equally whether the prior estate is legal or equitable, and that in the case of innocent persons taking equitable mortgages from a fraudulent mortgagor, the negligence required to induce the Court to postpone the prior incumbrancer must be gross, *i.e.* so great as to make him responsible for the fraud committed on the subsequent incumbrancer (*b*).

[Title of *cestui que trust* prevails in absence of negligence.]

5. If a trustee in whose name shares in a company are standing borrows money for his own purposes and deposits the certificates as a security for his debt, the equitable title of the mortgagee will not, in the absence of negligence on the part of the *cestui que trust*, prevail against the prior equitable title of the *cestui que trust* (*c*). And a *cestui que trust* is entitled to place reliance upon his trustee, and is not guilty of negligence if, in the absence of anything to raise suspicion, he omit to inquire whether a fraud has been committed upon him by the trustee (*d*), and as "any person is entitled to vest property in another as trustee for himself, and to leave the title deeds in the hands of the trustee" (*e*), where the purchaser of an equity of redemption for his own convenience took the assignment in the name of a confidential clerk, ostensibly as absolute owner, but in fact as trustee, and allowed the assignment to remain in his custody,

[(*a*) *S. C.* at p. 494. The whole judgment deserves careful perusal, and see *Lloyd's Banking Company* v. *Jones*, 29 Ch. D. 221: *Manners* v. *Mew*, 29 Ch. D. 725.]

[(*b*) *Taylor* v. *Russell*, (1891) 1 Ch. 8 (reversed by C. A. ibid., but on other grounds); but see *Farrand* v. *Yorkshire Banking Company*, 40 Ch. D. 182.]

[(*c*) *Shropshire Union Railways and Canal Company* v. *The Queen*, 7 L. R. H. L. 496.]

[(*d*) Ib.; *Re Vernon Ewens & Co.*, 32 Ch. D. 164; 33 Ch. Div. 402, and see *Hartopp* v. *Huskisson*, 55 L. T. N. S. 773; *Re Richards*, 45 Ch. D. 589.]

[(*e*) *Re Richards*, 45 Ch. D. 594, *per* Stirling, J.]

and the clerk availed himself of possession of the deed to effect an equitable charge, it was held that there was no such negligence as would deprive the *cestui que trust* of his prior equitable title (*a*).

6. Where trust funds were invested in the names of two trustees in the shares of a bank, the articles of which provided that the bank should have a paramount charge on the shares held by more persons than one in respect of all monies owing to the bank from all or any of the holders thereof, alone or jointly with any other person, it was held that the bank had a lien on the shares for a debt owing by a firm in which one of the trustees was a partner, which must prevail over the title of the *cestuis que trust* (*b*).] [Lien of banking company on shares.]

7. A party, having a secret equity, who stands by and permits the apparent owner to deal with others, as if he were the absolute owner and as if there were no such secret equity, shall not be permitted to assert such secret equity against a title founded upon such apparent ownership (*c*). *A fortiori* if the person having the secret equity be party to a document which assumes that there is no such equity, or on having notice of a purchaser's claim do not give information of the equity, so as to enable him to proceed against the person by whom he has been deceived (*d*). ["It is a principle of natural equity which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it" (*e*).] Secret equity.

[(*a*) *Carritt* v. *Real and Personal Advance Company*, 42 Ch. D. 263; and see *Re Richards*, 45 Ch. D. 589.]

[(*b*) *New London and Brazilian Bank* v. *Brocklebank*, 21 Ch. Div. 302; *Miles* v. *New Zealand Alford Estate Company*, 32 Ch. Div. 266; but see *Bradford Banking Company* v. *Briggs & Co.*, 12 App. Cas. 293; 31 Ch. Div. 19; 29 Ch. D. 149; *ante*, p. 794.]

(*c*) *Mangles* v. *Dixon*, 1 Mac. & G. 446, *per* Lord Cottenham; *S. C.* 3 H. L. Cas. 739, *per* Lord Truro; *Troughton* v. *Gitley*, Ambl. (Blunt's ed.) 633, and cases cited, Ib. note (4); *Cornforth* v. *Pointon*, W. N. 1866, p. 189; [*Ex parte Bolland*, 9 Ch. D. 312; *Re Blachford*, W. N. 1884, p. 141.]

(*d*) *Mangles* v. *Dixon*, 1 Mac. & G. 447, 3 H. L. Cas. 740.

[(*e*) Per Jud. Com. *Ramcoomar Koondoo* v. *Macqueen*, L. R. Ind. App. Supp. vol. 40.]

Canons laid down in Thornton *v.* Ramsden.

8. The doctrines of the Court on this subject were much discussed in the case of *Thornton* v. *Ramsden* (*a*), and the following canons were laid down by the highest authorities in the House of Lords on appeal:—

a. If a stranger begins to build on land, *supposing it to be his own*, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not afterwards allow the real owner to assert his title to the land.

b. But if a stranger builds on land *knowing* it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it (*b*).

c. If a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined.

d. If the tenant, being a mere tenant at will, builds on the land in the *belief* that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, *knowing* that he is acting in that belief, and does not interfere to correct the error, (*semble*) equity will interfere to compel the grant of a lease.

e. If a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the *knowledge* of the landlord, and, without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation (*c*).

[Willmott *v.* Barber.]

[9. The ground upon which relief is given in these cases is fraud in the possessor of the legal right, and the elements necessary to constitute fraud of this description were enumerated by Fry, J., in a recent case (*d*), as follows:—

"(1) The plaintiff must have made a mistake as to his legal rights.

(*a*) 4 Giff. 519; 1 L. R. H. L. 129, *nom. Ramsden* v. *Dyson*; and see *Bankart* v. *Tennant*, 10 L. R. Eq. 141; [*Plimmer* v. *Mayor, &c., of Wellington*, 9 App. Cas. 699.]

(*b*) See also *Crampton* v. *Varna Railway Company*, 7 L. R. Ch. App. 562.

[(*c*) See *Plimmer* v. *Mayor, &c., of Wellington*, 9 App. Cas. 699.]

[(*d*) *Willmott* v. *Barber*, 15 Ch. D. 96, 105; and see *Weller* v. *Stone*, 54 L. J. N.S. Ch. 497.]

(2) The plaintiff must have expended some money, or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief.

(3) The defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff.

(4) The defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights (*a*).

(5) The defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting his legal right."]

Estates subject to common charge.

10. The question who has the better equity frequently arises where estates, subject to a common charge, become vested in different owners, and each assignee endeavours to throw the charge upon the other.

Express agreement to exonerate from a judgment.

11. It has been held in Ireland that if there be an *express agreement* that one estate shall exonerate another from a judgment, a purchaser with notice of the agreement will be bound by it (*b*). And a covenant that the one estate is *free from incumbrances* or for *quiet enjoyment* will amount to such an agreement (*c*).

Judgments as between two purchasers.

12. It has been further decided in Ireland that where A., the conusor of a judgment, settles an estate for valuable consideration, and afterwards sells an unsettled estate, the purchaser of the latter cannot have the judgment raised by a contribution from both estates (*d*); and even where a purchaser was not seeking relief against another purchaser, but the plaintiff was the judgment creditor seeking to have his debt raised, it was held that the whole onus must be borne by the subsequent purchaser (*e*); and the circumstance that the conveyance to the first purchaser contained a covenant against incumbrances or for quiet enjoyment does not appear, where it occurred, to have been the material ground on which the decision was rested (*f*). Neither did the Court distin-

[(*a*) See as to this *Plimmer* v. *Mayor, &c., of Wellington*, 9 App. Cas. 699.]

(*b*) *Hamilton* v. *Royse*, 2 Sch. & Lef. 315; *Handcock* v. *Handcock*, 1 Ir. Ch. Rep. 444.

(*c*) *Handcock* v. *Handcock*, 1 Ir. Ch. Rep. 444; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369; *Aicken* v. *Macklin*, 1 Dru. & Walsh, 621.

(*d*) *Hartley* v. *O'Flaherty*, Beat. 61; Ll. & G. *t.* Plunket, 208; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369.

(*e*) *Aicken* v. *Macklin*, 1 Dru. & Wal. 621.

(*f*) *Aicken* v. *Macklin*, 1 Dru. & Wal. 621; *Handcock* v. *Handcock*, 1 Ir. Ch. Rep. 444; and see *Hughes* v. *Williams*, 3 M. & G. 690; *Averall* v. *Wade*, Ll. & G. *t.* Sugden, 259.

guish the case where the subsequent purchaser had no notice of the prior charge. Indeed, in the leading case, the subsequent purchaser on whom the onus was thrown was apparently a purchaser without notice (*a*).

As between settled and unsettled estates.

13. It has been further ruled in Ireland that where the conusor of a judgment settles an estate with a covenant against incumbrances, the purchasers under the settlement can throw the judgments on the unsettled estates as against subsequent judgment creditors of the settlor, who had merely a general and roving lien, and did not stand in the place of specific purchasers (*b*), and even where the settlement was voluntary and without a covenant against incumbrances, it was ruled by the M. R. in Ireland that the owners of other estates devised by the settlor had no equity for contribution from the settled estates to pay off a judgment to which both settled and unsettled estates were subject at the date of the settlement (*c*). But on appeal the decision was reversed (*d*).

[So where estates were expressed to be settled for value, subject to charges amounting to 65,000*l.*, with a covenant against incumbrances except "the charges now existing thereon, amounting to the said sum of 65,000*l.*," and a power was reserved of further charging the property to a specific amount, which power was subsequently exercised, but the charges upon the estates at the time of the settlement in fact far exceeded 65,000*l.*, it was held that the purchasers under the settlement were entitled to be recouped the difference between the charges actually subsisting and the 65,000*l.*, in priority to the mortgagees under the power (*e*).]

Law in England.

14. These principles, which have been acted upon in Ireland, will no doubt be followed to some extent in England. If, for instance, A., possessing Blackacre and Whiteacre [which are subject to a common incumbrance], mortgages Blackacre to B., and covenants that it is free from incumbrances, this is a contract between A. and B., and every purchaser of Whiteacre with notice of the incumbrance and of the contract must be bound by the contract.

Rule in equity in absence of contract.

15. But if there be no express contract between A. and B., then the right of B. depends on a rule of equity, and as against A.

(*a*) See *Hartley* v. *O'Flaherty*, Beat. 69.

(*b*) *Averall* v. *Wade*, Ll. & G. *t.* Sugden, 252; *Hughes* v. *Williams*, 3 Mac. & G. 683; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369.

(*c*) *Ker* v. *Ker*, 3 Ir. Rep. Eq. 489.

(*d*) 4 I. R. Eq. 15.

[(*e*) *Re Barker's Estate*, 3 L. R. Ir. 395.]

himself it is clear that B. can insist on throwing the whole incumbrance on Whiteacre (*a*); and so as against any person claiming a general and roving lien only as a judgment creditor of A. (*b*); and even if A. afterward sell Whiteacre to C., who has notice of the incumbrance and of the mortgage, there is no ground for saying that B. has not the like equity as against C., but if C. have no notice of the incumbrance or no notice of the mortgage, the Court will probably refuse to enforce the rule against him. At least Lord St. Leonards seems to have thought that the decisions in Ireland do not affect innocent purchasers—*i.e.* purchasers for valuable consideration without notice (*c*). And in the case of *Strong* v. *Hawkes* (*d*), L. J. Turner expressed a doubt whether the cases in Ireland had not gone too far.

Barnes *v.* Racster.

16. In *Barnes* v. *Racster* (*e*) a person mortgaged Foxhall to A., and then to B., and then Foxhall and No. 32 to A., and then Foxhall and No. 32 to C. All parties had notice of the prior transactions. It was held that B. could not compel A. to pay himself exclusively out of No. 32, so as to leave B. the first incumbrancer on Foxhall, but C. was entitled to have the charges thrown proportionately upon Foxall and No. 32.

Purchaser with notice.

17. A purchaser of an equitable interest *specifically* has a higher equity than a person claiming under a *general* and *roving* charge as a judgment, and therefore the purchaser of such an equitable interest without notice of an equitable judgment was properly held not to be bound by it (*f*).

[Rule where specific charge on one property and general lien on another.]

[18. If there be a specific charge on one property to secure a sum of money, and there be a general lien on other property, (as for instance a banker's lien on his customer's securities in his hands), to secure the same sum, the property comprised in the specific charge must be primarily resorted to in exoneration of the property subject to the general lien (*g*).

[Where goods wrongfully pledged by a firm.]

19. The owner of goods which have been wrongfully pledged by a partnership firm to secure an advance to them, which is further secured by the guarantee of one of the partners, or by the deposit of partnership property, is entitled to have the

(*a*) See *Averall* v. *Wade*, Ll. & G. *t.* Sugden, 259.

(*b*) See *Averall* v. *Wade*, Ll. & G. *t.* Sugden, 252.

(*c*) Vend. & P. 746, 14th ed.

(*d*) 4 De G. & J. 652, & MS.

(*e*) 1 Y. & C. C. C. 401; *Bugden* v. *Bignold*, 2 Y. & C. C. C. 377; and see *Re Lawder's Estate*, 11 Ir. Ch. Rep. 346; *In Re Mower's Trust*, 8 L. R. Eq. 110. As to the right of judgment creditors to marshall *inter se*, see *Re Lynch's Estate*, 1 Ir. Rep. Eq. 396.

(*f*) *Re Grady*, 13 Ir. Ch. Rep. 154. See *Wells* v. *Kilpin*, 18 L. R. Eq. 298.

[(*g*) *Re Dunlop*, 21 Ch. Div. 583.]

securities marshalled and to have the benefit of the guarantee or a lien on the deposited property (*a*).]

SECTION II.

OF TESTAMENTARY DISPOSITION.

How trusts of freeholds to be devised.

1. An equitable interest in lands is transmissible by *devise* (*b*). Indeed the old *use*, which preceded the trust, was devisable by *parol* previously to the Statute of Wills, 32 H. 8. c. 15 (*c*); but after that Act the trust, by analogy to legal estates, became devisable only by will in *writing*.

Statute of Frauds.

2. The Statute of Frauds, 29 Car. 2. c. 3, followed, which required a devise of "lands" to be by a will, *signed* by the testator in the presence of and attested by *three witnesses*. This enactment was applied by the Courts to a devise of the equitable interest in lands. Otherwise a door would have been opened to all the mischiefs and inconveniences the Statute was intended to prevent (*d*). Whether trusts were within the *letter* of the Act, or equity brought them under its operation by *analogy*, it is not easy to determine (*e*); but undoubtedly the word "lands" has often been extended to include trusts (*f*), and, if so, there seems to be little reason why trusts should not have fallen within the *express* terms of the Statute.

Trusts of copyholds.

3. *Copyholds*, strictly speaking, are not at common law a devisable interest. A surrender is made to the use of the will, and the gift contained in the will operates as a declaration of the use. The devisee does not come in by the will, but by the surrender and the will taken together, as if the name had been inserted in the surrender itself (*g*). Thus copyholds at *law* were out of the Statute of Frauds, and might have been devised by a will neither signed nor attested; and as equity followed the law the trust of a copyhold was devisable in the same manner (*h*).

[(*a*) *Ex parte Salting*, 25 Ch. Div. 148; *Ex parte Alston*, 4 L. R. Ch. App. 168.]

(*b*) *Cornbury* v. *Middleton*, 1 Ch. Ca. 211, *per* Wyld, Just.; *Greenhill* v. *Greenhill*, 2 Vern. 679, *per* Lord Harcourt; *Philips* v. *Brydges*, 3 Ves. 127.

(*c*) Shepp. Touch. 407; and see *ante*, p. 688, note (1).

(*d*) *Wagstaff* v. *Wagstaff*, 2 P. W. 259, *per* Lord Macclesfield; *Adlington* v. *Cann*, 3 Atk. 151, *per* Lord Hardwicke; *Burgess* v. *Wheate*, 1 Eden, 224, *per* Lord Mansfield.

(*e*) See *Burgess* v. *Wheate*, *Wagstaff* v. *Wagstaff*, *ubi supra*; *Doe* v. *Danvers*, 7 East, 322.

(*f*) See *supra*, p. 766.

(*g*) *Hussey* v. *Grills*, Amb. 800, *per* Lord Hardwicke.

(*h*) *Appleyard* v. *Wood*, Sel. Ch. Ca. 42; *Wagstaff* v. *Wagstaff*, 2 P. W.

And the equitable interest might always have been passed by will, though not preceded by a *surrender*, which previously to 55 G. 3. c. 192, was required to pass the *legal* estate (*a*).

Where no custom to devise the legal estate of copyholds.

4. As equitable interests in copyholds were regulated by analogy to the custom affecting the legal estate, one might have supposed, that where the *legal* estate could not be devised, the *equitable* estate in like manner must have been left to descend. However, it was decided by the Court, that even assuming the absence of any power to devise the *legal* estate (*b*), the owner of the equitable estate could pass by *will* (*c*). Whether the will must have been executed according to the Statute of Frauds, or whether any instrument sufficient for declaring the uses on a surrender would have been enough, does not sufficiently appear. But in a case of customary freeholds of which the legal estate could not be devised (and customary freeholds are now regarded as copyholds (*d*), Lord Hardwicke held that the reason why the *equitable* interest in copyholds could be devised by an unattested will, was because the *legal* estate of copyholds could be devised by an unattested will, and that as, in the case of customary freeholds before him, the legal estate could not be devised, the equitable interest could only pass by a will executed according to the *Statute of Frauds* (*e*). And *à fortiori* where a customary freehold, of which the legal estate was not devisable, was vested in a trustee upon such trusts as the *cestui que trust* should by will "to be by him *legally* executed" appoint, it was held that the equitable interest could not be devised by a will not executed according to the Statute of Frauds (*f*).

Of customary freeholds.

Wills Act.

5. Now by the Wills Act (*g*), as to wills made on or after 1*st January*, 1838, property, of whatever description, whether *real or personal*, freehold or copyhold, legal or equitable, may be devised or bequeathed by a will in writing, signed by the

258; *Tuffnell* v. *Page*, 2 Atk. 37; and see *Attorney-General* v. *Andrews*, 1 Ves. 225; but see *Anon. case*, cited *Wagstaff* v. *Wagstaff*, 2 P. W. 261.

(*a*) *Greenhill* v. *Greenhill*, 2 Vern. 679; *Tuffnell* v. *Page*, 2 Atk. 37; *Gibson* v. *Rogers*, Amb. 93.

(*b*) As to the validity of a custom restraining surrenders to the use of a will, see *Pike* v. *White*, 3 B. C. C. 286, and note 1, Ib.; *Doe* v. *Thompson*, 7 Q. B. 897.

(*c*) *Lewis* v. *Lane*, 2 M. & K. 449; *Wilson* v. *Dent*, 3 Sim. 385; [*Allen* v. *Bewsey*, 7 Ch. Div. 453;] but see *Hussey* v. *Grills*, Amb. 299.

(*d*) See *ante*, p. 263.

(*e*) *Hussey* v. *Grills*, Amb. 300. The whole argument in this case assumes that the will as opposed to the codicil was executed according to the Statute of Frauds, and yet the report states that the will was in writing, "but not attested according to the Statute of Frauds." The Reg. Lib. does not state whether the will was or not so executed. Amb. Blunt's edit.

(*f*) *William* v. *Lancaster*, 3 Russ. 108.

(*g*) 1 Vict. c. 26.

testator in the presence of and attested by *two* witnesses, and by such a will only.

Revocation of wills by alteration of estate.

6. If, before this Act, a testator seised of an equitable estate in fee had devised it, and then disturbed the *equitable seisin* by executing a conveyance and taking back a new estate in the same property, the will was revoked in like manner as if the estate had been legal (*a*). But if a testator had devised an equitable estate and afterwards taken a conveyance so as merely to clothe the equitable estate with the legal, or was party to a conveyance for merely changing the trustees, such conveyances were not a revocation of the prior will (*b*). Now by the late Wills Act, a subsequent disturbance of the seisin, either at law or in equity, does not revoke the will (*c*).

SECTION III.

OF SEISIN AND DISSEISIN.

Equitable seisin.

1. THE term *seisin* is properly applicable to *legal* estates; but a Court of equity regards actual receipt of the rents and profits under the *equitable* title as equivalent to *seisin* at law, and has often adjudicated upon the rights of parties with reference to that circumstance.

Casborne v. Scarfe.

Thus, in *Casborne* v. *Scarfe* (*d*), it was disputed, whether, as curtesy did not attach at law without a *seisin* in fact, the husband could claim his curtesy out of the wife's equity of redemption; but Lord Hardwicke said, "It is objected there is no *seisin* whatever of the legal estate in the wife in the consideration of law. But the true question is, if there was such a *seisin* or possession of the equitable estate in the wife, as in this Court is considered equivalent to an actual *seisin* of a freehold estate at common law—and I am of opinion there was —actual possession, clothed with the receipt of the rents and profits, is the highest instance of an *equitable seisin*, both of which were in this case."

(*a*) *Locke* v. *Foote*, 5 Sim. 618; *Earl of Lincoln's case*, 1 Eq. Ca. Ab. 411; *S. C.* Shower's P. C. 154.

(*b*) *Doe* v. *Pott*, 2 Doug. 710; *Watts* v. *Fullarton*, cited Doug. 718; *Parsons* v. *Freeman*, 3 Atk. 741; *Dingwell* v. *Askew*, 1 Cox. 427; *Clough* v. *Clough*, 3 M. & K. 296.

(*c*) 1 Vict. c. 26, s. 23.

(*d*) 1 Atk. 603; and see *Parker* v. *Carter*, 4 Hare, 413.

2. And so it was held that there was *possessio fratris* of a trust, in other words, that if a person inherited a trust and died before actual *seisin* of the estate by receipt of the rents and profits, it should descend to the brother of the half blood, as heir to the father, in preference to the sister of the whole blood; but that if there had been such a receipt of the rents and profits as constituted equitable *seisin*, the sister of the whole blood, as heir to the brother, would exclude the brother of the half blood (*a*). *Possessio fratris.*

3. The doctrines of the Court upon the subject of equitable *disseisin* cannot be better illustrated than by a statement of the well-known case of the *Marquis of Cholmondeley* v. *Lord Clinton* (*b*). The circumstances were briefly these:—George, Earl of Orford, conveyed certain manors and hereditaments to the use of himself for life, remainder to the heirs of his body, remainder as he should by deed or will appoint, remainder to the *right heirs of Samuel Rolle*, with a power reserved of revocation and new appointment. Some time after, the Earl executed a mortgage in fee, which operated in equity as a revocation of the settlement *pro tanto*. In 1701 the Earl died without issue and intestate, and upon his death the ultimate remainder (which had been a vested interest in the Earl himself, as the *heir of Samuel Rolle at the date of the deed*), should have descended to the right heir of the Earl, but, the parties mistaking the law, the person who was *heir of Samuel Rolle at the death of the Earl* was allowed to enter on the premises, and continued in possession, subject to the mortgage, up to the commencement of the suit. The bill was filed in 1812, by the assign of the right heir of the Earl against the mortgagee and the assign of the right heir of Samuel Rolle, for redemption of the premises, and an account of the profits. It was debated whether, as the legal estate was vested in the mortgagee, and the heir of Samuel Rolle had held the possession subject to a subsisting mortgage, the assign of the Earl's heir, to whom the equity of redemption belonged in point of *right*, had been disseised of his equitable interest, and was now barred by the effect of time. Sir W. Grant argued, that although there might be what was deemed a *seisin* of an equitable estate, there could be no *disseisin*—first, because the *disseisin* must be of the entire estate, and not of a limited and partial interest in it; and, secondly, because a tortious act Marquis of Cholmondeley *v.* Lord Clinton.

(*a*) See now 3 & 4 W. 4. c. 106.
(*b*) 2 Mer. 171; 2 J. & W. 1; and see *Penny* v. *Allen*, 7 De G. M. & G. 422.

Marquis of Cholmondeley *v.* Lord Clinton.

could never be the foundation of an equitable title; that an equitable title might undoubtedly be *barred* by length of time but could not be *shifted* or *transferred* (*a*); that the equity of redemption subsisted, and it must therefore belong to some one, and could only belong to the original *cestui que trust* (*b*); that the *cestui que trust* could only be barred by barring the trustee (*c*). Sir W. Grant did not then decide the point, but directed a case for the opinion of the Queen's Bench on a question of law, and retained the bill in the meantime.

Re-heard.

The cause was afterwards re-heard on the equity reserved before Sir T. Plumer, who determined that the original *cestui que trust* had been *disseised* and was consequently barred (*d*). "The grounds," he said, "upon which it is contended that the holder of the rightful equity is not bound by *laches* and non-claim are that the tortious possessor does not claim to be the holder of more than the equitable estate—that there is no *disseisin*, abatement or intrusion of a trust—that the possessor is only tenant at will, and may be dispossessed at any time by the trustee of the legal estate, and he has therefore only a precarious and permissive possession—that tortious possession can never be the foundation of an equitable title (*e*). But this reasoning" he continued, "proceeds on a mistaken view of the manner in which, and the grounds upon which, the bar from length of time operates. The question respects the plaintiff's right to the remedy, not the defendant's title to the estate. A tortious act can never be the foundation of a *legal* any more than of an *equitable* title. The question is, whether the plaintiff has prosecuted his title in due time (*f*). As to the argument that a title in a Court of equity may be *lost* by *laches*, but cannot be *transferred* without the act of the party, the case is the same in this respect both in equity and law. If the negligent owner has for ever forfeited by his *laches* his right to any remedy to recover, he has in effect lost his title for ever. The plaintiff is barred of his remedy; the defendant keeps possession without the possibility of being ever disturbed by any one: the loss of the former owner is necessarily his gain; it is more—he gains a positive title under the statute at law, and, by analogy, in equity (*g*). If the mere existence of an old legal estate would

(*a*) See *Hopkins* v. *Hopkins*, 1 Atk. 590.
(*b*) 2 Mer. 357–359.
(*c*) Ib. 361.
(*d*) 2 J. & W. 1.
(*e*) 2 J. & W. 153.
(*f*) Ib. 155.
(*g*) Ib. 155, 156.

have the effect of preventing the bar attaching upon the equitable estate, all the principles that have been established respecting equitable estates and titles would be overturned. According to this reasoning, whenever the legal estate is outstanding, in an old term, for instance, to attend the inheritance, the earliest equitable title must in all cases prevail; quiet enjoyment for sixty, one hundred, or two hundred years or more, would be no security, if the old term had existed longer; it would always be open to inquiry in whom was vested the equitable title which originally existed when the old term was created" (*a*). Marquis of Cholmondeley *v.* Lord Clinton.

On appeal to the House of Lords his Honour's decision was affirmed, and the principle on which it proceeded was approved. Lord Eldon said, "He could not agree, and had never heard of such a rule as that adverse possession, however long, would not avail against an equitable estate: his opinion was, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and *worked the same effect as abatement or intrusion with respect to legal estates, and that for the quiet and peace of titles and the world it ought to have the same effect*" (*b*). Appeal to the House of Lords.

SECTION IV.

OF MERGER.

1. At law merger is the necessary consequence of the union of two estates in the same person in the same right, but in equity two estates without any intervening interest may meet in the same person in the same right without merger, and, on the other hand, though the estates are separated by an intervening interest, merger may take effect. The principle by which the Court is guided is the *intention;* and in the absence of express intention, either in the instrument or by parol, the Court looks to the *benefit of the person in whom the two estates become vested* (*c*). General view.

2. The chief importance of the doctrine of merger is with Purchase subject to charges.

(*a*) 2 J. & W. 157.
(*b*) Ib. 190, 191.
(*c*) *Lord Compton* v. *Oxenden*, 2 Ves. jun. 264; *Forbes* v. *Moffatt*, 18 Ves. 390; *Horton* v. *Smith*, 4 K. & J. 630; [*Adams* v. *Angell*, 5 Ch. Div. 634 at p. 646; *Re Pride*, (1891) 2 Ch. 135.]

reference to charges. Thus A., the owner of an estate subject to a first incumbrance in favour of B., and a second incumbrance in favour of C., contracts to sell the estate to D. Here, if the purchaser knows of both the incumbrances, he of course will not accept the title until they have been discharged. But should he have *actual* notice of the incumbrance to B. only, and take a conveyance from A. and B. so as to extinguish the charge of the latter, this act (if, by reason of his having constructive notice of C's incumbrance or otherwise, the defence of purchase for value without notice is not available) lets in the incumbrance of C. as the first charge (*a*). If, on the other hand, the purchaser, being apprehensive of some outstanding incumbrance, take an assignment of B.'s security to a trustee for him in order that it may be kept on foot, then the charge does not merge in the fee-simple; but should C. take proceedings for raising his charge, the purchaser may protect himself by the shield of B.'s incumbrance as the first charge (*b*).

Purchase by person entitled to the charge.

3. The same principle under different circumstances applies where B., the first incumbrancer, buys up the interest of the owner subject to the charge; for if the charge be not kept on foot the incumbrance of C. will be let in, unless the defence of purchase for value without notice be applicable (*c*).

Purchaser may require the charge to be kept on foot.

4. The vendor must not be put to extra expense by the form in which the purchaser wishes the conveyance to be made, and

(*a*) *Toulmin* v. *Steere*, 3 Mer. 210; *Medley* v. *Horton*, 14 Sim. 226; *Parry* v. *Wright*, 1 S. & S. 369, 5 Russ. 142; *Smith* v. *Phillips*, 1 Keen, 694; *Brown* v. *Stead*, 5 Sim. 535; *Mocatta* v. *Murgatroyd*, 1 P. W. 393. [The case of *Toulmin* v. *Steere*, *ubi sup.* has been doubted, and in the recent case of *Adams* v. *Angell*, 5 Ch. Div. 634, 645, the late M. R., sitting in the Court of Appeal, while withholding his opinion as to whether it was binding in that Court, observed, "it amounts to no more than this, that in the case of a purchase from the owner of an equity of redemption in which the purchase-money is partly applied in paying off incumbrances, the purchaser with notice, whether actual or constructive, of other incumbrances is not, in the absence of any contemporaneous expression of intention, entitled as against the other incumbrancers, of whose securities he has notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further." And in a recent Indian appeal the Privy Council refused to apply the doctrine of *Toulmin* v. *Steere* to India on the ground that it did not rest on any broad intelligible principle of justice; *Gokuldoss Gopaldoss* v. *Rambux Seochand*, 11 L. R. Ind. App. 126, 130; and see *Re Cork Harbour Docks Co.*, 17 L. R. Ir. 515.] As to *Greswold* v. *Marsham*, 2 Ch. Ca. 170, see Dart, 917, 918, 5th edit. See also *Anderson* v. *Pignet*, 8 L. R. Ch. App. 180.

(*b*) *Watts* v. *Symes* 16 Sim. 646, *per* V. C. Shadwell; *Smith* v. *Phillips*, 1 Keen, 699, *per* Lord Langdale; *Parry* v. *Wright*, 1 S. & S. 379, *per* Sir John Leach.

(*c*) *Parry* v. *Wright*, 1 S. & S. 369; 5 Russ. 142; *Garnett* v. *Armstrong*, 2 Conn. & Laws. 458.

where the vendor is under a personal liability he may insist on being discharged from it, but with these qualifications the purchaser can insist on having charges kept up instead of being merged (*a*).

Mode of keeping charge on foot.

5. If the purchaser desire to keep on foot a charge vested in himself, he should take a conveyance of the equity of redemption to a trustee, and the intention should be expressed on the face of the instrument, and if this be done the charge and the inheritance will both be sustained in equity, so as to afford protection against any intervening incumbrance (*b*).

Merger on a contingency.

6. A purchaser may even have the charge assigned so as to keep it on foot in one event and merge it in another event, should the contingencies affecting the estate make such a course desirable (*c*).

A trustee not absolutely necessary.

7. The assignment should in prudence be made to a trustee, but if the purchaser have the equity of redemption conveyed to *himself*, yet if the intention to keep up the charge be clear, no merger will take place (*d*).

Getting in a charge pending contract for purchase.

8. If a person *contract* only for the purchase of an estate, and pays off a first charge with a view to the purchase but before the completion of it, no merger takes place, but the purchaser stands in the shoes of the first incumbrancer (*e*).

Where the person who created the second charge buys up the first charge.

9. The question of merger has been spoken of as one of *intention* (*f*), but this principle must not be applied where a person has himself created two successive incumbrances and then buys up the first charge, for in this case the mortgagor when he creates the second incumbrance is under a duty to discharge the debt previously incurred, and though the second mortgagee cannot compel him to do this, yet if the mortgagor do discharge the first debt, the second incumbrancer, whatever may have been the intention, will have the benefit of it. Besides, in most cases a mortgagor, in creating an incumbrance, enters into a covenant for further assurance, and this, independently of any general equity, would, it is conceived, give the incumbrancer a right to call for the assignment to him of any interest in the estate subsequently

(*a*) *Cooper* v. *Cartwright*, Johns. 679.

(*b*) *Bailey* v. *Richardson*, 9 Hare, 736; and see *Holt* v. *Holt*, cited 1 P. W. 374.

(*c*) See *Selsey* v. *Lake*, 1 Beav. 146, 148.

(*d*) See *Davis* v. *Barrett*, 14 Beav. 542; *Forbes* v. *Moffatt*, 18 Ves. 384; *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; *Keogh* v. *Keogh*, 8 Ir. R. Eq. 179.

(*e*) *Watts* v. *Symes*, 1 De G. M. & G. 240.

[(*f*) *Adams* v. *Angell*, 5 Ch. D. 634; *In re Cork Harbour Docks Co.*, 17 L. R. Ir. 515, 526; *Re Pride*, (1891) 2 Ch. 135, 142.]

acquired by the mortgagor. Although, therefore, the mortgagor take an assignment of the prior charge to a trustee for himself to the intent that the same may be kept on foot, yet equity will not allow this as against the second incumbrancer (*a*).

Otter *v.* Vaux.

10. This has been carried so far that where a mortgage was made with a power of sale, and then a second incumbrance was created, and then the mortgagor purchased under the power of sale in the first mortgage, it was held that by this means the second incumbrance was let in as the first charge upon the estate (*b*). It was clear that if the mortgagor had paid off the first mortgage and taken a re-conveyance, this would have enured to the benefit of the second mortgagee; and the substance of the transaction was thought to be the same where the mortgagor took a re-conveyance from the mortgagee by the machinery of the power of sale: it was, indeed, said that this would give the second incumbrancer a double security—first, the purchase money in the hands of the first mortgagee, and then the estate in the hands of the mortgagor; but the answer was that the mortgagee could get no more than he was entitled to, viz., his principal money and interest (*c*).

[Trustee in bankruptcy buying up charge.]

[11. But where the trustee in bankruptcy of the mortgagor purchased from the first mortgagee, it was held that the second mortgagee was unaffected by the transaction, that the trustee stood in the position of transferee of the mortgage, and the second mortgagee was entitled to redeem him upon the usual terms (*d*).]

Owner of a charge may buy equity of redemption and hold his charge against an intervening incumbrancer.

12. It was observed by Sir William Grant (*e*) that the cases of *Greswold* v. *Marsham* (*f*) and *Mocatta* v. *Murgatroyd* (*g*) were express authorities to show that one purchasing an equity of redemption could not set up a prior mortgage of his own, nor consequently a mortgage which he had got in, against subsequent incumbrances of which he had notice. Now a person who borrows money cannot be his own creditor, or set up an incumbrance of his own, as against his own creditor (*h*); and if the vendor of the equity of redemption be himself personally liable for the charge, the purchaser will, as a general rule, be bound to indemnify him,

(*a*) *Otter* v. *Lord Vaux*, 2 K. & J. 657, *per* V. C. Wood.

(*b*) *Otter* v. *Lord Vaux*, 2 K. & J. 650; 6 D. M. & G. 638, 643; [and see *Re Cork Harbour Docks Co.*, 17 L. R. Ir. 515, 526.]

(*c*) *Otter* v. *Lord Vaux*, 2 K. & J. 657.

[(*d*) *Bell* v. *Sunderland Building Society*, 24 Ch. D. 618.]

(*e*) *Toulmin* v. *Steere*, 3 Mer. 224.

(*f*) 2 Ch. Ca. 170.

(*g*) 1 P. W. 393.

(*h*) *Watts* v. *Symes*, 1 De G. M. & G. 244, *per* L. J. Knight Bruce.

but that one purchasing an equity of redemption cannot set up a mortgage of his own, or one which he has got in, as against incumbrances not created by himself (a proposition not established by the authorities cited by Sir W. Grant (*a*)) is, it is conceived, not law at the present day (*b*). If the first mortgage be paid off and extinguished, of course the second charge is let in; but, subject to the equities flowing from the contract between the purchaser and his vendor, the first mortgage and the equity of redemption may be so vested in the same person as to keep the two separate, and so exclude the second incumbrance.

Effect of keeping a charge on foot.

13. It must be borne in mind that where the charge and the inheritance do not merge, the person in whom they are vested has two distinct possessions, and in the absence of any indication of intention that the charge shall in equity wait upon and attend the inheritance, the charge will go to the executor, subject to probate and legacy duty (*c*), and the inheritance to the heir (*d*). The question, therefore, is constantly arising as between the real and personal representatives, whether the two interests merged in the lifetime of the person entitled to both or were subsisting at the time of his death; and the question of merger or non-merger is held to be an open one up to the death of a testator (*e*), and for the purpose of collecting the intention parol evidence is admissible (*f*).

Rule where charge and inheritance become united.

14. Where a person is entitled to a charge and to the inheritance under the same instrument (*g*), *or* being first entitled to the charge subsequently acquires the inheritance as devisee (*h*), or heir (*i*), *or* being first entitled to the inheritance acquires the charge by bequest (*j*), or by succession as next of kin (*k*), in all

(*a*) See *Watts* v. *Symes*, 1 De G. M. & G. 244; and Dart. V. & P. 917, 918, 5th edit.; [*Adams* v. *Angell*, 5 Ch. Div. 634.]

(*b*) See now *Hayden* v. *Kirkpatrick*, 34 Beav. 645; *Stevens* v. *Mid-Hants Railway Company*, 8 L. R. Ch. App. 1064; [*Gokuldoss Gopaldoss* v. *Rambux Seochand*, 11 L. R. Ind. App. 126.]

(*c*) See *Swabey* v. *Swabey*, 15 Sim. 502.

(*d*) *Belaney* v. *Belaney*, 2 L. R. Ch. App. 138; 35 Beav. 469. Lord Romilly, M.R., observed that "If the testator had died intestate altogether, and the question had arisen between the heir and the next of kin, I think the term would have gone to the heir." Is it meant by this that a charge cannot be kept up for the benefit of the next of kin, but only for the benefit of persons claiming under a will?

(*e*) *Swinfen* v. *Swinfen* (No. 3), 29 Beav. 199; and see *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244.

(*f*) *Astley* v. *Milles*, 1 Sim. 298.

(*g*) *Grice* v. *Shaw*, 10 Hare, 76; *Richards* v. *Richards*, Johns. 754.

(*h*) *Forbes* v. *Moffat*, 18 Ves. 384; *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; *Davies* v. *Barrett*, 14 Beav. 542.

(*i*) *Chester* v. *Willes*, Amb. 246; *Powell* v. *Morgan*, 2 Vern. 90; *Thomas* v. *Kemeys*, 2 Vern. 348.

(*j*) *Price* v. *Gibson*, 2 Eden, 115.

(*k*) *Donisthorpe* v. *Porter*, 2 Eden, 162; *Lord Compton* v. *Oxenden*, 2 Ves. jun. 260.

these cases, in the absence of anything said or done by the owner of the charge and of the estate to show what his intention was (*a*), the Court presumes the charge to be merged or not according as merger would or not be for the owner's benefit. If, therefore, the owner would, as in the case of an infant previously to the Wills Act, have had a larger testamentary power over the charge than over the inheritance (*b*), or if the merger would let in subsequent or competing incumbrances (*c*) of substantial amount (*d*), or the debts of the testator or grantor (*e*), the Court presumes the intention to have been that the charge and the inheritance, though both vested in the same person, should be kept distinct. But if it clearly appear that to keep the charge on foot could in no way benefit the owner it will merge (*f*).

Rule where owner pays off a charge.

15. Where a charge is *paid off* by a person owning an interest in the property charged, the *quantum* of interest which he owns is, in the absence of direct evidence of intention, the chief guide in determining whether merger takes place. If he be *absolutely* entitled, the *presumption* is that he meant to free the property from the charge; if only *partially* interested, the *presumption* is that he intended to keep it on foot (*g*).

Tenant in fee-simple paying off a charge.

16. Thus, if the person paying off the charge be *tenant in fee-simple*, the presumption will be that the charge was meant to be merged (*h*), unless the assignment of the charge was to a

(*a*) See *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244, in which case Sir John Romilly, M.R., observed, "The three tests usually applied for the purpose of ascertaining whether the owner of the charge intended that it should merge in the inheritance at the time when he became entitled to the absolute interest in the charges are: 1. Any actual expression of that intention; 2. Where the form and character of the acts done are only consistent with the keeping the charge on foot; and 3. Such an intention may be presumed when, though a total silence in all other respects pervades the matter, it appears that it was for the interest of the owner of the charge that it should not merge in the inheritance;" [and see *Smith* v. *Smith*, 19 L. R. Ir. 514, 522.]

(*b*) *Powell* v. *Morgan*, 2 Vern. 90; *Thomas* v. *Kemeys*, 2 Ib. 345; *Duke of Chandos* v. *Talbot*, 2 P. W. 601.

(*c*) *Forbes* v. *Moffat*, 18 Ves. 384; *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; *Grice* v. *Shaw*, 10 Hare, 76; *Richards* v. *Richards*, Johns. 754; *Keogh* v. *Keogh*, 8 Ir. R. Eq. 179.

(*d*) *Richards* v. *Richards*, Johns. 767.

(*e*) *Davis* v. *Barrett*, 14 Beav. 552; *Sing* v. *Leslie*, 2 H. & M. 68.

(*f*) *Price* v. *Gibson*, 2 Eden, 115; *Donisthorpe* v. *Porter*, Ib. 162; *Lord Compton* v. *Oxenden*, 2 Ves. jun. 263; *Swinfen* v. *Swinfen* (No. 3), 29 Beav. 199.

[(*g*) *Adams* v. *Angell*, 5 Ch. Div. 634, 645; *Re Pride*, (1891) 2 Ch. 135, where an owner of five-sixths paid off a charge on the entirety pending a suit to set aside the sale of one of such five-sixths to him, and took a reconveyance as to the five-sixths, and a transfer as to the other sixth, and it was held that the charge was kept alive as to the disputed sixth.]

(*h*) *Hood* v. *Phillips*, 3 Beav. 513; *Pitt* v. *Pitt*, 22 Beav. 294; *Gunter* v. *Gunter*, 23 Beav. 571; *Swinfen* v. *Swinfen* (No. 3), 29 Beav. 199; [*In re Nunn's Estate*, 23 L. R. Ir. 286, 309.]

trustee in trust for the owner of the inheritance, his "*executors, administrators* and assigns," instead of his "*heirs* and assigns" (*a*), or there were other circumstances in the transaction sufficient to exclude the presumption (*b*).

The mere fact of taking the assignment to a *trustee* for the person paying off, though a material ingredient in the question of intention, is not alone enough to keep the charge on foot (*c*).

[And where a person, claiming to be the absolute owner of an estate, borrows money to pay off a mortgage, there being no intermediate incumbrance, the presumption is that he means to extinguish the charge (*d*).]

Tenant for life paying off a charge.

17. If the person paying off the charge be *tenant for life*, the Court considers that as his interest ceases with his death, he could never have meant that the charge should be extinguished instead of enuring to the benefit of his representatives (*e*); and the same rule applies though the tenant for life be or become entitled (subject to remainders to his own issue which fail) to the ultimate reversion in fee (*f*). But even in the case of tenant for life, positive evidence may be given by parol that he meant to merge the charge (*g*).

Tenant in tail in possession and of age paying off a charge.

18. As *tenant in tail in possession*, if of age, has an absolute power of disposition over the estate, subject to his compliance with certain forms, the presumption is, that if he pay off a charge he meant to merge it (*h*).

Special cases where charge has been kept on foot.

19. But if *tenant in fee-simple*, subject to an *executory limitation* over, which he cannot destroy (*i*), or a *tenant in tail* under an *Act of Parliament*, who is incapable of acquiring the fee-simple (*j*), or *tenant in tail in remainder* during the life of the tenant for life whose issue, if any, will be prior tenants in tail (*k*), pay off a charge, in all these cases, as the interest of the party

(*a*) *Gunter* v. *Gunter*, 23 Beav. 571; and see *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244.

(*b*) *Keogh* v. *Keogh*, 8 Ir. R. Eq. 179.

(*c*) *Pitt* v. *Pitt*, 22 Beav. 294; *Hood* v. *Phillips*, 3 Beav. 513.

[(*d*) *Mohesh Lal* v. *Mohunt Bawan Das*, 10 L. R. Ind. App. 62.]

(*e*) *Pitt* v. *Pitt*, 22 Beav. 294; *Burrell* v. *Earl of Egremont*, 7 Beav. 205; *Redington* v. *Redington*, 1 B. & B. 131; *Faulkner* v. *Daniel*, 3 Hare. 217; *Lindsay* v. *Earl Wicklow*, 7 Ir. R. Eq. 192.

(*f*) *Wyndham* v. *Earl of Egremont*, Amb. 753; *Trevor* v. *Trevor*, 2 M. & K. 675.

(*g*) *Astley* v. *Milles*, 1 Sim. 298.

(*h*) *St. Paul* v. *Dudley*, 15 Ves. 173; *per* Lord Eldon; *Jones* v. *Morgan*, 1 B. C. C. 206; *Earl of Buckinghamshire* v. *Hobart*, 3 Sw. 199; *Keogh* v. *Keogh*, 8 Ir. R. Eq. 179.

(*i*) *Drinkwater* v. *Combe*, 2 S. & S. 340.

(*j*) *Shrewsbury* v. *Shrewsbury*, 3 B. C. C. 120; *S. C.* 1 Ves. jun. 227; see *Earl of Buckinghamshire* v. *Hobart*, 3 Sw. 200.

(*k*) *Wigsell* v. *Wigsell*, 2 S. & S. 364; *Horton* v. *Smith*, 4 K. & J. 624.

required the charge to be kept on foot, the presumption is that such was the intention. And where a tenant in tail paid off a charge with the intention of extinguishing it *believing* himself to be tenant in fee-simple, and assuming that as the basis of the transaction, the Court considered, on the ground of *mistake*, that the tenant in tail had not merged the charge (*a*).

Payment of charge and subsequent acquisition of fee.

20. It seems to be settled that where a tenant for life or tenant in tail in remainder pays off a charge, and *afterwards the fee devolves* on the tenant for life, or the *remainder* of the tenant in tail *vests in possession*, this subsequent union of the charge and the inheritance is not *per se* sufficient to rebut the intention previously shown to keep the charge on foot (*b*).

Mortgage by person who has bought up a charge.

21. If a person having both a subsisting charge and the estate mortgage or convey the latter, without mention of the charge, the security carries with it all the mortgagor's interest, and as between the mortgagor and mortgagee there is a merger (*c*). If tenant in fee of an estate mortgage it to the trustees of his settlement to secure a fund to which he is absolutely entitled, subject to a life interest limited to his wife, and then dies in the lifetime of the wife, there can be no merger, for during the existence of the wife's interest the trustees could not, without a breach of trust, release the charge to him (*d*).

Whether charges can be made to attend the inheritance.

22. As charges are not unfrequently assigned like terms of years upon trust to *attend the inheritance*, it may be useful to add some cautionary remarks. So far as the author is aware, there is no authority for saying that charges can be made to wait upon the inheritance like terms of years. No doubt charges, like heirlooms and other personalty, can be settled to a certain extent to run in the channel of realty, but can they be impressed with the nature of realty itself? Thus A. buys an estate, and settles it by the purchase deed to the use of himself for life, with remainder to his first and other sons in tail, with remainder over to B., and suspecting secret incumbrances has a charge assigned to a trustee upon trust to attend the inheritance; A. dies, leaving an only son, who shortly afterwards dies without issue, when the estate becomes vested in B. An incumbrancer now starts up, and the charge is raised. Who is to have the benefit of it? Not, it will be said, A.'s real or personal repre-

(*a*) *Earl of Buckinghamshire* v. *Hobart*, 3 Sw. 186; *Kirkham* v. *Smith*, 1 Ves. 258.

(*b*) *Trevor* v. *Trevor*, 2 M. & K. 675; *Wigsell* v. *Wigsell*, 2 S. & S. 364; *Horton* v. *Smith*, 4 K. & J. 624.

(*c*) *Tyler* v. *Lake*, 4 Sim. 351; *Johnson* v. *Webster*, 4 De G. M. & G. 474.

(*d*) *Wilkes* v. *Collin*, 8 L. R. Eq. 338.

sentative, for by the trust he has parted with the absolute interest in favour of others. Not B., for how can personal estate go after an entail to a remainderman? The practice of assignment of charges, however, is so prevalent that when the point comes to be decided, the Court *may* go the whole length of holding that charges can attend the devolution of real estate through all its changes, and that they are not barred, &c., and that though latent before, yet they resume their vitality when a secret incumbrance is disclosed. The point must at present be considered an open one.

23. Now by a recent Act, 36 & 37 Vict. c. 66, s. 25, sub-s. 4, there is not any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. 36 & 37 Vict. c. 66, s. 25.

SECTION V.

OF DOWER AND CURTESY.

Dower and curtesy of a trust.

1. A TRUST or equitable interest (*a*) and equity of redemption (*b*), of *freeholds*, were until the Dower Act (*c*) exempt from the *lien* of dower; but were subject to the curtesy of the husband (*d*), unless the husband was an alien (*e*).

Freebench.

2. An equitable interest in *copyholds* (as the Dower Act does not apply to them (*f*)) remains as before not subject to freebench (*g*).

What seisin required to give curtesy.

3. With respect to *curtesy*, as at *law* the wife, to entitle her husband to curtesy, must have *seisin* in deed of the freehold (*h*),

(*a*) *Colt* v. *Colt*, 1 Ch. Rep. 254; *Bottomley* v. *Lord Fairfax*, Pr. Ch. 336; *Attorney-General* v. *Scott*, Cas. *t.* Talb. 138; *Chaplin* v. *Chaplin*, 3 P. W. 229; *Shepherd* v. *Shepherd*, Id. 234, note (D); *Lady Radnor* v. *Rotherham*, Pr. Ch. 65, *per* Lord Somers; *Goodwin* v. *Winsmore*, 2 Atk. 525. The distinction taken by Sir Jos. Jekyll in *Banks* v. *Sutton*, 2 P. W. 700, between trusts created by the husband himself, and trusts originating from a stranger, has been overruled by subsequent cases; see *Curtis* v. *Curtis*, 2 B. C. C. 630; *D'Arcy* v. *Blake*, 2 Sch. & Lef. 391; *Burgess* v. *Wheate*, 1 Eden, 197.

(*b*) *Dixon* v. *Saville*, 1 B. C. C. 326; *Reynolds* v. *Messing*, cited 1 Atk. 604; *Casborne* v. *Scarfe*, 2 J. & W. 194.

(*c*) 3 & 4 W. 4. c. 105.

(*d*) *Chaplin* v. *Chaplin*, 3 P. W. 234, *per* Lord Talbot; *Attorney-General* v. *Scott*, Cas. *t.* Talb. 139, *per eundem*; *Watts* v. *Ball*, 1 P. W. 108; *Sweetapple* v. *Bindon*, 2 Vern. 536; *Cunningham* v. *Moody*, 1 Ves. 174; *Casborne* v. *Scarfe*, 1 Atk. 603; *Dodson* v. *Hay*, 3 B. C. C. 405.

(*e*) See *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. Rep. 92. But see now 33 Vict. c. 14, s. 2.

(*f*) See p. 832.

(*g*) *Forder* v. *Wade*, 4 B. C. C. 521.

[(*h*) The seisin in deed of the freehold is necessary only in the cases in which, in the language of Lord Coke, "it may be attained unto;" Co. upon Litt. 29a., but where there are no

the question arises whether in the instance of a *trust*, there must not be such a *seisin* of the equitable estate in the wife as is considered equivalent to legal *seisin*, as actual possession of the estate clothed with the receipt of the rents and profits.

No curtesy where there is adverse possession.

4. It seems to be admitted that if the equitable interest be in the possession of a stranger, *adversely to the right of the wife*, there is no such seisin in deed as to entitle the husband to his curtesy (*a*).

Executory trusts.

5. But if money be articled or directed by will to be laid out in a purchase of *land to be settled on a married woman* in fee or in tail, the husband is entitled to curtesy, though no rent or interest may have been actually paid during the coverture (*b*). This proceeds on the principle that the *laches* of the trustees shall not prejudice the right of a third person, and, therefore, the claim to curtesy arises in the same manner as if the trustees had actually laid out the money in land and put the parties in possession.

Parker *v.* Carter.

6. And it has been held, that in the case of an ordinary trust, *any seisin* of the wife, though she has not possession or receipt of rents, is sufficient to entitle the husband to curtesy. Thus an estate had been vested in trustees upon trust for Carter, during the *joint* lives of himself and Mary his wife, and upon the death of *either* of them, and in default of appointment, upon trust for the children in fee. There were two children, a son and a daughter Elizabeth, and the daughter married Parker; Carter died in 1817, and on his decease the widow, although she had no life estate, held possession of the estate until her own death in 1839. Elizabeth Parker died in 1836, and the question was, whether Parker the husband was tenant by the curtesy, although his wife had never been in receipt of rents. The Vice-Chancellor ruled, that the possession of Carter was the possession of his

possible means by which the seisin in deed can be acquired, the husband will be entitled to curtesy notwithstanding its absence, for *impotentia excusat legem*. Thus in the case put by Lord Coke, "a man seised of an advowson or rent in fee hath issue a daughter, who is married, and hath issue and dieth seised, the wife, before the rent became due or the church became void, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesy, because he could by no industry attain to any other seisin," Co. upon Litt. 29a. So where a testator devised an estate to his daughter, her heirs and assigns, for her separate use, and the daughter died in the lifetime of the testator leaving a husband and an only child, it was held that under the operation of the Wills Act the husband was entitled to curtesy, and that as there were no possible means by which the husband could have obtained seisin in the wife's lifetime, it was not required, *Eager* v. *Furnivall*, 17 Ch. D. 115.]

(*a*) *Parker* v. *Carter*, 4 Hare, 413.

(*b*) *Sweetapple* v. *Bindon*, 2 Vern. 536; *Dodson* v. *Hay*, 3 B. C. C. 405.

trustee, and gave to the trustee a seisin of the inheritance: that the death of Carter did not interrupt that seisin, but the trustee was still in actual possession, not by a new title then for the first time accruing, but by continuance of the seisin acquired during the coverture: that the trustee was in such possession for the benefit of the party lawfully entitled thereto, and that he continued in such possession until the entry of Mary, which might be supposed to be a month or more after the death of her husband, and that such interval, there being no adverse possession, would entitle the husband to his curtesy (*a*).

Curtesy where there is separate use.

7. If the trust be for the *separate use* of the wife, so that her *seisin* would not entitle her husband to the possession or profits, it was formerly doubted whether in this case curtesy was not excluded. Lord Hardwicke was originally in favour of the curtesy (*b*); but in a subsequent case (without any allusion, however, to his former opinion), he decided against the claim of the husband (*c*). It has since been determined that the husband is entitled (*d*).

[Defeated by a disposition by the wife.]

[The right of the husband will however be defeated by a disposition by the wife of her inheritance by act *inter vivos* or by will (*e*).]

Opinion of Sir John Leach.

8. It was observed by Sir John Leach that at *law* the husband could not be excluded from the enjoyment of property given to or settled upon the wife, but in *equity* he might, and that not only partially, as by a direction to pay the rents and profits to the separate use of his wife during coverture, but wholly, by a direction that upon the death of the wife the *inheritance should descend to the heir of the wife, and that the husband should not be entitled to be tenant by the curtesy* (*f*); but this doctrine may admit of question, as there appears no reason why a person should be able to exempt equitable any more than legal estates from the ordinary incidents of property. A declaration, for instance, by a settlor, that a trust should be inalienable or not available to creditors would be absolutely void. In the case of *Bennet* v. *Davis* (*g*), which is cited by Sir J. Leach for his posi-

(*a*) *Parker* v. *Carter*, 4 Hare, 400; see *Casborne* v. *Scarfe*, 1 Atk. 606.

(*b*) *Roberts* v. *Dixwell*, 1 Atk. 609.

(*c*) *Hearle* v. *Greenbank*, 3 Atk. 715, 716.

(*d*) *Morgan* v. *Morgan*, 5 Mad. 408; *Follett* v. *Tyrer*, 14 Sim. 125; *Appleton* v. *Rowley*, 8 L. R. Eq. 139; [*Cooper* v. *Macdonald*, 7 Ch. Div. 288.] But see *contra*, *Moore* v. *Webster*, 3 L. R. Eq. 267.

[(*e*) *Cooper* v. *Macdonald*, 7 Ch. Div. 288.]

(*f*) *Morgan* v. *Morgan*, 5 Mad. 411.

(*g*) 2 P. W. 316.

tion, the question discussed was not whether curtesy attached on an equitable estate but whether an equitable estate arose. A testator had devised lands "to his daughter, the wife of Bennet, for her *separate use*, exclusive of her husband, to hold the same to her and her heirs," and that her husband should not be tenant by the curtesy, nor have the lands for his life in case he survived, but that they should upon his wife's death go to her heirs. It was contended that the wife could not be a trustee for herself, and that the husband could not be a trustee for the wife, they both being one person, and, that consequently, as there was no trustee, the husband was entitled to the estate beneficially. But the Court held that the husband was a trustee for the wife, and observed, "though the husband might be tenant by the curtesy (viz., of the legal estate), yet he should be but a trustee for the *heirs* of the wife." The remark certainly implies that on the death of the wife the husband would not be tenant by the curtesy of the equitable estate, but that question had not been adverted to at the bar, and apparently, from the context, was not under the consideration of the Court. Even assuming the remark to have been made advisedly, the view of the Court may have been that the curtesy of the husband was excluded on the ground now overruled, viz., that the trust being not simply for the wife and her heirs but during the coverture for the separate use of the wife, and after her death for her heirs, there was not a sufficient seisin as regarded the husband for the curtesy to attach upon (*a*).

[Effect of Married Women's Property Act, 1882.]

[9. Under the Married Women's Property Act, 1882, a married woman is enabled to acquire, hold, and dispose of property as her separate estate as if she were a feme sole, without the intervention of any trustee, and the question has been suggested whether a husband can become entitled to curtesy out of property which the wife has acquired as separate estate under the Act. It is conceived that, in the event of the wife not otherwise disposing of the property, he will be entitled to his curtesy in the same manner as if the property had independently of the Act been settled for the separate use of the wife (*b*).]

Distinction between dower and curtesy.

10. It must be acknowledged, that as dower and curtesy stand exactly on the same footing upon principle, either the rejection of dower, or the admission of curtesy, was an anomaly. Some

(*a*) See *Hearle* v. *Greenbank*, 3 Atk. 715, 716; *Morgan* v. *Morgan*, 5 Mad. 408.

[(*b*) 45 & 46 Vict. c. 75, sect. 1, sub-s. 1. See as to the effect of the Act, *infra*, p. 847, *et seq.*]

high authorities, as Lord Talbot (*a*), Sir T. Clarke (*b*), and Lord Loughborough (*c*), regarded the allowance of *curtesy* as the exception; and the ground upon which they proceeded was that as trusts followed the likeness of the use, and there was no curtesy of the use, there could be none of the trust. On the other hand, Sir J. Jekyll (*d*), Lord Hardwicke (*e*), Lord Cowper (*f*), Lord Mansfield (*g*), Lord Henley (*h*), and Lord Redesdale (*i*), thought that consistency would be restored by the admission of the title to *dower;* for, since the Statute of Frauds, they argued the system of trusts had undergone considerable alteration, and was conducted upon a much more liberal footing: the rule now was, that, as between the *cestui que trust* and the trustee and all claiming by or under them, whoever would have a right against the legal estate had a like right against the equitable. Thus either argument had a fair show of reason to support it; but the latter view was, no doubt, more in harmony with the system of trusts as eventually established.

How curtesy came to be allowed and not dower.

The Courts, according to Lord Redesdale, were led to refuse dower out of trust estates from a well-founded fear of affecting the titles to a large proportion of the estates in the country, because parties had been acting on the footing that dower did not attach to a trust; but the same objection did not apply to allowing *tenancy by the curtesy,* inasmuch as no person would purchase an estate without the concurrence of the husband (*j*).

Dower Act.

11. By the Dower Act (*k*), the widow is entitled to dower *in equity* where the husband dies beneficially entitled to any interest (not conferring a title to dower at law) which whether wholly equitable, or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession, other than an estate in joint tenancy (*l*). But in either case the wife will not be entitled to dower out of any property absolutely disposed of by the husband in his lifetime or by will (*m*). And by the Act a widow is not entitled to

(*a*) *Chaplin* v. *Chaplin*, 3 P. W. 234; *Attorney-General* v. *Scott*, Cas. *t.* Talb. 139.
(*b*) *Burgess* v. *Wheate*, 1 Eden, 196–198.
(*c*) *Dixon* v. *Saville*, 1 B. C. C. 327.
(*d*) *Banks* v. *Sutton*, 2 P. W. 713, 714.
(*e*) *Casburne* v. *Inglis*, 2 J. & W. 200.
(*f*) *Watts* v. *Ball*, 1 P. W. 109.
(*g*) *Burgess* v. *Wheate*, 1 Eden, 224.
(*h*) Ib. 249–251.
(*i*) *D'Arcy* v. *Blake*, 2 Sch. & Lef. 388.
(*j*) *D'Arcy* v. *Blake*, 2 Sch. & Lef. 388.
(*k*) 3 & 4 W. 4. c. 105.
(*l*) Ib. sect. 2.
(*m*) 3 & 4 W. 4. c. 105, sect. 4. But whether the husband has devised his estate in such a way as to manifest an intention that the estate should be free from dower, is a question often of

dower out of any land, when in the deed of conveyance thereof to her husband, or in any deed executed by him, it shall be declared that his widow shall not be entitled to dower (*a*). And the widow's right of dower may also be barred by declaration contained in the husband's will (*b*).

Exceptions from Act.

12. The Act does not extend to the dower of any widow married *on or before the* 1st *January*, 1834 (*c*), and does not apply to *copyholds* (*d*), though it does to lands of *gavelkind* tenure (*e*).

Dower uses no bar to widow married since the Act.

13. The ordinary *uses to bar dower* vest in the husband the whole inheritance in possession, partly at law and partly in equity, and therefore, *in the absence of declaration by him to the contrary*, must confer on a widow, *married after the Act*, a right to dower (*f*).

Intent to bar dower expressed in deed dated before the Act inoperative.

14. And if an estate was conveyed *before the Act* to uses in bar of dower with words expressing the *intent* of the limitations to be to prevent any wife of the purchaser from becoming dowable, such words cannot amount to a declaration under the Act (*g*); and, if they did, the deed, as being executed before 1st January, 1834, could not prejudice any right of dower (*h*); and consequently the widow married after the Act will, in such a case, be dowable (*i*).

Dower out of equitable fee subject to executory devise.

15. And a widow married since the Act is dowable of an *equitable estate* limited to the husband in fee, but subject to a *limitation over* on his dying without issue living at his death and which event has since occurred (*j*).

SECTION VI.

OF THE ESTATE OF A FEME COVERT CESTUI QUE TRUST.

UNDER the above title we propose, *First*, To advert shortly to the effect of marriage upon property, held upon trust for a *feme covert* simply, and not for her separate use, treating, in order, of

great nicety. See *Gibson* v. *Gibson*, 1 Drew. 42; *Lacey* v. *Hill*, 19 L. R. 346, and Lord St. Leonards on Real Property Statutes, p. 254.

(*a*) 3 & 4 W. 4. c. 105, sect. 6.

(*b*) Ib. sect. 7.

(*c*) 3 & 4 W. 4. c, 105, sect. 14.

(*d*) *Powdrell* v. *Jones*, 2 Sm. & G. 407; *Smith* v. *Adams*, 5 De G. M. & G. 712.

(*e*) *Farley* v. *Bonham*, 2 J. & H. 177.

(*f*) *Fry* v. *Noble*, 20 Beav. 602.

(*g*) *Fry* v. *Noble*, 7 De G. M. & G. 687.

(*h*) *Fry* v. *Noble*, 20 Beav. 598, *per* M.R. relying on sect. 14.

(*i*) *Fry* v. *Noble*, 20 Beav. 598; 7 De G. M. & G. 687; *Clarke* v. *Franklin*, 4 K. & J. 266.

(*j*) *Smith* v. *Spencer*, 2 Jur. N.S. 778.

pure personalty, chattels real, and real estate of freehold or inheritance; and, *Secondly*, To consider the nature of a wife's *separate estate* (*a*).

First. Of a *feme covert's* equitable interest generally.

[And here we may observe, that the mutual rights of husband and wife in the property of the wife have recently undergone such great changes, that it will be well, for the sake of simplicity, to deal separately with (A), the law as regards cases not affected by the Married Women's Property Act, 1882, and (B), the modifications introduced by that Act.

(A) As to cases not affected by the Married Women's Property Act.

The cases to be considered under this head will be confined to those in which property accrued before the 1st January, 1883, to women who were married before that date.]

Pure personal estate not settled to separate use.

1. As respects *pure personal estate* (by which expression is here meant personalty *exclusive of chattels real*, such as chattels personal, legacies, and other *choses en action*), not settled to the wife's separate use, the husband's power over the *equitable* estate is regulated by his power over the *legal* estate. A personal chattel, as furniture, held in trust for the wife, belongs in equity to the husband absolutely. But as to *choses en action*, as legacies, the right of the husband depends upon the fact of *reduction into possession* (*b*). If the wife's equitable interest be a present one, and the trustee is willing to facilitate the reduction into possession by payment, transfer, &c., to the husband, the trustee is at liberty to do so, and will not thereby incur any personal responsibility (*c*). On the other hand, the trustee, in whose hands the wife's *chose en action* is, may, in a proper case, insist on having it settled; and if for that purpose he pay it, by arrangement with the husband, to the trustees of an existing settlement, to be held by them upon the trusts thereof, such settlement will be as valid as if made by the Court (*d*). But a wife has no

(*a*) This section in the third and fourth editions was added to and much improved by the author's friend, the late Mr. F. O. Haynes.

(*b*) *Purdew* v. *Jackson*, 1 Russ. 45, 46. [Thus if a feme, joint tenant of a *chose in action*, marries, the joint tenancy is not thereby severed; *Re Butler's Trusts*, 38 Ch. Div. 286, overruling *Baillie* v. *Treharne*, 17 Ch. D. 388.]

(*c*) See *Re Swan*, 2 H. & M. 37.

(*d*) *Montefiore* v. *Behrens*, 1 L. R. Eq. 171. In this case M.R. speaks of the wife's right to have it settled as *she pleased*, but as to the wife's capacity, see *Re Swan*, 2 H. & M. 37; and see *Re Roberts' Trusts*, 38 L. J. N.S. Ch. 708.

equity to a settlement until her *antenuptial debts* have been discharged (*a*); and she has no such equity against a *purchaser* where the fund has been aliened by the husband, and the alienation is binding on the wife from her having taken a *fraudulent* part in the alienation (*b*).

Reduction into possession.

An actual reduction into possession (*c*) is required for defeating the wife's rights (*d*); and in the absence of reduction into possession by the husband during his life, the equitable interest passes to the wife by survivorship (*e*). It follows that where the wife's interest remains *reversionary* until after the husband's death, and the wife survives, she *necessarily* takes by survivorship (*f*). And so if the marriage be dissolved, or a judicial separation be decreed (*g*), [or a protection order be obtained (*h*)]

(*a*) *Barnard* v. *Ford*, 4 L. R. Ch. App. 247; *Miller* v. *Campbell*, W. N. 1871, p. 210.

(*b*) *Re Lush's Trust*, 4 L. R. Ch. App. 591; [*Cahill* v. *Cahill*, 8 App. Cas. 437; *S. C. nom. Cahill* v. *Martin*, 5 L. R. Ir. 227, 7 L. R. Ir. 361.]

[(*c*) As to the circumstances under which a lodgment in Court of money representing a *chose en action* belonging to the wife will amount to a reduction into possession, see *Donnelly* v. *Foss*, 7 L. R. Ir. 439.]

[(*d*) A release by the husband of a *chose en action* payable *in præsenti* is effectual to bar the wife's equity to a settlement, and if the release be of a legacy by deed poll it will be operative although there was no legal personal representative in existence at the time of its execution; and the release is good although the husband was living apart from the wife and not contributing to her support, *McCreery* v. *Searight*, 5 L. R. Ir. 206, 641; *Harrison* v. *Andrews*, 13 Sim. 595; see Roper on Husb. & Wife, vol. 1, p. 240 *et seq.*]

[(*e*) If the husband and wife appoint an agent to receive a *chose en action* of the wife, and he receives it, but does not pay it over to either husband or wife, his receipt nevertheless operates as a reduction into possession by the husband, *Huntley* v. *Griffith*, F. Moore, 452, Goldsborough, 2nd ed. p. 159, pl. 91; and this will also be the case, where the *chose en action* is the distributive share of the wife in the estate of an intestate of which she is the administratrix, *Re Barber*, 11 Ch. D. 442. If the wife with the assent of her husband receives a *chose en action*, it operates as a reduction into possession by him, *Rogers* v. *Bolton*, 8 L. R. Ir. 69; but the payment to the wife without the husband's assent will not prevent the husband, if he survive her, from suing for the *chose en action* as her legal personal representative, *S. C.*]

(*f*) *Purdew* v. *Jackson*, 1 Russ. 1; *Honnor* v. *Morton*, 3 Russ. 65. [In *Widgery* v. *Tepper*, 5 Ch. D. 516, affirmed 7 Ch. Div. 423, a husband sold his wife's share as one of the next of kin of an intestate in certain chattels and received the purchase money for her share. After the husband's death, which occurred in the wife's lifetime, it was discovered that the sale had taken place under circumstances which it was contended rendered it *voidable*, and on the question as to who was entitled to take proceedings to set the sale aside, it was held that the right of avoidance was in the husband's representatives and did not survive to the wife.]

(*g*) [*Wells* v. *Malbon*, 31 Beav. 48;] *Re Insole*, 35 Beav. 92; *Prole* v. *Soady*, 3 L. R. Ch. App. 220; *Johnson* v. *Lander*, 7 L. R. Eq. 228; *Heath* v. *Lewis*, 4 Giff. 665; *Swift* v. *Wenman*, 10 L. R. Eq. 15; and see *Fussell* v. *Dowding*, 14 L. R. Eq. 421; 27 Ch. D. 237; *Jessop* v. *Blake*, 3 Giff. 639; *Fitzgerald* v. *Chapman*, 1 Ch. D. 563; [and see *ante*, p. 383.]

[(*h*) *Re Coward and Adam's Purchase*, 20 L. R. Eq. 159; *Nicholson* v. *Drury Buildings Estate Company*, 7 Ch. D. 48; *Re Emery's Trusts*, 50 L. T. N.S. 197; 32 W. R. 357.]

before the *chose en action* is got in, it belongs to the wife. A similar principle applies, where the interest of the wife may be viewed as partly possessory and partly reversionary,—as where the wife is entitled during her own life; in which case, the husband cannot bind the interest of the wife beyond the duration of the coverture (*a*). So, even if the husband assign the wife's reversionary interest, and it subsequently, *during the husband's lifetime*, becomes possessory, the wife's right by survivorship remains, unless reduction into possession be actually effected by the husband in his lifetime (*b*). [And a settlement of such an interest by the wife is void and incapable of confirmation, and can be validated only by some act amounting to a new disposition by her while *sui juris* (*c*).]

Equity to a settlement.

2. The *equity to a settlement* appears to have had its origin (*d*) in cases where the trustee, declining to pay, transfer, &c., the *wife's possessory interest* to the husband, and the husband filing a bill against the trustee to compel *payment, transfer*, &c., the Court held that those who seek equity must do equity; and declined to assist the husband in obtaining the wife's equitable interest, except upon the terms of some portion of it being settled for the benefit of the wife and her issue.

[But where property is given to husband and wife, inasmuch as by the unity of the persons in law they take by entireties, and the husband is entitled in his own right to the entirety during his life, the wife will have no equity to a settlement out of any part of the property (*e*).]

Feme may assert her equity to a settlement actively.

3. Whatever may have been the source of this equity, it is undoubtedly one which the wife has a right, according to the now established practice of the Court, to assert *actively*, either by an action (*f*), or, in the case of an already existing suit, by

(*a*) *Stiffe* v. *Everitt*, 1 M. & Cr. 37; *Harley* v. *Harley*, 10 Hare, 325.

(*b*) *Ellison* v. *Elwin*, 13 Sim. 309; *Ashby* v. *Ashby*, 1 Coll. 553; *Baldwin* v. *Baldwin*, 5 De G. & Sm. 319; and see *Hamilton* v. *Mills*, 29 Beav. 193.

[(*c*) *Buckmaster* v. *Buckmaster*, 35 Ch. Div. 21, affirmed in Dom. Proc. *nom. Seaton* v. *Seaton*, 13 App. Cas. 61.]

(*d*) See *Bosvil* v. *Brander*, 1 P. W. 458; *Browne* v. *Elton*, 3 P. W. 202; *Wallace* v. *Auldjo*, 2 Dr. & Sm. 216; *Osborn* v. *Morgan*, 9 Hare, 432.

[(*e*) *Atcheson* v. *Atcheson*, 11 Beav. 485; *Ward* v. *Ward*, 14 Ch. D. 506; *Re Bryan*, 14 Ch. D. 516; and that the Married Women's Property Act, 1882, has not altered the law in this respect, see *Re March*, 27 Ch. Div. 166; *Re Jupp*, 39 Ch. D. 148.]

(*f*) *Lady Elibank* v. *Montolieu*, 5 Ves. 737; *Duncombe* v. *Greenacre*, 28 Beav. 472; on appeal, 2 De G. F. & J. 509. [The right is a personal one in the wife, and, on her death without having taken any steps to assert it, fails, and cannot be set up by her children. If, however, the wife has taken proceedings to enforce her equity, and has obtained a decree or order referring the matter to the Judge in chambers to approve a proper settlement, the children are en-

petition (*a*), at any time before the husband has finally reduced the equitable interest into possession; and possession by the husband in the mere character of *executor*, or *administrator*, or *trustee*, and not as husband in his marital right, will not be deemed a reduction into possession to defeat the equity to a settlement (*b*). [And the equity may be enforced in respect of a fund which is possessory although not actually distributable, as in the case of a share of an estate which is being administered by the Court, but which will not be distributable until further consideration (*c*).

Where the husband and wife are not domiciled in England, and the law of the place of their domicile does not recognize any equity to a settlement in the wife, she cannot assert the right in the English Courts (*d*).]

[Or waive it.] It is equally clear that the equity is one which the wife has a right to waive, by consenting in open Court (*e*) to the receipt of the equitable interest by the husband, [but an infant is not capable of giving such consent (*f*).] The wife may revoke her consent at any time before the actual transfer (*g*), and she has no power of consenting *out of Court*, and therefore a trustee who thinks a settlement ought to be executed, which the husband rejects, is justified, notwithstanding the wife's wishes to the contrary, in paying the money into Court (*h*).

[But where a conveyance by husband and wife of the wife's real estate is duly acknowledged by her, she must be treated as

titled to the benefit of that decree or order, and may bring an action to enforce the settlement. But if the wife dies after the institution of the action, but before a decree or order for a settlement has been made, the children, who have no equity except to enforce a judgment obtained in their favour, cannot compel a settlement, *Lloyd* v. *Williams*, 1 Mad. 450; *De la Garde* v. *Lemprière*, 6 Beav. 344; *Wallace* v. *Auldjo*, 2 Dr. & Sm. 216, 234; and even after a decree for a settlement has been made, the wife may, while the settlement is still *in fieri* and unexecuted, come into Court and waive her right, and so disappoint the claims of the children, *Lloyd* v. *Williams*, *ubi sup.*; *Pemberton* v. *Marriott*, 47 L. T. N.S. 332.]

(*a*) *Greedy* v. *Lavender*, 13 Beav. 62; *Scott* v. *Spashett*, 3 Mac. & G. 599; [*Re Robinson's Settled Estate*, 12 Ch. D. 188.]

(*b*) *Baker* v. *Hall*, 12 Ves. 497; *Wall* v. *Tomlinson*, 16 Ves. 413; [*Re Birchall*, 44 L. T. N.S. 243.]

[(*c*) *Re Robinson's Settled Estate*, 12 Ch. D. 188.]

[(*d*) *Re Marsland*, 55 L. J. N.S. Ch. 581.]

(*e*) And as to interests acquired under an instrument made after 31st December, 1857, the wife may, after the fund has become possessory, release her equity to a settlement by deed acknowledged, 20 & 21 Vict. c. 57, s. 1; see *ante*, p. 21.

[(*f*) *Shipway* v. *Ball*, 16 Ch. D. 376.]

(*g*) *Penfold* v. *Mould*, 4 L. R. Eq. 562.

(*h*) *Re Swan*, 2 H. & M. 34. But see *contra*, *Re Roberts' Trusts*, 38 L. J. N.S. Ch. 708, [where the trustees were saddled with costs for paying the money into Court.]

having given up to her husband all claim on the purchase money, even though part of it is left outstanding in trustees by way of an indemnity fund against charges on the estate (*a*).]

As to fund under 200*l.*

4. In one case where the fund was under 200*l.*, and therefore by the practice of the Court payable to the husband without the consent of the wife, the wife, though the husband had deserted her, had no equity to a settlement (*b*). But this case has since been overruled, and the Court has directed the whole fund, though it was under 200*l.*, to be settled upon the wife and children (*c*).

[Equity to settlement prevails though husband indebted to estate.]

[5. The wife's equity to a settlement is paramount to the right of the representatives of the testator or intestate under whom her interest is derived to retain a debt due from the husband to the testator or intestate (*d*).]

Where the husband, being himself an executor, was a defaulter to the estate, it was held that the wife, one of the residuary legatees, had no equity to a settlement as against the claims of other persons who suffered by the default (*e*); [but this decision has been doubted (*f*).]

Equity to settlement prevails against assignees in law or by deed.

6. The wife's equity to a settlement subsists not only against the husband himself, but also, *as a general rule*, against those claiming under him, as a trustee under his bankruptcy, or an assignee by deed, even for valuable consideration; in fact, the assertion of the equity most commonly takes place in cases where the husband has become bankrupt or has assigned the fund. Where, owing either to the trustee refusing to pay without suit, or to the wife's taking independent proceedings of her own, the fund comes under the control of the Court, the latter commonly considers that payment of *one-half* to the husband or the assignees, and the settlement of the other half on the *wife and children*, is, in the absence of special circumstances, a reasonable apportionment (*g*). As the moiety paid to the husband or assignees repre-

Proportion to be settled.

[(*a*) *Tennent* v. *Welch*, 37 Ch. D. 622, *q.v.*, as to effect of acknowledgment generally.]

(*b*) *Foden* v. *Finney*, 4 Russ. 428.

(*c*) *Re Cutler*, 14 Beav. 220; [*Re Kincaid's Trusts*, 1 Drew. 326;] *Re Merriman's Trust*, 10 W. R. 334 [*Barker* v. *Vogan*, 17 L. R. Ir. 447.]

[(*d*) *Re Batchelor*, 16 L. R. Eq. 481; *Re Cordwell's Estate*, 20 L. R. Eq. 644; *Re Briant*, 39 Ch. D. 471, and see *Carr* v. *Taylor*, 10 Ves. 574.]

(*e*) *Knight* v. *Knight*, 18 L. R. Eq. 487.

[(*f*) *Re Briant* (*ubi sup.*).]

(*g*) *Spirett* v. *Willows*, 1 L. R. Ch. App. 520; *Napier* v. *Napier*, 1 Dru. & War. 407; *Vaughan* v. *Buck*, 1 Sim. N. S. 287; *Bagshaw* v. *Winter*, 5 De G. & Sm. 468; *Marshall* v. *Gibbings*, 4 Ir. Ch. Rep. 276; *Re Grove's Trusts*, 3 Giff. 582. In *Re Suggitt's Trusts*, 3 L. R. Ch. App. 215, the L.JJ. gave the husband a third only; [and see *Callow* v. *Callow*, 55 L. T. N.S. 154.]

sents the whole of the husband's interest, the entirety of the other moiety must be settled on the wife and children, to the exclusion of the husband (*a*), except on failure of issue (*b*), in which event the husband will take, whether he survive the wife or not (*c*). It would appear that in Lord Eldon's time a rule existed against giving the wife the *whole* fund (*d*). But subsequently, in a case (*e*) in the Exchequer, where the husband was *insolvent*, Baron Alderson directed a settlement of the *whole* fund, considering *insolvency* to afford ground for a special exception. At the present day it is clear that the Court, wherever the special circumstances warrant the step (as, for instance, where the husband has abandoned the wife, or is not in a position to maintain her, and the fund is not more than sufficient for her maintenance), will settle the whole corpus, and, it seems, the arrears of income (*f*) on the wife and children (*g*). In every case the Court exercises a discretion as to the amount with reference to the particular circumstances (*h*)—namely, the conduct of the parties (*i*), the wife's means of livelihood (*j*), the settlement, if any, previously made upon her (*k*), and the sums before received

Discretion of Court.

(*a*) *Lloyd* v. *Williams*, 1 Mad. 450; *Barker* v. *Lea*, 6 Mad. 330; *Whittem* v. *Sawyer*, 1 Beav. 593.

(*b*) *Carter* v. *Taggart*, 5 De G. & Sm. 49; *Spirett* v. *Willows*, 12 Jur. N.S. 538; *Gent* v. *Harris*, 10 Hare 383; *Bagshaw* v. *Winter*, 5 De G. & Sm. 468.

(*c*) *Croxton* v. *May*, 9 L. R. Eq. 404; *Walsh* v. *Wason*, 8 L. R. Ch. App. 482; but see *Re Suggitt's Trusts*, 3 L. R. Ch. App. 215.

(*d*) *Dunkley* v. *Dunkley*, 2 De G. M. & G. 396.

(*e*) *Brett* v. *Greenwell*, 3 Y. & C. 230. [But Sir E. Sugden when Lord Chancellor of Ireland declined to follow this case. See *Napier* v. *Napier*, 1 Dru. & War. 407.]

(*f*) *Wilkinson* v. *Charlesworth*, 10 Beav. 324; but see *Newman* v. *Wilson*, 31 Beav. 34.

(*g*) *Smith* v. *Smith*, 3 Giff. 121; *Bowyer* v. *Woodman*, 3 L. R. Eq. 313. *Duncombe* v. *Greenacre* (No. 2), 29 Beav. 378; *Re Grove's Trust*, 3 Giff. 582; *Bray* v. *Laycock*, 2 Eq. Rep. 385; *Gardner* v. *Marshall*, 14 Sim. 575; *Koeber* v. *Sturgis*, 22 Beav. 589; *Re Kincaid*, 1 Drew. 326; *Watson* v. *Marshall*, 17 Beav. 363; *Ward* v. *Yates*, 1 Dr. & Sm. 80; *Dunkley* v. *Dunkley*, 2 De G. M. & G. 390; *Carter* v. *Taggart*, 5 De G. & Sm. 49; *Duncombe* v. *Greenacre*, 28 Beav. 472; *Gent* v. *Harris*, 10 Hare, 383; *Re Welchman*, 1 Giff. 31; *Re Tutin's Trust*, W. N. 1869, p. 141; *Nicholson* v. *Carline*, 22 W. R. 819; *Re Cordwell's Estate*, 20 L. R. Eq. 644; [*Roberts* v. *Cooper*, (1891) 2 Ch. C. A. 335; and see *Taunton* v. *Morris*, 8 Ch. D. 453; 11 Ch. Div. 779;] *Bonner* v. *Bonner*, 17 Beav. 86. In one case where the wife had been abandoned by her husband for upwards of 20 years, the Court ordered the corpus of the fund to be paid to the wife as a *feme sole*; *Re Pope's Trust*, W. N. 1873, p. 79.

(*h*) *Re Suggitt's Trust*, 3 L. R. Ch. App. 215.

(*i*) *Gilchrist* v. *Cator*, 1 De G. & Sm. 188; *Barrow* v. *Barrow*, 5 De G. M. & G. 782; [*Boxall* v. *Boxall*, 27 Ch. D. 220; *Reid* v. *Reid*, 33 Ch. D. 220.]

(*j*) *Bagshaw* v. *Winter*, 5 De G. & Sm. 467; *Ex parte Pugh*, 1 Drew. 202.

(*k*) *Scott* v. *Spashett*, 3 Mac. & G. 599; *Spicer* v. *Spicer*, 24 Beav. 365; *Spirett* v. *Willows*, 12 Jur. N. S. 538.

by the husband in respect of the wife's fortune (*a*); [and the mere fact that the wife and children are in necessitous circumstances, and dependent on her for support, will not alone be sufficient to induce the Court to direct a settlement of more than a half (*b*).] Where the wife has been amply provided for, and the husband has not misconducted himself, the Court has dismissed the wife's bill with costs, and left the husband at liberty to follow up his marital rights (*c*).

[7. As regards the form of the settlement, the general rule is that the rights of the husband will not be interfered with further than is necessary to give effect to the equity in favour of the wife and children. Thus, the ultimate limitation, in default of children of the wife by any coverture will, in general, be for the husband whether he survives or not (*d*). But in special circumstances, as where the property is of small amount, the Court has not unfrequently secured to the wife the capital as well as the income (*e*). In a case where the wife, upon being examined, expressed a wish that part of the fund to which she was entitled should be retained in Court, and the income paid to her, with liberty for her to apply for payment of the capital at a future period, if she desired it, the Court made the order, settling the fund upon her for life, with remainder to her children, with liberty for her to apply to the Judge at chambers for a transfer of all or any part of the capital to her, by way of revocation of the settlement (*f*). Where the wife and children were in necessitous circumstances, and supported by her, and the husband had received a large proportion of the fund, which was of small amount, the Court ordered £20 a year out of *income and capital* to be paid to the wife during her life for her separate use, and after her death the remainder to be paid to her children at twenty-one, and if

[Form of settlement.]

[Part of the fund retained in Court with liberty to apply.]

(*a*) *Gardner* v. *Marshall*, 14 Sim. 575; *Vaughan* v. *Buck*, 1 Sim. N. S. 287.

[(*b*) *Roberts* v. *Cooper*, (1891) 2 Ch. (C. A.) 335; or, *semble*, of any portion of the fund, under special circumstances, see p. 348.]

(*c*) *Giacometti* v. *Prodgers*, 14 L. R. Eq. 253; 8 L. R. Ch. App. 338.

[(*d*) *Croxton* v. *May*, 9 Eq. 404; *Walsh* v. *Wason*, 8 Ch. 483; *Re Robinson's Settled Estates*, 12 Ch. D. 188; *Roberts* v. *Cooper*, (1891) 2 Ch. (C. A.) 335, 348.] For the details of the proper settlement, see *Spirett* v. *Willows*, 4 L. R. Ch. App. 407; [*Cogan* v. *Duffield*, 2 Ch. Div. 44; *Re Gowan*, 17 Ch. D. 778; and as to giving the wife a power of appointment among the children, see *Oliver* v. *Oliver*, 10 Ch. D. 765; which case, however, was disapproved of in *Re Gowan*; cf. *Re Parrott*, 33 Ch. Div. 274.]

[(*e*) *Boxall* v. *Boxall*, 27 Ch. D. 220, 224; *Roberts* v. *Cooper*, *ubi supra*.]

[(*f*) *Re Craddock's Trust*, W. N. 1875, p. 187; see *Boxall* v. *Boxall*, 27 Ch. D. 220, 225.]

there should be none then to the representatives of the assignee of the fund (*a*).]

How far life interest of wife is subject to equity to a settlement.

8. Upon principle it would seem that the wife's equity to a settlement ought *in all cases* to be the same, whether it be claimed against the husband or his trustee in bankruptcy or his assignee for value. There is, however, an exception where the subject-matter against which the equity is asserted is a *life interest* of the wife. In this case, so long as the husband maintains the wife, he is entitled to receive the income of her life estate, and there can be no equity to a settlement (*b*). If, however, he deserts her, or is divorced by reason of his misconduct, the Court will not allow him to receive the income without securing at least a portion of it for the maintenance of the wife (*c*); and *pari ratione* where the husband becomes bankrupt, and the wife is left without the means of subsistence, the same equity will be enforced against the trustee in bankruptcy (*d*). But where the husband assigns the income for value while duly discharging the marital obligation of maintenance, and *subsequently* deserts his wife, the wife is held to have no equity against the particular assignee for value, for the very object of the husband in making the alienation may have been to find the means for better providing for his wife, and the purchaser cannot be involved in such an inquiry (*e*).

Right by survivorship.

9. It must be remembered that the wife's *equity to a settlement* and her *right by survivorship* are two entirely distinct things. The former does not apply where the fund is *reversionary* (*f*), but arises only when the fund is ready for *reduction into possession*, and may be waived by the wife as before stated; the latter the wife cannot, by any act during coverture, deprive herself of, except so far as the provisions of Malins' Act (*g*) may enable her so to do. Occasionally resort has been had to

[(*a*) *Roberts* v. *Cooper*, 1891, 2 Ch. (C. A.) 335, 348.]

(*b*) *Bullock* v. *Menzies*, 4 Ves. 798; *Re Duffy's Trust*, 28 Beav. 386, and cases there cited. [But see the observations in *Taunton* v. *Morris*, 8 Ch. D. 453; 11 Ch. Div. 779.]

(*c*) *Barrow* v. *Barrow*, 5 De G. M. & G. 782; *Tidd* v. *Lister*, 3 De G. M. & G. 870.

(*d*) *Vaughan* v. *Buck*, 1 Sim. N. S. 384; *Squires* v. *Ashford*, 23 Beav. 132; *Barnes* v. *Robinson*, 1 N. R. 257. [See *Taunton* v. *Morris*, 8 Ch. D. 453, affirmed 11 Ch. Div. 779, where the Court in the case of an insolvent debtor who contributed nothing to the support of his wife, gave the *whole income* to the wife to the exclusion of the provisional assignee.]

(*e*) *Tidd* v. *Lister*, 10 Hare, 140; 3 De G. M. & G. 857; *Re Duffy's Trust*, 28 Beav. 386; [and see *Taunton* v. *Morris*, 11 Ch. D. 779.]

(*f*) *Osborn* v. *Morgan*, 9 Hare, 432.

(*g*) 20 & 21 Vict. c. 57; see p. 21, *supra*.

certain ingenious devices for the purpose of bringing the wife's reversionary interest into possession. Thus where a fund has been settled on A. for life, and after his decease on B. a married woman absolutely, the husband of B., in order to reduce the wife's *chose en action* into possession, has purchased the prior life interest, and had it assigned to himself or his wife. But this scheme will not bear examination, for if the assignment be made to the *husband*, then, as the life interest was possessed by him in his *own right*, and the reversionary interest in *right of his wife*, the two will not coalesce; and if the assignment was made to the wife so that the husband would have both interests in the same right, then the *feme* on the coverture ceasing might disclaim the accession of interest and so prevent the intended merger. The late Vice-Chancellor of England held in several cases that the *chose en action* could thus be reduced into possession (*a*), and on one occasion Lord Cottenham, on an application to take the wife's consent, seems to have assented to the doctrine (*b*). But in a case before Lord Langdale, M.R., the question was considered to involve too much difficulty to be disposed of on petition (*c*); and the case of *Whittle* v. *Henning* (*d*) before Lord Cottenham, and other cases (*e*), have since decided that a reversionary *chose en action* of the wife cannot, by means of this machinery, be reduced into possession so as to be made disposable. However, if a fund be settled on A. for life, and the remainder be appointed to the *feme covert* for her *separate use*, and her power of anticipation is not restrained, the tenant for life and *feme covert* in remainder can deal with the fund (*f*).

[10. If the husband assign the reversionary interest of his wife in a *chose en action*, and survive her, and the interest be not reduced into possession during her life, administration to the wife's estate must be taken out before the assignee of the husband can compel payment of the interest assigned (*g*).] [Administration by surviving husband to wife's estate.]

10. As regards the wife's equitable *chattels real*, the effect of marriage being, as a general rule, the same upon equitable as Equitable chattels real of *feme covert*.

(*a*) *Creed* v. *Perry*, 14 Sim. 592; *Bean* v. *Sykes*, Ib. 593; *Lachton* v. *Adams*, Ib. 594; *Hall* v. *Hujonin*, Ib. 595; *Bishop* v. *Colebrook*, 16 Sim. 39; *Wilson* v. *Oldham*, 5th March, 1841, MS.; see the opinion of the late Mr. Jacob in 3rd edit. p. 371.

(*b*) *Lachton* v. *Adams*, 14 Sim. 594.

(*c*) *Story* v. *Tonge*, 7 Beav. 91; and see *Box* v. *Box*, 2 Conn. & Laws. 605.

(*d*) 2 Ph. 731.

(*e*) *Box* v. *Jackson*, 6 Ir. Eq. Rep. 174; *Williams* v. *Mayne*, 1 Ir. R. Eq. 519; [*Re Butler's Trusts*, 3 Ir. R. Eq. 138; 3 L. R. Ir. 89.]

(*f*) See *Dudley* v. *Tanner*, W. N. 1873, p. 75.

[(*g*) *Re Butler's Trusts*, 3 L. R. Ir. 89.]

upon legal interests, it follows, that as the husband may assign the *chattels real* of the wife at *law*, so he may assign her *trust* of a term in equity (*a*), though it be [reversionary (*b*) or] merely a contingent interest (*c*); and without the concurrence of either the wife or the trustee, and without consideration. And this doctrine is not interfered with by the case of *Purdew* v. *Jackson* (*d*); for a trust of chattels real is not a *chose en action*, but a present interest—an estate in possession (*e*). If, however, the equitable interest in the chattel be such that it could not by possibility vest in the wife during the coverture, then, inasmuch as the legal interest of a similar kind could not be disposed of by the husband, he cannot dispose of the equitable interest (*f*). If a husband mortgage his wife's chattel real, and the wife survives, she has the equity of redemption, though the mortgage deed recited falsely that the husband was absolutely entitled (*g*). If the equitable interest in the chattel be settled to the *separate use* of the *feme covert*, and she does not dispose of it, it survives to the husband (*h*).

Whether wife entitled to settlement out of equitable chattels real.

11. Whether the doctrine regarding the wife's *equity to a settlement* extends to the *equitable chattels real* of the wife, has been much doubted. It was held in one case, by Vice-Chancellor Wigram, as a result of the principles laid down by Lord Cottenham, in *Sturgis* v. *Champneys* (*i*), that even where the husband could dispose of the equitable chattel, the wife was entitled to a provision out of the equitable interest, as against the assignee of the husband for valuable consideration (*j*). The opinion of the Vice-Chancellor himself was the other way, but he considered himself bound by the authority of the Chancellor in the case referred to.

Result of decisions.

13. The result of these decisions is remarkable. Thus, a mort-

(*a*) *Roupe* v. *Atkinson*, Bunb. 162; *Mitford* v. *Mitford*, 9 Ves. 99, *per* Sir W. Grant; *Re Carr's Trusts*, 12 L. R. Eq. 609; *Packer* v. *Wyndham*, Pr. Ch. 418, 419, *per* Lord Cowper; *Franco* v. *Franco*, 4 Ves. *528, *per* Lord Alvanley; *Bullock* v. *Knight*, 1 Ch. Ca. 266, *per* Lord Nottingham; *Sanders* v. *Page*, 3 Ch. Rep. 223, *per Cur.*; *Macaulay* v. *Philips*, 4 Ves. 19, *per* Lord Alvanley; *Wikes' Case*, Lane, 54, *per* Barons Snig and Altham; *S. C.* Roll. Ab. 343; *Jewson* v. *Moulson*, 2 Atk. 421, *per* Lord Hardwicke; *Incledon* v. *Northcote*, 3 Atk. 435, *per eundem*; *Clark* v. *Burgh*, 2 Coll. 221; [*Re Bellamy*, 25 Ch. D. 620.]

[(*b*) *Re Bellamy*, 25 Ch. D. 620.]

(*c*) *Donne* v. *Hart*, 2 R. & M. 360.

(*d*) 1 Russ. 1.

(*e*) See *Mitford* v. *Mitford*, 9 Ves. 98, 99; *Holland's case*, Style, 21; *Burgess* v. *Wheate*, 1 Eden, 223, 224; *Box* v. *Jackson*, 1 Drury, 84.

(*f*) *Duberley* v. *Day*, 16 Beav. 33.

(*g*) *M'Cullagh* v. *Littledale*, 9 Ir. R. Eq. 465.

(*h*) *Archer* v. *Lavender*, 9 Ir. R. Eq. 220.

(*i*) 5 M. & Cr. 77; and see *Wortham* v. *Pemberton*, 1 De G. & Sm. 644.

(*j*) *Hanson* v. *Keating*, 4 Hare, 1.

gage by the husband of the wife's *legal* term bars her of all right, except in the equity of redemption (*a*); while under a similar mortgage of the *equitable* term, she would have an equity to a settlement as against the mortgagee. Again, the *legal* reversionary term of the wife, provided it be such as may by possibility vest during the coverture, is capable of absolute assignment by the husband; and the wife has no right by survivorship, such as exists in the case of her *chose en action*, while as respects the assignment of a similar *equitable* interest there would be an equity to a settlement in the wife. The difficulties of applying the doctrine of the *wife's equity* to the case of chattels real, must, undoubtedly, prove considerable; but it can be hardly expected that the steps, of which Lord Cottenham in *Sturgis* v. *Champneys* took the first, will be retraced.

Effect of getting in legal estate of wife's equitable term.

14. It is conceived that if the husband, or the assignee from him of the wife's *equitable term*, can procure an assignment of the *legal estate* from the trustee, the wife's equity to a settlement is at an end; but the point is not touched by authority.

Arrears of income.

15. The equitable interest of the wife in a *chattel real* is not a *chose en action*, but an estate, and therefore, although, according to the principles laid down in *Sturgis* v. *Champneys*, the wife can claim an equity to a settlement out of such estate *prospectively*, yet until such claim is established, the right of the husband prevails. All arrears of income therefore which may have occurred before the claim, whether from an equitable estate in fee or for life, or a term of years, will be exempt from the equity to a settlement, and belong to the husband or his assignee (*b*).

Estate by *elegit* in trust for a *feme covert*.

16. If a judgment be acknowledged to A. in trust for a *feme sole*, and she marries, and the conusee of the judgment sues out an *elegit*, and possession of the lands is delivered to him in trust for the wife, the husband may assign the *extended interest*, as he might have assigned the trust of a term certain (*c*); and the law is the same where the *feme* is put in possession of lands by a decree of a Court of equity until a certain sum is raised by way of *equitable elegit* (*d*). But a *mere judgment*, recovered by the wife before the coverture, is clearly a *chose en action*, and as such

(*a*) *Hill* v. *Edmonds*, 5 De G. & Sm. 603; *Clark* v. *Cook*, 3 De G. & Sm. 333.

(*b*) *Re Carr's Trust*, 12 L. R. Eq. 609.

(*c*) *Lord Carteret* v. *Paschal*, 3 P. W. 201, *per* Lord King. But this was before the case of *Purdew* v. *Jackson*, 1 Russ. 1.

(*d*) *S. C.* Ib. 179.

cannot be disposed of by the husband as against the wife surviving (*a*).

Mortgage term in trust for a *feme covert.*

17. And it has been held that a *mortgage term* in trust for the wife (*b*), or a *term in trustees for raising a portion* for her (*c*), may be assigned by the husband, so as to carry the beneficial interest. But in these cases a doubt arises whether the debt or portion may not be held to be the principal thing; and as the doctrine that a *chose en action* of the wife is not disposable by the husband is of far more recent date than the decisions referred to, the question cannot be considered as settled. The cases in which it has been held under the order and disposition clause in bankruptcy, that the land draws with it the debt, so as to exclude the operation of the clause, tend to support the old authorities (*d*), but they are hardly conclusive, and a modern decision of Sir John Romilly, M.R., which was affirmed on appeal, has shaken the authority of the older cases (*e*).

Wife's equitable interest in lands of freehold or inheritance.

18. The case of the wife's equitable estate in lands of *freehold* or *inheritance*, presents in the main the same general similarity to the case of her *legal* estate in like lands, as has been noticed in respect of chattels real. Thus the husband without the wife can, in the case of the equitable as in that of the legal interest, convey an estate for the *joint lives* of himself and his wife (*f*), or for his *own life after issue born.* So he and his wife conjointly can, by deed acknowledged by the latter under the Fines and Recoveries Act, dispose of the equitable and of the legal interest; and can bar an equitable entail as they might a legal entail, by deed inrolled in Chancery; [and can dispose of an equitable reversionary interest in freehold property, which has been purchased by trustees in breach of trust and is still personal estate in equity (*g*).]

19. But according to Lord Cottenham's decision in *Sturgis* v. *Champneys* (*h*), the acts of the *husband alone* cannot affect the wife's equity to a settlement, where the interest of the wife can only be recovered through the medium of a *Court of equity* (*i*).

(*a*) *Fitzgerald* v. *Fitzgerald*, 8 C. B. 611.

(*b*) *Bates* v. *Dandy*, 2 Atk. 207; *Packer* v. *Wyndham*, Pr. Ch. 412, see 418.

(*c*) *Walter* v. *Saunders*, 1 Eq. Ca. Ab. 58; *Incledon* v. *Northcote*, 3 Atk. 430, see 435; and see *Mitford* v. *Mitford*, 9 Ves. 99; *Hore* v. *Becher*, 12 Sim. 465.

(*d*) *Jones* v. *Gibbons*, 9 Ves. 407; and see *Rees* v. *Keith*, 11 Sim. 388; [*Re Richards*, 45 Ch. D. 589, 596.]

(*e*) *Duncombe* v. *Greenacre*, 28 Beav. 472; 2 De G. F. & J. 509.

(*f*) As to the legal estate, see *Robinson* v. *Norris*, 11 Q. B. 916.

[(*g*) *Re Durrant and Stoner*, 18 Ch. Div. 106.]

(*h*) 5 M. & Cr. 97.

(*i*) At law a husband during the coverture and before issue born has

The propriety of the decision in this case was questioned by the late Lord Westbury (*a*). But after so long a lapse of time it is not likely that the principle of it will be shaken. It has accordingly been held that as regards an equitable *freehold*, that is, an estate to which a *feme covert* is entitled in equity *for her own life*, she may proceed actively, and institute a suit against the trustee of her bankrupt husband for a settlement of it upon herself (*b*). But she has no such equity against a *purchaser, for value*, from her husband, who at the time was *supporting her* (*c*). In short, the principles which cover the wife's equitable interest for *life in realty*, are the same as those which regulate the *like interest* of the wife in *personalty* (*d*).

[It has been suggested in a recent case (*e*) that since the passing of the Judicature Act, 1873, it is immaterial whether the estate of the wife is legal or equitable, and that the equity to a settlement can be enforced against the husband even although his estate is legal; but this conclusion was not necessary for the decision of the case, and seems to be open to grave doubt.]

Equitable estates in fee simple or fee tail.

20. As to the case of *an equitable fee simple* or *fee tail* to which a *feme covert* is entitled, a distinction must be borne in mind between the husband's powers over a wife's *personal*, and over her *real* estate. The husband can get possession of the absolute interest of the former and make away with it; and therefore the Court settles the corpus or a competent part of it on the wife and her children; but as to realty, the husband has no power over the corpus, but can dispose only of the interest during the joint lives, or if there be issue, for his own life; and as this limited interest is all that the husband or those claiming under him can deal with, and the husband has the *curtesy* in his *own right*, it is only the interest during the *joint lives* that requires to be settled. As to any ulterior interest, the Court has properly nothing to do with it. If the wife be tenant in fee,—why should the heir be disinherited in favour of the children? and if the

the estate for the joint lives of himself and his wife, but in her right only; and even after issue born he has no estate in his own right, for curtesy does not commence until the death of the wife, *Jones* v. *Davies*, 8 Jur. N. S. 592. Until the Act 8 & 9 Vict. c. 106, s. 6, a husband could not during the coverture have passed the legal estate for his own life, except by a conveyance which carried the fee tortiously, as by a feoffment; Co. Lit. 30, a.

(*a*) See *Gleaves* v. *Paine*, 1 De G. J. & S. 87.

(*b*) *Barnes* v. *Robinson*, 1 New Rep. 257; *Sturgis* v. *Champneys*, 5 M. & Cr. 97; [*Fowke* v. *Draycott*, 29 Ch. D. 996.]

(*c*) *Tidd* v. *Lister*, 10 Hare, 140; 3 De G. M. & G. 857; *Stanton* v. *Hall*, 2 R. & M. 175.

(*d*) See *ante*, p. 840.

[(*e*) *Fowke* v. *Draycott*, 29 Ch. D. 996.]

wife be tenant in tail,—why should the issue in tail and remainderman be defeated? "In the case of the wife's real estate," observed V.C. Wood, "she wants no protection out of the *corpus* of that estate, for she cannot be deprived of it without her own concurrence, which the law requires to be given in such a manner as will protect her from her husband" (*a*). Where, therefore, the wife is tenant in fee or in tail in equity, the claim of the wife stands on the same footing as where she is tenant for life in equity, and has been so dealt with accordingly (*b*).

[Real estate held upon trust for sale.]

[21. Where real estate is held upon trust for sale and to pay the proceeds to a married woman, the husband can, after the land has actually been sold, give a good discharge for the purchase-money, but until the sale the husband cannot by any act of his bar the wife's right (*c*).

[Fund in Court representing realty.]

22. Where a fund in Court represents realty to which a married woman is absolutely entitled, she may elect to take it as personalty, and, upon her being separately examined and consenting, it may be paid out to her husband without any deed being executed (*d*).

[Alimony.]

23. A married woman, to whom permanent alimony has been allowed on a judicial separation from her husband, cannot alienate it, as it is not in the nature of property but is simply an allowance to provide for the daily maintenance of the wife and is by its very nature inalienable (*e*).]

Existence of an outstanding term.

24. The mere circumstance of the existence of a *jointure-term*, preceding the estate of a *feme covert*, tenant in tail in possession subject to the term, sufficiently renders the wife's estate equitable to entitle her to a settlement during the joint lives in a suit instituted by her (*f*). And, indeed, wherever a plaintiff is obliged to come into a *Court of equity* he must submit to do

(*a*) *Durham* v. *Crackles*, 8 Jur. N. S. 1175.

(*b*) *Wortham* v. *Pemberton*, 1 De G. & Sm. 644; *Durham* v. *Crackles*, 8 Jur. N. S. 1174. L. J. Knight Bruce on one occasion observed, "We do not touch the husband's possible tenancy by the curtesy in the real estate of which we direct a settlement, and, so far as I am concerned, for this reason, that in my opinion we have not jurisdiction to order any settlement which shall interfere with it;" *Smith* v. *Matthews*, 3 De G. F. & J. 153. From which it might be inferred that a settlement subject to the curtesy might extend beyond the joint lives; but if the Court under special circumstances, has ever directed a settlement of the equitable fee on the wife and children, the settlement as regards the children must be viewed as the voluntary settlement of the wife, and not the judicial act of the Court. See *Gleaves* v. *Paine*, 1 De G. J. & S. 87; *Smith* v. *Matthews*, 3 De G. F. & J. 139.

[(*c*) *Franks* v. *Bollans*, 3 L. R. Ch. App. 717.]

[(*d*) *Standering* v. *Hall*, 11 Ch. D. 652; *Re Robin's Estate*, 27 W. R. 705.]

[(*e*) *Re Robinson*, 27 Ch. Div. 160.]

(*f*) *Wortham* v. *Pemberton*, 1 De G. & Sm. 644.

equity, though the estate of the wife is *legal*, as if a husband make an equitable mortgage of land of which his wife is seised at law, the mortgagee cannot obtain a legal mortgage or enforce his security without providing for the wife, if deserted or not maintained at the time of the equitable mortgage (*a*).

Getting in the legal estate.

25. The effect of the husband, or the *husband's assignee*, procuring a conveyance of the *legal estate* so as to clothe his equitable interest therewith, must be the same as in the case of an equitable term of years before adverted to (*b*).

[(B) Of the modifications introduced by the Married Women's Property Act, 1882 (*c*).

[Married Women's Property Act, 1882.]

1. By sect. 1, sub-s. 1 of the Act it is enacted that "a married woman shall, *in accordance with the provisions of this Act*, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property, as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee." This is a general section, "pointing out the provisions the details of which are to be worked out in the subsequent sections" (*d*); it must therefore be construed together with sections 2 and 5 (*e*).

By sect. 2, "every woman who marries *after* the commencement of this Act" (1st January, 1883), "shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

And by sect. 5, "every woman married *before* the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her *title* to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall *accrue* after the commencement of this Act, including any wages, earnings, money and property, so gained or acquired by her as aforesaid (*f*)."

(*a*) *Durham* v. *Crackles*, 8 Jur. N. S. 1174.

(*b*) See *ante*, p. 843.

[(*c*) 45 & 46 Vict. c. 75.]

[(*d*) *Re Cuno*, 43 Ch. Div. 12, 15, *per* Cotton, L.J.]

[(*e*) *S. C.*, and see *Re Drummond and Davie*, (1891) 1 Ch. 524, 534.]

[(*f*) As to the protection extended to the trade or business from which

[General effect of Act.]

2. The result of this enactment is that as to women married since the 31st of December, 1882, and also as to property accruing after that date to women married before that date, the rights of the husband, during the life of the wife, are entirely excluded, and the wife is enabled to deal with, bind and dispose of her property, whether real or personal, in the same manner as if she were a *feme sole*. The cases relating to the rights of the husband over the wife's property during the coverture, and to the equity to a settlement of the wife, and to the wife's right by survivorship have, therefore, no bearing, where the marriage has taken place or the property has been acquired since the 31st of December, 1882.

[Property falling into possession after the commencement of the Act.]

3. It will be observed that the 5th sect. relates to the *accruer* of the married woman's *title*, which must, in order to bring the case within the section, take place after the commencement of the Act, and the section does not deal with the case of a change in the title such as occurs when a contingent interest becomes vested or a reversionary interest falls into possession. A contrary view was indeed for some time entertained, but the question has now been set at rest by the decision of the Court of Appeal (*a*).

[Mere expectancy.]

A mere *spes successionis* to property as one of a class of possible next of kin is not a "contingent *title*" within the section, and therefore where property was given upon trust for such a class, and the class became ascertainable subsequently to the passing of the Act, a married woman who was a member of the class was held entitled to her share for her separate use under the section (*b*).

[Damages recovered in action by husband and wife.]

Damages awarded to the wife in an action by her and her husband in respect of personal injury to her, even assuming that they are not her separate property under sec. 1, sub-s. 2, are clearly so under this section (*c*).

[Rights of husband in property not disposed of by wife.]

4. Whether the rights of the husband after the wife's death in such parts of her property as have not been disposed of by her are affected by the Act, was a question upon which there

the earnings arise, see *Ashworth* v. *Outram*, 5 Ch. D. 923, *post* 898, note (*a*).]

[(*a*) *Reid* v. *Reid*, 31 Ch. Div. 402; overruling *Baynton* v. *Collins*, 27 Ch. D. 604; *Re Tucker*, 33 W. R. 932, 52 L. T. N.S. 23, 54 L. J. N.S. Ch. 874; *Re Adames' Trusts*, 54 L. J. N.S. Ch. 878, 33 W. R. 834; *Re Hobson's Settlement*, 55 L. J. N.S. Ch. 300; and see *Re Thompson and Curzon*, 29 Ch. D. 177; *Re Hughes's Trusts*, W. N. 1885, p. 62; *Re Dixon*, 54 L. J. N.S. Ch. 964; *Beckett* v. *Parker*, 19 Q. B. D. 7.]

[(*b*) *Re Parsons*, 45 Ch. D. 51, dissenting from *Re Beaupre's Trusts*, 21 L. R. Ir. 397.]

[(*c*) *Beasley* v. *Rooney*, (1891) 1 Q. B. 509; and see *post*, p. 858.]

was some difference of opinion founded on the use of the words "feme sole" in the 1st sect., but it has now been decided (*a*) that as the Act simply confers on married women the capacity to acquire, hold, and dispose by will or otherwise of property as if they were *femes sole*, and does not purport to deal with the devolution of property undisposed of, the rights in a married woman's property after her death, so far as such property is not disposed of or bound by her in her lifetime, are unaffected by the Act (*b*). The husband therefore will be entitled, as to personal chattels and cash by the marital right, and as to *choses en action* on taking out administration to her estate under 29 Car. 2. c. 3, s. 2, to retain her undisposed of personal estate to the exclusion of her next of kin. And the mere fact that the married woman has made a will appointing executors, to whom probate in general form has been granted under the new Probate Rules of March, 1887, will not affect the right of the husband (*c*), as although such probate enables the executor to get in her assets (whether she had power to dispose of them by will or not) it does not affect the beneficial title (*d*).

[Extent of application of Act.]

5. The Act has no application where the marriage took place and the property was acquired, or the title to it accrued, before the commencement of the Act, 1st January, 1883, and in such cases the old law applies (*e*).

Where a testator dies after the Act, but his will was executed before the passing of the Act, the will must be construed according to the law in force when it was executed, but the interest of a married woman under it will be governed by the Act. Thus where a residuary estate was given by such a will to A. and B. and C., his wife, under which gift before the Act A. would have taken one moiety, and B. and C. the other moiety as if they had been one person, it was held by the Court of Appeal, reversing the decision of Chitty, J., that A. was still entitled to one moiety, but the other moiety belonged to B. and C. as joint tenants as if she were unmarried. The Court of Appeal expressed no opinion as to what share A. would have taken if the will had been executed after the passing of the Act (*f*), but it has now been decided that the previous law has not been altered in this

[(*a*) In accordance with the opinion expressed in the last edition of this work, p. 752.]

[(*b*) *Re Lambert's Estate*, 39 Ch. D. 627; and see *Surman* v. *Wharton*, (1891) 1 Q. B. 491, 493.]

[(*c*) *Re Lambert's Estate*, 39 Ch. D. 627.]

[(*d*) *Smart* v. *Tranter*, 43 Ch. Div. 587.]

[(*e*) *Re Harris' Settled Estates*, 28 Ch. D. 171.]

[(*f*) *Re March*, 27 Ch. Div. 166; reversing *S. C.* 24 Ch. D. 222.]

[Status of married woman not altered as between her and grantor.]

respect (*a*); and it has been observed that "the capacity of a married woman to take property is not altered" by the Act "as between her and the grantor. That was always complete. Whatever property, real or personal, was devised, bequeathed, conveyed, or assigned to a married woman, as between her and the grantor, passed absolutely. The Act only enlarges her capacity to take such property as her separate property" (*b*).

[Will of married woman does not pass property acquired after the death of her husband.]

6. Section 1 of the recent Act does not confer a testamentary power of disposition in respect of any property which does not fall within sections 2 and 5 (*c*) already noticed (*d*), and as those sections refer only to *separate property*, it has been held that the will of a married woman will not be effectual to pass property acquired by her after the determination of the coverture (*e*), so that the doctrine of *Willock* v. *Noble* (*f*), that the will of a *feme covert* requires republication in order to render it effectual to dispose of such property, is still applicable notwithstanding the provisions of the Act (*g*).]

Secondly. Of the separate use.

Trusts for separate use of a *feme covert.*

1. [Independently of the recent enactments affecting the property of married women] the principle at *common law* is that, as the husband undertakes the debts and liabilities of the wife, he is entitled absolutely or partially, according to the circumstances of the case, to the enjoyment of her property; but in *equity* a *feme* is allowed to contract with the husband before marriage, for the exclusive enjoyment of any specific property (*h*); or a person may make a gift to the wife during the coverture, and shut out the husband's interference by clearly expressing such an intention. Where the separate estate is the result of a special agreement between the parties, the policy of the law can scarcely be said to be transgressed, for the old rule was established for the benefit and protection of the husband, and

[(*a*) *Per* Kay, J.; *Re Jupp*, 39 Ch. D. 148; but whether this case was rightly decided upon the construction of the particular will, *quære*; *Re Dixon*, 42 Ch. D. 306.

[(*b*) *S. C.* per Kay, J., at p. 153.]

[(*c*) *Re Cuno*, 43 Ch. Div. 12.]

[(*d*) See *ante*, p. 847.]

[(*e*) *Re Price*, 28 Ch. D. 709; *Re Taylor*, 57 L. J. Ch. 430; *Re Williams*, 59 L. T. N.S. 310; *Re Smith*, 35 Ch. D. 583, at p. 597; *Re Cuno*, 43 Ch. Div. 12; *Re Smith*, 45 Ch. D. 632.]

[(*f*) L. R. 7 H. L. 580.]

[(*g*) It is observable that in the 2nd sect. the words are "to have and to hold as her separate property and to dispose of *in manner aforesaid*" (that is, as it would seem, by will or otherwise), while in the 5th sect. they are "to have and to hold and to dispose of in manner aforesaid as her separate property," but no distinction can be founded upon this.]

(*h*) See *Parkes* v. *White*, 11 Ves. 228.

unusquisque renuntiare potest juri pro se instituto; but that equity should have allowed a stranger to vest property in the wife independently of the husband during the coverture, appears a more questionable doctrine, though it may be said, that even in that case, there was no violation of the marital rights, for the property never vested in the *feme* herself, and the donor might limit any estate which the law did not refuse to recognize. The Court has also permitted the further anomaly of a restriction upon the *feme's anticipation* (where such an intention has been expressed) of the growing proceeds of the separate estate; but this indulgence appears not a distinct inroad upon the common law incidents of property, but rather an appendage to the separate use for the purpose of more effectually excluding the influence of the husband. If the wife were not debarred from anticipating the proceeds, she might, where the husband was not actuated by proper motives, be induced to divest herself of the property, and place it at the husband's disposal.

Not necessary that there should be an express trustee.

2. At the first introduction of the settlement to the separate use it was doubted, whether, to accomplish the object, the interposition of an *express trustee* was not necessary (*a*), but it was afterwards determined that this precaution might be dispensed with, for, rather than the intention should be disappointed, the husband himself should be construed a trustee for the wife (*b*). But [as to cases not falling within the recent statute] whether a trustee be expressly appointed or not, the intention of excluding the husband must not be left to inference, but must be clearly and unequivocally declared; for, as the husband is bound to maintain the wife, he has *primâ facie* a right to her property (*c*); but, provided the meaning be clear, the Court will execute the intention, though the settlor may not have expressed himself in technical language (*d*).

[Gift by husband to wife.]

[The husband may himself during the coverture give any specific property to the wife for her separate use, without the

(*a*) *Harvey* v. *Harvey*, 1 P. W. 125; *Burton* v. *Pierpont*, 2 P. W. 78.

(*b*) *Bennet* v. *Davis*, 2 P. W. 316; *Parker* v. *Brooke*, 9 Ves. 583; *Rolfe* v. *Budder*, Bunb. 187; *Prichard* v. *Ames*, T. & R. 222; *Newlands* v. *Paynter*, 10 Sim. 377; 4 M. & Cr. 408; *Turnley* v. *Kelly*, Wallis's Rep. by Lyne, 311; *Archer* v. *Rooke*, 7 Ir. Eq. Rep. 478.

(*c*) *Ex parte Ray*, Mad. 207, *per* Sir T. Plumer; *Wills* v. *Sayers*, 4 Mad. 409, *per eundem*; *Massey* v. *Parker*, 2 M. & K. 181, *per* Sir C. Pepys; *Kensington* v. *Dolland*, 2 M. & K. 188, *per* Sir J. Leach; *Moore* v. *Morris*, 4 Drew. 37, *per* V. C. Kindersley; [*Fitzgibbon* v. *Pike*, 6 L. R. Ir. 487; and see *Re Sibeth*, 14 Q. B. D. 417.]

(*d*) *Darley* v. *Darley*, 3 Atk. 399, *per* Lord Hardwicke; *Stanton* v. *Hall*, 2 R. & M. 180, *per* Lord Brougham; [and see *Re Peacock's Trusts*, 10 Ch. D. 490.]

intervention of a trustee (*a*); and if a husband permit his wife to carry on a business for her own benefit, independently of him, it becomes her separate property, and the husband becomes so far as is necessary a trustee of everything employed in the business for the wife (*b*).

In the absence of proof of an unequivocal or final intention on the part of a husband to constitute himself a trustee for his wife, the Court will not, after his death, upon her uncorroborated statement, treat the property as belonging to her for her separate use (*c*).

[Allowance to wife of lunatic.]

An allowance made under an order in lunacy to the wife of a lunatic, living apart from her husband, for her separate maintenance, belongs to her for her separate use (*d*).

[Married Women's Property Act, 1882.]

3. Now by the Married Women's Property Act, 1882, a married woman can acquire, hold, and dispose of property as her separate estate, in the same manner as if she were a *feme sole, without the intervention of any trustee* (*e*); and under the 2nd and 5th sections of the Act (*f*) all property acquired by any married woman since the 31st of December, 1882, irrespective of the date of her marriage, and also all property belonging to any woman married since that date, are made her separate estate (*g*).

[Intervention of trustee rendered wholly unnecessary.]

[Application of previous law.]

Notwithstanding the material change thus made in the principle on which the doctrine of the separate use is based, it is conceived that subject to the enlarged rights and liabilities introduced by the Act, many of the principles which regulate the administration of property held for the separate use will apply equally to any property which by virtue of the late Act belongs to a married woman as her separate estate; so that, while the old law has to some extent ceased to be applicable to cases governed by the late Act, it will frequently be necessary

[(*a*) *Lady Cowper's case*, cited in *Graham* v. *Londonderry*, 3 Atk. 393; *Lucas* v. *Lucas*, 1 Atk. 270; *Walter* v. *Hodge*, 2 Sw. 92; *Ex parte Whitehead*, 14 Q. B. Div. 419.]

[(*b*) *Ashworth* v. *Outram*, 5 Ch. Div. 923; *Ex parte Whitehead*, 14 Q. B. Div. 419; and see *Slanning* v. *Style*, 3 P. W. 334; *Calmady* v. *Calmady*, cited in *Slanning* v. *Style*, Ib. 338. As to gifts by strangers to the separate use of a married woman before the recent Act, and the distinction between such gifts and paraphernalia of the wife, see Macq., Husb. and Wife, 3rd ed., p. 115.]

[(*c*) *Re Whittaker*, 21 Ch. D. 657; *Parker* v. *Lechmere*, 12 Ch. D. 256.]

[(*d*) *In the Goods of Tharp*, 3 P. Div. 76.]

[(*e*) 45 & 46 Vict. c. 75, s. 1.]

[(*f*) See *ante*, p. 847.]

[(*g*) However, the general power of disposition thus conferred is modified by the provision of sect. 19, excepting settlements from the operation of the Act. See *post*, p. 886.]

to refer to it even in connection with property bound by that Act. Moreover, as to property acquired before the 1st January, 1883, by women married before that date, the law remains unaffected by the Act.

What words will create a trust for separate use.

4. In cases not falling within the recent Act], the marital claims are defeated if the gift be to the wife for her "separate use" (*a*), or "sole and separate use" (*b*), or "solely for her own use" (*c*) (which is construed as separate use), or "solely and entirely for her own use and benefit" (*d*), [or "for her sole use and disposal" (*e*), or "for her sole and absolute use and disposal" (*f*),] or for "her livelihood" (*g*), or "that she may receive and enjoy the profits" (*h*), or "to be at her disposal" (*i*), or "to be by her laid out in what she shall think fit" (*j*), or "for her own use, independent of her husband" (*k*), or "not subject to his control" (*l*), or "for her own use and benefit, independent of any *other person*" (*m*), or "to receive the rents from the tenants while she lives, whether married or single," with a direction that no sale or mortgage should be made during her life (*n*): for such expressions as these are considered incon-

(*a*) *Massy* v. *Rowen*, 4 L. R. H. L. 294, 299, and 300, *per Cur.*, where it was observed by Lords Colonsay and Cairns, that the word "separate" had acquired a "technical meaning," and that the word "sole" had not.

(*b*) *Parker* v. *Brooke*, 9 Ves. 583; *Archer* v. *Rooke*, 7 Ir. Eq. Rep. 478.

(*c*) *Re Tarsey's Trust*, 1 L. R. Eq. 561; *Adamson* v. *Armitage*, 19 Ves. 416; G. Coop. 283; *Ex parte Ray*, 1 Mad. 199; *Ex parte Killick*, 3 Mont. D. & De G. 480; *Davis* v. *Prout*, 7 Beav. 288; *Arthur* v. *Arthur*, 11 Ir. Eq. Rep. 511; *Lindsell* v. *Thacker*, 12 Sim. 178 (the marginal note in the last case is altogether erroneous); and see *Massey* v. *Parker*, 2 M. & K. 181; —— v. *Lyne*, Younge, 562; but as to the latter case, see *Tullett* v. *Armstrong*, 4 M. & Cr. 403; and see *Gilbert* v. *Lewis*, 1 De G. J. & S. 39; *Lewis* v. *Mathews*, 2 L. R. Eq. 177. The word "sole" by itself is a word of equivocal and ambiguous meaning, and takes its colour from the context. It has been held, in Ireland, in a recent case, affirmed on appeal by the House of Lords, not to create *per se* a separate use in a gift to a legatee, where at the date of the will the legatee was a *feme sole*; *Massy* v. *Hayes*, 1 Ir. Rep. Eq. 110. *S. C. nom. Massy* v. *Rowen*, 4 L. R. H. L. 288. But otherwise where the legatee was known to the testator to be a married woman; *Hartford* v. *Power*, 2 Ir. Rep. Eq. 204; [*Farrow* v. *Smith*, W. N. 1877, p. 21; *Re Amies' Estate*, W. N. 1880, p. 61.]

(*d*) *Inglefield* v. *Coghlan*, 2 Coll. 247.

[(*e*) *Bland* v. *Dawes*, 17 Ch. D. 794.]

[(*f*) *Baker* v. *Ker*, 11 L. R. Ir. 3.]

(*g*) *Darley* v. *Darley*, 3 Atk. 399, *per* Lord Hardwicke; and see *Cape* v. *Cape*, 2 Y. & C. 543; *Ex parte Ray*, 1 Mad. 208; but see *Lee* v. *Prieaux*, 3 B. C. C. 383; *Wardle* v. *Claxton*, 9 Sim. 524, *id. qu.*

(*h*) *Tyrrell* v. *Hope*, 2 Atk. 558. But this was in marriage articles, and under special circumstances, and must not be taken to establish any general rule.

(*i*) *Prichard* v. *Ames*, T. & R. 222; *Kirk* v. *Paulin*, 7 Vin. 96. *Secus* probably if these words had occurred in a gift to a *feme sole*.

(*j*) *Atcherley* v. *Vernon*, 10 Mod. 531.

(*k*) *Wagstaff* v. *Smith*, 9 Ves. 520.

(*l*) *Bain* v. *Lescher*, 11 Sim. 397.

(*m*) *Margetts* v. *Barringer*, 7 Sim. 482.

(*n*) *Goulder* v. *Camm*, 6 Jur. N. S. 113; 1 De G. F. & J. 146.

sistent with the notion of any interference on the part of the husband. So, if the gift be accompanied with such expressions as "her receipt to be a sufficient discharge" (*a*), or "to be delivered to her on demand" (*b*); for in these cases the check put upon the husband's legal right to receive could only have been with the intention of giving the wife a particular benefit. So, if the gift be to the husband should he be living with his wife, but if separate then half to the husband and the other half to the wife "absolutely," for the context shows that by absolutely is meant for the separate use (*c*).

[Where trustees have a discretion to "*pay, apply, and dispose of*" the income of a trust fund for the maintenance and support of a married woman, they may pay the income to her for her *separate use* (*d*).]

What words not sufficient.

5. But if the trust be merely "to pay to her," or "to her and her assigns" (*e*), or the gift be "to her use" (*f*), or "her own use" (*g*), or "her absolute use" (*h*), or "in trust only for her, her executors, administrators, and assigns" (*i*), or, "to her, her heirs, and assigns, for her or *their* own sole and absolute use" (*j*), or "to pay into her own proper hands for her own use" (*k*), or "to pay to her to be applied for the maintenance of herself and such child or children as the testator might happen to leave at his death" (*l*), there is no such unequivocal evidence of an intention to exclude the husband.

Husband made a trustee for the wife.

6. Where property was vested in the *husband jointly with another*, as general trustees of the will, upon trust (*inter alia*), for the wife, it was held not to be a gift to her separate use (*m*).

(*a*) *Lee* v. *Prieaux*, 3 B. C. C. 381; *Woodman* v. *Horsley*, cited Ib. 383; *Cooper* v. *Wells*, 11 Jur. N. S. 923; *Re Molyneux' Estate*, 6 I. R. Eq. 411; [*Surman* v. *Wharton*, (1891) 1 Q. B. 491, 493;] and see *Stanton* v. *Hall*, 2 R. & M. 180.

(*b*) *Dixon* v. *Olmius*, 2 Cox, 414.

(*c*) *Shewell* v. *Dwarris*, Johns. 172.

[(*d*) *Austin* v. *Austin*, 4 Ch. D. 233.]

(*e*) *Dakins* v. *Berisford*, 1 Ch. Ca. 194; *Lumb* v. *Milnes*, 5 Ves. 517.

(*f*) *Jacobs* v. *Amyatt*, 1 Mad. 376, n.; *Wills* v. *Sayers*, 4 Mad. 411; *Anon. case*, cited 7 Vin. 96.

(*g*) *Johnes* v. *Lockhart*, in note to *Lee* v. *Prieaux*, 3 B. C. C. 383, ed. by Belt (this case is erroneously cited as an authority to the contrary in *Lumb* v. *Milnes*, 5 Ves. 520, and *Ex parte Ray*, 1 Mad. 207); *Wills* v. *Sayers*, 4 Mad. 409; *Roberts* v. *Spicer*, 5 Mad. 491; *Beales* v. *Spencer*, 2 Y. & C. C. C. 651; *Darcy* v. *Croft*, 9 Ir. Ch. Rep. 19.

(*h*) *Rycroft* v. *Christy*, 3 Beav. 238.

(*i*) *Spirett* v. *Willows*, 3 De G. J. & S. 293.

(*j*) *Lewis* v. *Mathews*, 2 L. R. Eq. 177.

(*k*) *Tyler* v. *Lake*, 2 R. & M. 183; *Kensington* v. *Dollond*, 2 M. & K. 184; *Blacklow* v. *Laws*, 2 Hare, 48; but see *Hartley* v. *Hurle*, 5 Ves. 545, *contra*.

(*l*) *Wardle* v. *Claxton*, 9 Sim. 524.

(*m*) *Ex parte Beilby*, 1 Ge. & J. 167; and see *Kensington* v. *Dollond*, 2 M. & K. 184.

Had the husband *alone* been appointed a trustee for the wife the decision might have been different (*a*).

[7. On the resumption of cohabitation in cases where there has been a judicial separation or a protection order, the property to which the wife is entitled when such cohabitation takes place belongs to her for her separate use (*b*).] [Resumption of cohabitation.]

8. If a *feme sole* marry without having disposed of the property settled to her separate use, the limitation to the separate use will on the marriage take effect. This doctrine is open to much observation upon principle (*c*), but Lord Cottenham, in the cases of *Tullett* v. *Armstrong*, and *Scarborough* v. *Borman* (*d*), anxious to prevent the consequences that would have flowed from a different decision, and not finding any other safe ground upon which to base his judgment, asserted an inherent power in the Court of Chancery to modify estates of its own creation, and in virtue of that jurisdiction established the validity of the separate use in case of the *feme's* marriage. If a fund be given to a *feme sole* for her separate use, without the intervention of a trustee, and she *sells out the fund and invests it in another form*, and *then marries*, the separate use has been destroyed, and she is regarded as the owner of the new property in the ordinary way (*e*). Effect after marriage of the trust for separate use.

9. If property be settled, whether by deed or will, to the separate use of a *feme*, and the separate use was meant to be confined to a *particular marriage*, and the husband dies, and the widow marries again, the second husband will not be excluded [by the terms of the instrument] from his ordinary marital rights (*f*). The question simply is, What was the intention of the settlement or will? So, if real or personal estate be devised or bequeathed to A., a married woman, for her sole and separate use independent of her husband B., the separate Effect of separate use on second marriage.

(*a*) *Ex parte Beilby*, 1 Ge. & J. 167; and see *Darley* v. *Darley*, 3 Atk. 399.

[(*b*) 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, s. 8; 41 Vict. c. 19, s. 4; *Re Emery's Trusts*, 50 L. T. N.S. 197; 32 W. R. 357.]

(*c*) Some observations upon this subject will be found in the 3rd edit. p. 124.

(*d*) 4 M. & C. 377; and see *Newlands* v. *Paynter*, Ib. 408; *Russell* v. *Dickson*, 2 Dru. & War. 138; *Archer* v. *Rooke*, 7 Ir. Eq. Rep. 478.

(*e*) *Wright* v. *Wright*, 2 J. & H. 647.

(*f*) *Barton* v. *Briscoe*, Jac. 603; *Benson* v. *Benson*, 6 Sim. 126; *Knight* v. *Knight*, Ib. 121; *Jones* v. *Salter*, 2 R. & M. 208; *Moore* v. *Harris*, 4 Drew. 33; *Tudor* v. *Samyne*, 2 Vern. 270; *Sir E. Turner's case*, 1 Ch. Ca. 307; 1 Vern. 7. And see *Sanders* v. *Page*, 3 Ch. Rep. 224; *Pitt* v. *Hunt*, 1 Vern. 18; *Howard* v. *Hooker*, 2 Ch. Rep. 81; *Edmonds* v. *Dennington*, cited *Carleton* v. *Earl of Dorset*, 2 Vern. 17. [But see the Married Women's Property Act, 1882, when the marriage takes place after the 31st Dec. 1882.]

use applies only to the existing and not to any future coverture (*a*); but if the exclusion of any *future husband* was also in contemplation, it will be carried into effect (*b*); and if the separate use do extend to any marriage, *present or future*, even the *arrears* due to the *feme* at the time of a subsequent marriage are protected from the after-taken husband (*c*). And if a *jointure* or other interest to arise on the cesser of the present marriage be provided for a *feme covert*, it may be so limited as to enure to her separate use, and be inalienable during the *present coverture* (*d*).

[Separate use not arising until death of husband.]

[10. Where policies of assurance on the life of the husband were settled for the benefit of the wife during her life for her separate use, independently of any future husband with whom she might intermarry, it was held that the trust for the separate use did not arise during the life of the husband (*e*).]

The wife's power to dispose of her separate estate.

11. Where property is settled to the *separate use*, the *feme covert*, unless her power of anticipation be restrained, may, without the concurrence of her trustees, unless the terms of the settlement require it (*f*), deal with the property directly and expressly, precisely in the same manner as if she were a *feme sole*. But, at the same time, she will be protected against *fraud*, and, therefore, a settlement procured from her by her husband, upon a false representation, will be set aside (*g*).

General rule.

12. The general principle that governs the law of separate use was laid down by Lord Thurlow, and has been recognized by the highest authorities, viz., that "a *feme covert, acting with respect to her separate property, is competent to act in all respects as if she were a feme sole*" (*h*).

Right of married woman to sue, &c., as to separate estate.

13. A *feme covert*, therefore, as regards her separate property, *sues* separately as plaintiff [and since the Married Women's Property Act, 1882, without a next friend], and defends separately (*i*), and, if out of the jurisdiction, may be *served with*

(*a*) *Moore* v. *Harris*, 4 Drew. 33.

(*b*) *Ashton* v. *M'Dougall*, 5 Beav. 56; *Re Gaffee*, 7 Hare, 101; 1 Mac. & G. 541; *Hawkes* v. *Hubback*, 11 L. R. Eq. 5; *Re Molyneux's Estate*, 6 I. R. Eq. 411.

(*c*) *Ashton* v. *M'Dougall*, 5 Beav. 56; and see *Newlands* v. *Paynter*, 4 M. & Cr. 418; *England* v. *Downs*, 6 Beav. 269.

(*d*) *Re Molyneux's Estate*, 6 I. R. 411.

[(*e*) *King* v. *Lucas*, 23 Ch. Div. 712.]

(*f*) *Grigby* v. *Cox*, 1 Ves. 518, *per* Lord Hardwicke; *Dowling* v. *Maguire*, Rep. *t.* Plunket, 19, *per* Lord Plunket.

(*g*) *Knight* v. *Knight*, 5 Giff. 26; 11 Jur. N. S. 618; and see *Sharpe* v. *Foy*, 4 L. R. Ch. App. 35.

(*h*) *Hulme* v. *Tenant*, 1 B. C. C. 20.

[(*i*) 45 & 46 Vict. c. 75, s. 1 (2): Rules of Supreme Court, Order 16, r. 16; and it is not material whether the contract, in respect of which the action is, was entered into before or

process by leave of the Court (*a*), may present a *petition* without a next friend and without her husband (*b*), and will be bound by a *submission in her pleadings* (*c*), or by a *settlement of accounts* (*d*), or by a *contract* for purchase (*e*), or sale (*f*), and may *give away* the chattels settled to her separate use by manual delivery (*g*), or may *lend* money to her husband (*h*), or may *demise* land settled to her separate use, when the lessee will be protected even at law under the equitable plea against intrusion by the holder of the legal estate (*i*), may *dispose of* her equitable interest in freehold estate settled to her separate use, *without acknowledgment* under the Fines and Recoveries Act (*j*), and will be bound as to her separate estate, if she agree verbally to accept a lease and takes possession (which is part performance) under the agreement (*k*), and may be made a *contributory* under a winding-up order (*l*), and her *declarations* may be read in evidence against her (*m*), and she will be liable to an *attachment* for want of answer where she answers separately (*n*), and similarly for *disobeying the order* of the Court in a suit to which she is a party in respect of her separate estate (*o*), or her separate

after the Act: *Gloucestershire Banking Company* v. *Phillipps*, 12 Q. B. D. 533.]

(*a*) *Copperthwaite* v. *Tuite*, 13 Ir. Eq. Rep. 68; [Rules of Supreme Court, Order 11.]

(*b*) 45 & 46 Vict. c. 75, s. 1, (2); *Re Outwin's Trusts*, 48 L. T. N.S. 410.]

(*c*) *Allen* v. *Papworth*, 1 Ves. 163; *Clerk* v. *Miller*, 2 Atk. 379; *Bailey* v. *Jackson*, C. P. Cooper's Rep. 1837–38, 495. Husband and wife put in a joint answer, and the wife admitted certain indentures to be in her possession and claimed the estates to which the indentures related to her separate use for her life. The plaintiff moved for production, but it was argued that the answer was the husband's and could not be read as an admission by the wife. However, the Court said though there was a logical difficulty, there was none in substance: that if the wife claimed the benefit of the separate use she must take it with its disadvantages; and ordered the production by the wife, and that the husband should permit her to produce; *Cowdery* v. *Way*, V.C.K.B. 2nd Nov. 1843. And see *Callow* v. *Howle*, 1 De G. & Sm. 531; *Beeching* v. *Morphew*, 8 Hare, 129; *Clive* v. *Carew*, 1 J. & H. 207.

(*d*) *Wilton* v. *Hill*, 25 L. J. N.S. Ch. 156.

(*e*) *Picard* v. *Hine*, 5 L. R. Ch. App. 274.

(*f*) *Davidson* v. *Gardner*, Sugd. Vend. & Purch. 891, 11th ed.; *Stead* v. *Nelson*, 2 Beav. 248; and see *Harris* v. *Mott*, 14 Beav. 169; *Vansittart* v. *Vansittart*, 4 K. & J. 70; *Milnes* v. *Busk*, 2 Ves. jun. 498.

(*g*) *Farington* v. *Parker*, 4 L. R. Eq. 116.

(*h*) *Woodward* v. *Woodward*, 3 De G. J. & S. 672.

(*i*) *Allen* v. *Walker*, 5 L. R. Ex. 187.

(*j*) *Pride* v. *Bubb*, 7 L. R. Ch. App. 64.

(*k*) *Gaston* v. *Frankum*, 2 De G. & Sm. 561; *S. C.* on appeal, 16 Jur. 507.

(*l*) *Re Leeds Banking Company*, 3 L. R. Eq. 781; and see *Butler* v. *Cumpston*, 7 L. R. Eq. 16.

(*m*) *Peacock* v. *Monk*, 2 Ves. 193, *per* Lord Hardwicke.

(*n*) *Graham* v. *Fitch*, 2 De G. & Sm. 246; *Taylor* v. *Taylor*, 12 Beav. 271; *Home* v. *Patrick* (No. 1), 30 Beav. 405, in which case M. R. observed that if the *feme* had not obtained or concurred in the order to answer separately there might be a difficulty.

(*o*) *Ottway* v. *Wing*, 12 Sim. 90.

property may be ordered to be *sequestered* (*a*). [And it has been held that a married woman was bound in equity to make good a representation that she was entitled to property, which had been made on her behalf to the Court while she was an infant, and on the faith of which a marriage and settlement had been sanctioned (*b*).]

[Right preserved and extended by Married Women's Property Act.]

[14. Since the Married Women's Property Act, 1882, a married woman, by sect. 1, sub-sect. (2), is capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, in contract or in tort, *or otherwise*, in all respects as if she were a *feme sole*, and her husband need not be made a party to any action or proceeding, and any damages or costs recovered by her in any *such* action or proceeding are her separate property; and any damages or costs recovered against her are payable out of her separate property and not otherwise (*c*). Under this enactment a married woman may sue without her husband in respect of a tort committed *before* the commencement of the Act, and the damages recovered belong to her as separate property (*d*); and it has been intimated that if the action were brought by the husband and wife jointly, the section, which applies only to "any *such* action," *i.e.*, an action brought by the wife as if she were a *feme sole*, would not make the damages separate property (*e*). But in a recent case (*f*) Charles, J., thought that sect. 1, sub-sect. 2, was not necessarily confined to actions brought solely by the wife, and that even where in the same writ the husband was joined as a party, the money recovered by the wife might be her separate property within the meaning of that section; and in that case, the husband and wife having sued as co-plaintiffs in respect of injury to the wife, it was held that whatever might be the true construction of sect. 1, sub-sect. 2, the damages recovered were clearly her separate property under sect. 5. Under the sub-section the right to bring an action in respect of any

(*a*) *Keogh* v. *Cathcart*, 11 Ir. Eq. Rep. 280; and see cases cited Ib.

[(*b*) *Per* Stirling, J., *Mills* v. *Fox* 37 Ch. D. 153.]

[(*c*) A married woman cannot be compelled to give security for costs where she sues as sole plaintiff, even though she may have no separate estate, and there is nothing against which, if she fails, available execution can issue; *Re Isaac*, 30 Ch. Div. 418; *Re Thompson*, 38 Ch. Div. 317, 318; but she may be ordered to give security for costs of appeal in a proper case, *Whitaker* v. *Kershaw*, 44 Ch. Div. 296.]

[(*d*) *Weldon* v. *Winslow*, 13 Q. B. Div. 784; *Weldon* v. *De Bathe*, 14 Q. B. Div. 339; *James* v. *Barrand*, 49 L. T. N.S. 300.]

[(*e*) *Weldon* v. *Winslow*, 13 Q. B. Div. 784, 788.]

[(*f*) *Beasley* v. *Roney*, (1891) 1 Q. B. 509, 513.]

cause of action within section 7 of the Statute of Limitations, 21 Jas. I. c. 16, which accrued before the passing of the recent Act, commenced at the date of that Act coming into operation, as the married woman then became "discovert" within the meaning of the statute of James, and time runs against her as from that date (*a*); and by force of the words "or otherwise" the *feme* may be sued in respect of an equitable liability not directly arising out of contract or any other cause of action on which a *feme sole* might be sued (*b*). But the sub-section is limited to actions relating to the married woman personally; thus it does not remove her incapacity to act as next friend or guardian *ad litem* (*c*).

[Not retrospective.]

And the sub-section is not retrospective, and does not render a married woman liable in respect of a breach of trust or of implied contract committed previously to the Act (*d*).

[Liability for costs.]

The liability of a married woman who is ordered to pay costs attaches when the order against her is made, and affects arrears of income, as to which she was restrained from anticipation, which have become due and payable to her since the commencement of the action, and if the order is for payment of costs by her to the trustees in whose hands the arrears are, they may retain the money in discharge of the costs (*e*).

[Remedies for protection of separate property.]

By section 12 of the Act every woman has in her own name against all persons, including her husband, the same civil remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole;* but no husband or wife is entitled to sue the other for a tort (*f*).

General engagement of a *feme covert* in writing.

15. At a comparatively early period in the history of the law of the separate use it was established that the separate property of the *feme covert* might be bound by her engagements. Thus]

[(*a*) *Weldon* v. *Neal*, 51 L.T. N.S. 289; 32 W. R. 828; *Lowe* v. *Fox*, 15 Q. B. Div. 667.]

[(*b*) *Re Kershaw*, 63 L. T. N.S. 203; and as to the right of a married woman to sue in respect of her interest in a partnership of which she is a member; see *Eddowes* v. *Argentine Loan Company*, 62 L. T. N.S. 602; *S.C.* 63 L. T. N.S. 364.]

[(*c*) *Re Duke of Somerset*, 34 Ch. D. 465.]

[(*d*) *Davies* v. *Stanford*, 61 L. T. N.S. 234.]

[(*e*) *Cox* v. *Bennett*, (1891) 1 Ch. (C. A.) 617, distinguishing *Re Glanvill*, 31 Ch. Div. 532, on the ground that in that case the *feme* was not suing alone under the powers of the Act.]

[(*f*) An application by a husband against his wife for damages under an undertaking given by her on an injunction which was subsequently dissolved, is not in the nature of an action for tort within this section; *Hunt* v. *Hunt*, W. N. 1884, p. 243. Since the Act, the sole undertaking of a married woman as to damages must be accepted where she as sole plaintiff is entitled to an injunction; *Re Prynne*, W. N. 1885, p. 144.]

the Courts determined that if, without any *direct* or *express* reference to her separate property, a *feme covert* who had property settled to her separate use (*a*), professed to bind herself by any *written* instrument, the implication of law was, that she meant to charge her separate estate; for, except with reference to that, the instrument was without meaning and nugatory. Thus, if a *feme covert* executed a *bond* (*b*), even to her husband (*c*), or joined in a bond with another, even with her husband (*d*), or signed a *promissory note* (*e*), or *bill of exchange* (*f*), [or gave a guarantee (*g*),] though she was not *personally* bound, yet her *separate estate*, if anticipation were not restrained (*h*), was liable. [But if, prior to the recent Act, her anticipation was restrained as to such separate estate as she was entitled to at the time of entering into the engagement, such engagement had no effect either at law or in equity (*i*).] Again, if she gave a written retainer to a *solicitor*, it entitled him to have his costs out of her separate estate (*j*), though the circumstance that the solicitor of a husband and wife has transacted business relating to the separate estate is not, *per se*, sufficient to make that estate directly liable for the amount of his costs (*k*). So if she entered into a contract in writing for the purchase of an estate, she might enforce it against the vendor, as it created a valid obligation in respect of her property (*l*). And it was not necessary that the contract should expressly refer to the separate property, or that the vendor should know that the purchaser was a married woman (*m*).

(*a*) As to the power of a married woman to *contract* under 3 & 4 W. 4. c. 74, in respect of her real estate generally, see *Crofts* v. *Middleton*, 2 K. & J. 194; 8 De G. M. & G. 192; *Pride* v. *Bubb*, 7 L. R. Ch. App. 64.

(*b*) *Lillia* v. *Airey*, 1 Ves. jun. 277; *Norton* v. *Turvill*, 2 P. W. 144; *Peacock* v. *Monk*, 2 Ves. 193, *per* Lord Loughborough; *Tullett* v. *Armstrong*, 4 Beav. 323, *per* Lord Langdale.

(*c*) *Heatley* v. *Thomas*, 15 Ves. 596.

(*d*) *Heatley* v. *Thomas*, 15 Ves. 596; *Standford* v. *Marshall*, 2 Atk. 68; *Hulme* v. *Tenant*, 1 B. C. C. 20.

(*e*) *Bullpin* v. *Clarke*, 17 Ves. 365; *Field* v. *Sowle*, 4 Russ. 112; *Tullett* v. *Armstrong*, 4 Beav. 323, *per* Lord Langdale; *Fitzgibbon* v. *Blake*, 3 Ir. Ch. Rep. 328; [*Davies* v. *Jenkins*, 6 Ch. D. 728; *Devitt* v. *Faussett*, 7 L. R. Ir. 511.]

(*f*) *Stuart* v. *Kirkwall*, 3 Mad. 387; *Coppin* v. *Gray*, 1 Y. & C. C. C. 205; *Tullett* v. *Armstrong*, 4 Beav. 323, *per* Lord Langdale; *McHenry* v. *Davies*, 10 L. R. Eq. 88; *Lancashire and Yorkshire Bank* v. *Tee*, W. N. 1875, p. 213.

[(*g*) *Morrell* v. *Cowan*, 6 Ch. D. 166, reversed on other grounds.]

[(*h*) *Re Sykes's Trusts*, 2 J. & H. 415.]

[(*i*) *Roberts* v. *Watkins*, 46 L. J. N.S. Q. B. 552.]

(*j*) *Murray* v. *Barlee*, 4 Sim. 82; 3 M. & K. 209.

(*k*) *Callow* v. *Howle*, 1 De G. & Sm. 531; and see *Re Pugh*, 17 Beav. 336.

(*l*) *Dowling* v. *Maguire*, Ll. & G. Rep. *t.* Plunket, 1; but see *Chester* v. *Platt*, Sugd. Vend. & Purch. 207, 14th edit.

(*m*) *Dowling* v. *Maguire*, Ll. & G. Rep. *t.* Plunket, 1.

Bond by *feme* before marriage.

In one case a *feme* executed a bond *before her marriage*, and her property having been settled upon her marriage to her separate use, the obligee filed his bill against the husband and wife to have the debt paid out of her separate estate, and the husband having absconded, the Court made the order (*a*).

[Costs of raising the charge.]

[The liability of the separate estate extended to the costs of an action to enforce the charge against the estate (*b*).]

General engagements not in writing.

16. Although it was thus established beyond question that a *feme covert* made her separate property liable by the execution of any *written* instrument, yet the principles upon which the liability was held to attach were for some time involved in much doubt. Thus it was considered by Lord Loughborough (*c*), Sir J. Leach (*d*), and the late Vice-Chancellor of England (*e*), that the separate estate of a *feme covert* was not subject to her *general engagements*, and this upon the notion that a *feme covert* could not contract, but that every dealing in respect of her estate was in the nature either of an *appointment* or of a *disposition* (*f*). However, it was clear that [irrespective of the recent Act] a *feme covert* could, in respect of her separate use, contract (*g*), and that her written obligations were not to be viewed as appointments, and did not operate merely by way of disposition. The principles that govern the liability of the *feme's* separate property have been very satisfactorily explained by Lord Brougham in *Murray* v. *Barlee* (*h*), and by Lord Cottenham in *Owens* v. *Dickenson* (*i*), and their judgments must be held to have clearly established that the dealings of a *feme covert* with her separate estate did not operate by way of *appointment* or *disposition*.

(*a*) *Briscoe* v. *Kennedy*, cited *Hulme* v. *Tenant*, 1 B. C. C. 17.

[(*b*) *Morrell* v. *Cowan*, 6 Ch. D. 166; and see now 45 & 46 Vict. c. 75, s. 1 (2).]

(*c*) See *Bolton* v. *Williams*, 2 Ves. jun. 142, 150, 156; *Whistler* v. *Newman*, 4 Ves. 145.

(*d*) See *Greatley* v. *Noble*, 3 Mad. 94; *Stuart* v. *Kirkwall*, Ib. 389; *Aguilar* v. *Aguilar*, 5 Mad. 418; *Field* v. *Sowle*, 4 Russ. 114; *Chester* v. *Platt*, Sugd. Vend. & Purch. 207, 14th edit.

(*e*) See *Murray* v. *Barlee*, 4 Sim. 82; and see *Digby* v. *Irvine*, 6 Ir. Eq. Rep. 149.

(*f*) See *Bolton* v. *Williams*, 2 Ves. jun. 150; *Greatley* v. *Noble*, 3 Mad. 94; *Stuart* v. *Kirkwall*, Ib. 389; *Aguilar* v. *Aguilar*, 5 Mad. 418; *Field* v. *Sowle*, 4 Russ. 114.

(*g*) See *Owens* v. *Dickinson*, Cr. & Ph. 53; *Dowling* v. *Maguire*, Rep. *t.* Plunket, 19; *Master* v. *Fuller*, 4 B. C. C. 19; *Stead* v. *Nelson*, 2 Beav. 245; *Bailey* v. *Jackson*, C. P. Cooper's Rep. 1837-8, 495; *Francis* v. *Wigzell*, 1 Mad. 261; *Crosby* v. *Church*, 3 Beav. 489; *Tullett* v. *Armstrong*, 4 Beav. 323.

(*h*) 3 M. & K. 209, at pp. 223, 224. It may be observed that in this case the late V. C. of England, while expressing his opinion upon the hearing below, that the general engagements of the *feme covert* did not affect the separate estate, does not appear to have conceived that any distinction existed between a written and unwritten obligation; see 4 Sim. 94.

(*i*) Cr. & Ph. 48, at pp. 53, 54.

This being so, it became difficult to see on what ground any valid distinction could be sustained between *written* and *verbal* engagements. If a written promise to pay, as a promissory note, referring neither to the instrument of trust nor to the property, were held to bind the separate estate, upon what ground could a verbal assumpsit be distinguished? So long as it could be maintained that the dealing of the married woman operated by way of *disposition* of the separate estate, there seemed room for contending that the disposition, as being an assignment of trust, must have been in writing (*a*); but so soon as it was admitted that the general engagement *in writing* was binding it seemed impossible to resist the conclusion that a *verbal* general engagement must bind likewise. When it was attempted to imply a promise from mere *acts* of the *feme*, which might be construed as intended to bind either her husband or herself, there seemed room for a distinction, but an *express verbal* promise and an *express written* promise to pay must, it is conceived, stand on the same footing.

Observations of V. C. Kindersley respecting *feme's* verbal engagements.

The late Vice-Chancellor Kindersley, upon this subject expressed himself as follows:—"It has not yet, indeed, been made the subject of positive decision, that the principle embraces a *feme's verbal* engagements or cases of common *assumpsit*. Considering, however, the opinions expressed and the reason of the thing, I think it very probable that when that question arises for decision, it will be decided in the affirmative" (*b*).

Cases where writing is required.

But a verbal engagement could not bind the wife where the Statute of Frauds required, in the case of a *feme sole*, an engagement in *writing*, as if the *feme covert* were to undertake verbally to pay the debt of a stranger, or of her husband, who, for this purpose, is a stranger (*c*). It was even held, in Ireland, that the general engagements of the wife *not in writing*, could not, by reason of the Statute of Frauds, be satisfied out of any interest in *land* settled to her separate use (*d*). But this doctrine seems to involve a confusion between special contracts, which in the case of a *feme sole*, are required by the statute to be in writing, and general contracts, which, in the case of a *feme sole*, are not

(*a*) See p. 859, *supra*.

(*b*) *Vaughan* v. *Vanderstegen*, 2 Drew. 183; and see *Wright* v. *Chard*, 4 Drew. 673; *Newcomen* v. *Hassard*, 4 Ir. Ch. Rep. 274; *Blatchford* v. *Woolley*, 2 Dr. & Sm. 204; *Shattock* v. *Shattock*, 2 L. R. Eq. 182; 53 Beav. 489.

(*c*) *Re Sykes's Trust*, 2 J. & H. 415.

(*d*) *Burke* v. *Tuite*, 10 Ir. Ch. Rep. 467; and see *Shattock* v. *Shattock*, 2 L. R. Eq. 192; *Johnson* v. *Gallagher*, 2 De G. F. & J. 514.

required to be in writing. In the latter case the remedy is against the *feme sole* personally, but where the *feme* is *covert*, is not against the *person*, but the *property*. The satisfaction, therefore, decreed against the separate estate is not the specific performance of a special contract, but an *equitable execution by way of legal process* for working out the liability created by the general contract.

Whether separate estate can be made liable by operation of law in clear contravention of the intention.

17. It was considered that there was still another distinction, viz., that, allowing the *general* engagements of the wife, whether written or unwritten, to bind her separate estate, yet, supposing the doctrine of these cases to be founded on the *intention* to charge the settled property as implied by the circumstance that otherwise the act would be nugatory, the same result would not follow where it was clearly *not* the intention of the *feme* to create any charge—where, in short, there was no contract either expressed or implied. Thus it was decided, that where an annuity granted by a *feme covert* and charged upon her separate estate, had been set aside as void for want of compliance with the requisitions of the Annuity Acts, the separate estate was not liable to repay the consideration money (*a*); and the decisions to this effect were cited, without disapprobation, by L. J. Turner (*b*). And where a married woman received rents claiming them as her separate property, but was in fact not entitled, Vice-Chancellor Kindersley held that the rents so received could not be recovered from her separate estate (*c*).

A *feme covert* having separate estate is a *feme sole* to all intents and purposes.

18. The Vice-Chancellor at the same time observed, "The doctrine (of the separate use) is now in a state of transition, and is not clearly established in all its points; but the modern tendency has been to establish the principle, that *if you put a married woman in the position of a feme sole in respect of her separate estate, that position must be carried to its full extent, short of making her personally liable*" (*d*).

[This, however, must be understood in respect only of the separate estate to which the married woman was actually entitled at the time of the engagement, which it was sought to enforce against her separate estate; for a married woman did not, by *having separate estate*, acquire an equitable *status* of capacity to contract debts, so as to enable her to bind separate

(*a*) *Jones* v. *Harris*, 9 Ves. 486; *Aguilar* v. *Aguilar*, 5 Mad. 414; and see *Bolton* v. *Williams*, 4 B. C. C. 297; *S. C.* 2 Ves. jun. 138.

(*b*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 513; and see *Shattock* v. *Shattock*, 2 L. R. Eq. 182; 35 Beav. 489.

(*c*) *Wright* v. *Chard*, 4 Drew. 673.

(*d*) Ib. 4 Drew. 685.

estate to which she might afterwards become entitled, but could only contract with reference to separate estate to which she was actually entitled, and so as to bind that estate (*a*). So where an infant *feme*, in contemplation of her marriage, covenanted to settle all her after-acquired property, and subsequently, after attaining her majority but prior to the Married Women's Property Act, 1882, confirmed the settlement, it was held that this confirmation made the settlement absolutely binding only so far as related to property which she had already acquired at the time of confirmation, but that as to property which she might afterwards acquire for her separate use the covenant would remain voidable, and the married woman might, on such subsequent property accruing, elect to avoid the settlement as to it, and take it for her separate use (*b*).]

True principle.

19. The principle to be deduced from the cases was thus laid down by L. J. Turner. "To affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband, might not affect it in the case of a married woman living with her husband," &c. "In order," he continued, "to bind the separate estate by a *general* engagement, it should appear that the engagement was made *with reference to, and upon the faith or credit of that estate, and the question whether it was so or not is to be judged of by the Court upon all the circumstances of the case*" (*c*). These opinions have since been indorsed by the Court as a correct exposition of the law (*d*). In a late case Lord Justice James, in further illustration of the subject, observed, "The term *general engagement* is a misleading one. If it merely mean that goods sold to a married woman in the ordinary course of domestic life—that contracts expressed to be made by her in respect of property not her separate estate—*e.g.*

[(*a*) *Pike* v. *Fitzgibbon*, *Martin* v. *Fitzgibbon*, 17 Ch. D. 454; and see *Re Roper*, 39 Ch. D. 482, 488.]

[(*b*) *Smith* v. *Lucas*, 18 Ch. D. 531; and see *Buckmaster* v. *Buckmaster*, 35 Ch. Div. 21; *S. C. Seaton* v. *Seaton*, 13 App. Cas. 61; *Duncan* v. *Dixon*, 44 Ch. D. 211.]

(*c*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 515; see the principle approved and expanded by Sir R. T. Kindersley, V.C., in *Re Leeds Banking Company*, 3 L. R. Eq. 787; and see the same principle approved by V. C. Malins in *Butler* v. *Cumpston*, 7 L. R. Eq. 20; and by V. C. in Ireland, in *Hartford* v. *Power*, 3 I. R. Eq. 602; and by Lord Hatherley in *Picard* v. *Hine*, 5 L. R. Ch. App. 274.

(*d*) See *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 591; and see preceding note.

for buying or selling, or letting or hiring a house—do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have, in that sense and to that extent the proposition that her separate estate is not liable to her general engagements is quite correct. But that does not affect the rule, as laid down by Lord Justice Turner, as to general engagements, as to which it appears that they were made with reference to, and upon the faith or credit of, the separate estate. It would be very inconvenient that a married woman with a large separate property should not be able to employ a solicitor or a surveyor, or a builder or tradesman, or hire labourers or servants, and very unjust if she did that they should have no remedy against such separate property" (*a*).

[20. Thus where a married woman was living separate from her husband, and monies were advanced by a stranger in providing her with necessaries, such monies were held to constitute a debt binding her separate estate (*b*).] [Money advanced to woman living separate from husband.]

21. Now, by the Married Women's Property Act, 1882 (*c*), sect. 1, already adverted to (*d*), a married woman is made capable of "entering into and rendering herself liable in respect of and to the extent of her separate property on any contract," and it is further enacted as follows: (sub.-sect. 3,) "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown;" (sub.-sect. 4,) "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." [Married Women's Property Act, 1882.]

The contract, however, will not affect property as to which there is a restraint on anticipation (*e*).

It will be observed that by the recent Act no distinction is made between written and verbal engagements of the married woman, and both, therefore, equally bind her separate property. [Verbal and written engagements equally binding.]

It has been decided, upon the construction of these provisions, that the Act does not enable a married woman who has [Capacity to contract dependent on existence of separate property.]

(*a*) *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 593.

[(*b*) *Hodgson* v. *Williamson*, 15 Ch. D. 87.]

[(*c*) 45 & 46 Vict. c. 75.]

[(*d*) *Ante*, p. 847.]

[(*e*) Sect. 19.]

no separate property to bind herself by a contract or engagement (*a*), and a person suing a married woman on an alleged contract must prove that she had, at the time of entering into the contract, separate property (*b*), free from any restriction on anticipation (*c*), as to which she might reasonably be deemed to have contracted (*d*).

[After acquired property when bound by contract.]

It has further been decided that as the Act refers to married women and not to widows, and to *separate* property and not to the property of women in general, the contract of the married woman will not affect separate property acquired after the coverture (*e*), or separate property as to which she was restrained from anticipation when she entered into the contract, but which afterwards becomes free from such restriction by the determination of the coverture (*f*); though it will affect separate property acquired by her during a subsequent coverture (*g*), a state of the law which certainly appears to be somewhat anomalous.

[Contracts entered into previously to Act.]

The Act does not expressly state whether it affects contracts entered into prior to its commencement (1st Jan. 1883), for enforcing which proceedings are taken after that date; but the language of the 1st section points to future contracts, and it has been said that "to hold that it was intended to alter the effect of contracts already made would be an unreasonable and violent construction, and one which the Court ought not to adopt without very express words" (*h*). But an order made by consent after the commencement of the Act, in an action relating to a contract before the Act, whereby all questions under the contract were referred to arbitration, and the parties bound themselves to perform and keep the award, was held to be a new contract and to be within the Act (*i*).

[Antenuptial debts.]

22. The separate estate has been made to answer a debt of

[(*a*) *Stogdon* v. *Lee*, (1891) 1 Q. B. (C. A.) 166; *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Re Shakespeare*, 30 Ch. D. 169; and see *Pelton* v. *Harrison*, (1891) 2 Q. B. 422.]

[(*b*) See *Tetley* v. *Griffith*, W. N. 1887, p. 218. *Secus*, where she is sued for an antenuptial debt under section 12 of the Act of 1870; *Downe* v. *Fletcher*, 21 Q. B. D. 11.]

[(*c*) *Branstein* v. *Lewis*, 64 L. T. N.S. 265.]

[(*d*) *Leak* v. *Driffield*, 24 Q. B. D. 98.]

[(*e*) *Beckett* v. *Tasker*, 19 Q. B. D. 7.]

[(*f*) *Pelton* v. *Harrison*, (1891) 2 Q. B. 422.]

[(*g*) *Jay* v. *Robinson*, 25 Q. B. Div. 467.]

[(*h*) *Re Roper*, 39 Ch. D. 481, 487, *per* Kay, J.; and see *Conolan* v. *Leyland*, 27 Ch. D. 632; *Re March*, 27 Ch. Div. 166; *Turnbull* v. *Foreman*, 15 Q. B. Div. 234.]

[(*i*) *Conolan* v. *Leyland*, 27 Ch. D. 632.]

the wife contracted before marriage (*a*), and under the Married Women's Property Act, 1870 (*b*), property belonging to a *feme* and settled by her to her separate use without power of anticipation was liable to such a debt (*c*).

[Married Women's Property Act, 1882.]

Now, by the Married Women's Property Act, 1882 (*d*), sect. 13, it is provided that "a woman after her marriage shall continue to be liable, in respect and to the extent of her separate property, for all debts contracted, and all contracts entered into or wrongs committed by her *before her marriage*, including any sums for which she may be liable as a contributory" to any joint-stock company. The section contains provisions for working out the liability, but there is a proviso that nothing in the Act is to operate to increase or diminish the liability of any woman married before the commencement of the Act for any such debt, etc., except as to any separate property to which she may become entitled by virtue of the Act, and to which she would not have been entitled for her separate use if the Act had not passed.

It has been held that this section extends not only to debts properly so called contracted by the *feme* while *sole*, but to debts contracted by her under the powers of the Act, and for which judgment has been recovered, during a former coverture (*e*).

Liability of estate of *feme covert* to make good her breaches of trust.

23. The inquiry now under consideration involves the question how far a *feme covert* [could before the Married Women's Property Act, 1882,] commit a *breach of trust* for which her separate estate would be made liable. Where the breach of trust resulted in the loss of the very fund in which the *feme* had an interest to her separate use, the Court treated her acts as amounting to a *disposition* of the separate interest which she had power to bind (*f*). So if a *feme covert* who was *executrix or trustee* had wasted the trust estate, the ordinary right of retainer might be exercised against her separate estate under the *same* instrument (*g*). And the separate estate of a married woman under a settlement was held liable to make good the loss occasioned by her wrongfully selling absolutely a valuable chattel in which

[(*a*) *Chubb* v. *Stretch*, 9 L. R. Eq. 555.]

[(*b*) 33 & 34 Vict. c. 93.]

[(*c*) *Sanger* v. *Sanger*, 11 L. R. Eq. 470; *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; *Re Hedgeley*, 34 Ch. D. 379; *Axford* v. *Reid*, 22 Q. B. Div. 548.]

[(*d*) 45 & 46 Vict. c. 75.]

[(*e*) *Jay* v. *Robinson*, 25 Q. B. Div. 467; *Pelton* v. *Harrison*, (1891) 2 Q. B. 422.]

(*f*) *Crosby* v. *Church*, 3 Beav. 485; *Hanchett* v. *Briscoe*, 22 Beav. 496.

(*g*) *Pemberton* v. *M'Gill*, 1 Dr. & Sm. 266; and see p. 782, *supra*.

under the *same* settlement, she had only a limited interest (*a*). But where an annuity was devised to a *feme sole* in trust to apply it for the benefit of another, and the *feme* afterwards married and property was settled to her separate use, and then there was a breach of trust in respect of the annuity, the M. R. held that the effect of the marriage was to vest the legal estate of the annuity in the husband, that she could only act as his agent, that she could not be made liable for general torts in reference to trusts any more than for general torts at law—that strictly speaking she could not commit torts, but that they were the torts of her husband, and her acts created a liability against her husband: that he acted for her although she remained trustee, just as the husband of an executrix acted for the executrix, that her receipts must be treated as his receipts, and he alone was liable, and on these grounds the M. R. refused all relief against the separate property of the wife (*b*).

[Where a married woman having notice of assignment of a contract by her to convey land, conveyed to the assignor, it was held that she had not committed a tort, but a breach of trust or implied contract which would not have bound her separate property before the Married Women's Property Act, 1882 (*c*).

[Married Women's Property Act, 1882.]

24. Now, by the recent Act (*d*), section 24, it is provided as follows: "The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any *breach of trust or devastavit* committed by any married woman, being a trustee or executrix or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration." This section must be read in connection with the provisions of sections 1 and 13 already referred to (*e*); of section 19, to be hereafter noticed (*f*); and of section 18, which provides that a married woman who is an executrix or administratrix alone or jointly with others, or a trustee alone or jointly of property subject to any trust, may sue or be sued, and transfer or join in transferring any public or other stocks, funds, or investments in that character, without her husband as if she were a *feme sole* (*g*).]

(*a*) *Clive* v. *Carew*, 1 J. & H. 199.
(*b*) *Wainford* v. *Heyl*, 20 L. R. Eq. 321.
[(*c*) *Davies* v. *Stanford*, 61 L. T. N.S. 234.]
[(*d*) 45 & 46 Vict. c. 75.]
[(*e*) *Ante*, pp. 847, 865, 867.]
[(*f*) *Post*, p. 886.]
[(*g*) The section, it will be observed, does not deal with land, and although

Nature of the relief against the separate estate.

25. Supposing a person entitled to establish his claim against the separate estate, the limits of his remedy appear to be [as follows: Prior to the recent Act he could] not bring an action against the *feme covert* as the sole defendant and as *personally* liable (*a*). "There is no case," said Sir T. Plumer, "in which this Court has made a *personal* decree against a *feme covert*. She may pledge her separate property, and make it answerable for her engagements; but where her trustees are not made parties to a bill, and no particular fund is sought to be charged, but only a personal decree against her, the bill cannot be sustained" (*b*). But the party aggrieved might have brought an action against her and her trustees (and the death of her husband, which puts an end to the separate use, either after the commencement of the action (*c*), or even before it (*d*), would not have defeated the action), and might have prayed payment of his demand out of all *personal estate* in the hands of the trustees to which she was entitled absolutely (including *arrears* of rents), and also out of the *accruing* rents *of real estate*, if there were no clause against anticipation, until the claim and costs had been satisfied (*e*). "Determined cases," said Lord Thurlow, "seem to go thus far, that the general engagement of the wife shall operate upon her *personal property*, shall apply to the *rents and profits of her real estate*, and that her trustees shall be obliged to apply *personal estate, and rents and profits when they arise*, to the satisfaction of such general engagement; but this Court has not used any *direct* process against the separate estate of the wife, and the manner of coming at the separate property of the wife has been by decree to bind the trustees as to personal estate in their hands, or rents and profits, according to the exigency of justice or of the engagement

the Act enables a *feme covert* to convey land in fee simple, being her separate property, without the concurrence of her husband (*Re Drummond and Davie's Contract*, (1891) 1 Ch. 524, 531), yet it does not appear that she has power to convey land of which she is trustee, otherwise than by deed acknowledged under the Fines and Recoveries Act.]

[(*a*) Where a judgment had been obtained against a married woman, it was on her application set aside, after a considerable lapse of time, as being irregular and wrong, *Atwood* v. *Chichester*, 3 Q. B. Div. 722, *Davies* v. *Ballenden*, 46 L. T. N.S. 797.]

(*b*) *Francis* v. *Wigzell*, 1 Mad. 262. [But see *Picard* v. *Hine*, 5 L. R. Ch. App. 274; *Davies* v. *Jenkins*, 6 Ch. D. 728.]

(*c*) *Field* v. *Sowle*, 4 Russ. 112.

(*d*) *Heatley* v. *Thomas*, 15 Ves. 596; but see *Kenge* v. *Delavall*, 1 Vern. 326.

(*e*) *Hulme* v. *Tenant*, 1 B. C. C. 20; *Standford* v. *Marshall*, 2 Atk. 68; *Murray* v. *Barlee*, 4 Sim. 82; 3 M. & K. 209; *Field* v. *Sowle*, 4 Russ. 112; *Nantes* v. *Corrock*, 9 Ves. 182; *Bullpin* v. *Clarke*, 17 Ves. 365; *Jones* v. *Harris*, 9 Ves. 492, 493, 497; *Stuart* v. *Kirkwall*, 3 Mad. 387.

of the wife to be carried into execution." His Lordship then adds, "I know of no case where the general engagement of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make *conveyance of that real estate*, and by *sale*, *mortgage*, or otherwise, raise the money to satisfy that general engagement on the part of the wife" (*a*). But it is conceived that if in any case the instrument were so specially worded as to place the *corpus* of real estate also at the *separate disposal* of the *feme covert*, the engagements of the wife would, upon principle [independently of the recent Act, have bound] the whole interest settled to the separate use, whether *corpus* or income (*b*).

[Where the property is acquired subsequently to the engagement.]

[A judgment recovered against the separate estate of a married woman in respect of an engagement not within the recent Act, binds only so much of the separate estate as the married woman was entitled to at the time when the engagement was entered into, and as remains undisposed of at the time of the judgment, and does not affect separate estate acquired subsequently to the engagement (*c*). In such a case, therefore, the proper inquiry to be inserted in a judgment against the separate estate is, "what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the Court" (*d*).

[Where clause against anticipation.]

If there be a clause against anticipation as to any part, the Court directs payment out of the *feme's* separate estate, except that part of which she has no power of anticipation (*e*); and separate estate as to which anticipation was restrained at the time of the engagement, will not become available for the payment by reason of the determination of the coverture before the date of the judgment (*f*), and in this respect the law is not altered by the recent Act (*g*).

(*a*) *Hulme* v. *Tenant*, 1 B. C. C. 20, 21; and see *Boughton* v. *James*, 1 Coll. 26; *Nantes* v. *Corrock*, 9 Ves. 189.

(*b*) See p. 884 and p. 914, note (*b*).

[(*c*) *Pike* v. *Fitzgibbon*, 17 Ch. Div. 454; reversing *S. C.* 14 Ch. D. 837; *Flower* v. *Buller*, 15 Ch. D. 665; *Chapman* v. *Biggs*, 11 Q. B. D. 27.]

[(*d*) *Pike* v. *Fitzgibbon*, *Martin* v. *Fitzgibbon*, 17 Ch. Div. 454; *Durrant* v. *Ricketts*, 8 Q. B. D. 177; 30 W. R. 428; *Gloucestershire Banking Company* v. *Phillips*, 12 Q. B. D. 533; and see *Gallagher* v. *Nugent*, 8 L. R. Ir. 353; *Re Roper*, 39 Ch. D. 482, 491.]

[(*e*) *Murray* v. *Barlee*, 4 Sim. 95.]

[(*f*) *Pike* v. *Fitzgibbon*, *Martin* v. *Fitzgibbon*, 17 Ch. Div. 454, reversing *S. C.* 14 Ch. D. 837.]

[(*g*) *Myles* v. *Burton*, 14 L. R. Ir. 258; *Pelton* v. *Harrison*, (1891) 2 Q. B. 422.]

But where a woman married before the recent Act, who was restrained from anticipation, received, under an erroneous order of the Court, money to which she was not entitled, so that she was under a liability to refund which did not arise out of contract, it was held that arrears of income which had accrued due to her previously to the order declaring her liability to refund, must be retained in satisfaction of her liability (*a*). [Liability not arising out of contract.]

The remedy against the separate estate is in the nature of equitable execution, which may be obtained either by the appointment of a receiver or by a direction to the trustees to pay, and if any proceedings are pending between the married woman and her creditor, the order may be obtained in such proceedings without instituting a fresh action (*b*). [Equitable execution without new proceedings.]

26. The rule that the trustees of the property held for the separate use of a *feme covert*, must be parties to a suit for charging that property has in recent cases been broken through. Thus, in *Picard* v. *Hine* (*c*), where the trustee of a particular property was a defendant, the Court made a decree in a general form declaring that the separate property of the *feme covert*, vested in her or in *any other person* in trust for her, was chargeable with the payment of the plaintiff's debt, and in a later case V. C. Hall, on the authority of *Picard* v. *Hine*, held expressly that it was not necessary to make the trustees parties (*d*). But any order made in the absence of the trustees must be without prejudice to any claims they may have against the trust estate (*e*). [Trustee not a necessary party.]

Now, by the recent Act, although the ultimate remedy is only against the separate estate, the action may be brought against the married woman as if she were a *feme sole*, without joining either her husband or any trustee as a party, and a judgment may be obtained against the married woman (*f*). This judgment can, however, only be enforced against the separate estate, but it is available (in cases where the engagement in respect of which it is obtained was made after the 31st of December, 1882) against any separate estate of the married [Nor the husband.]

[(*a*) *Re Dixon*, 35 Ch. D. 4.]

[(*b*) *Re Peace and Waller*, 24 Ch. Div. 405; *M'Garry* v. *White*, 16 L. R. Ir. 322.]

[(*c*) 5 L. R. Ch. App. 274.]

[(*d*) *Davies* v. *Jenkins*, 6 Ch. D. 728; *Flower* v. *Buller*, 15 Ch. D. 665; *Durrant* v. *Ricketts*, 8 Q. B. D. 177; but see *Atwood* v. *Chichester*, 3 Q. B. Div. 722.]

[(*e*) *Collett* v. *Dickensen*, 11 Ch. D. 687; *Re Peace and Waller*, 24 Ch. Div. 405.]

[(*f*) *Brown* v. *Morgan*, 12 L. R. Ir. 122.]

woman whether acquired before or after the date of the engagement (*a*).

[Form and effect of judgment against separate estate.]

27. Under the recent Act, judgment in default or under Ord. 14 of the Rules of the Supreme Court may be signed against a married woman, but execution can only issue against her separate estate as to which her anticipation is not restrained (*b*), unless the restraint arises under a settlement made by the married woman herself of her own property (*c*). The judgment should expressly state that "execution is to be limited to her separate property not subject to any restriction on anticipation, unless by reason of sect. 19 of the Married Women's Property Act, 1882, the property be liable to execution notwithstanding such restriction" (*d*). Judgment in this form against the married woman is not a personal judgment (*e*), but binds only her separate property, and under such a judgment there is no "debt due from her" within the meaning of sect. 5 of the Debtors Act, 1869, capable of being enforced by committal (*f*). But although the relief thus given against the married woman is different from that in the case of a *feme sole*, she is liable to be sued on any ground on which a *feme sole* could be sued, and this liability to be sued is entirely distinct from her power to contract. Thus a liability to refund in the capacity of a residuary legatee may be the subject of an action against the *feme*, although she is restrained from anticipation (*g*).

Where a married woman against whom a judgment has been made has only separate property which is subject to a restraint on anticipation, and has not received any income since the date of the judgment, an order for committal cannot be made against her under sect. 5 of the Debtors Act (*h*), and even if she has received such income, no such order can be made, when

[(*a*) 45 & 46 Vict. c. 75, s. 1; *Bursill* v. *Tanner*, 13 Q. B. D. 691; but see *Moore* v. *Mulligan*, W. N. 1884, p. 34.]

[(*b*) *Perks* v. *Mylrea*, W. N. 1884, p. 64; and as to the practice before the Act, *Ortner* v. *Fitzgibbon*, 50 L. J. N.S. Ch. 17; 43 L. T. N.S. 60.

[(*c*) *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Nicholls* v. *Morgan*, 16 L. R. Ir. 409.]

[(*d*) *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Scott* v. *Morley*, 20 Q. B. D. 120, 132; *Nicholls* v. *Morgan*, 16 L. R. Ir. 409; and see *Johnstone* v. *Browne*, 18 L. R. Ir. 428. But a writ of sequestration need not be so limited, though it would not be effectual against separate estate as to which the *feme* is restrained from anticipation, *Hyde* v. *Hyde*, 36 W. R. 708.]

[(*e*) *Scott* v. *Morley*, 20 Q. B. Div. 120; *Draycott* v. *Harrison*, 17 Q. B. D. 417.]

[(*f*) *Scott* v. *Morley*, *ubi supra*; but as it is a "judgment" within Rules of Court, 1883, O. xlv. r. 1, it may be enforced by garnishee proceedings; *Holtby* v. *Hodgson*, 24 Q. B. Div. 103.]

[(*g*) *Whittaker* v. *Kershaw*, 45 Ch. Div. 320, 327, 329.]

[(*h*) *Meager* v. *Pellew*, 14 Q. B. Div. 973.]

the effect would practically be to get rid of the restraint on anticipation (*a*).

28. A person entitled to establish a claim against the separate estate of a *feme covert* cannot obtain an injunction against her to restrain her from dealing with it until his right has been established by obtaining a judgment (*b*). [No injunction to restrain dealing with separate estate until claimant's right established.]

29. It was formerly held, though not without a conflict of judicial opinion, that where the creditor proceeded not against the *feme covert* personally, but against her separate property as a trust fund, the Statute of Limitations did not apply and could not be pleaded (*c*). But it was recently pointed out by Kay, J., that the leading case upon the subject proceeded upon the view that the bond of a married woman operated as an appointment making her a trustee for the obligee—a view which is now exploded. And it has now been decided by the Court of Appeal that the Statute of Limitations applies by analogy to the liability of a *feme covert* in respect of her separate estate (*d*).] Statute of Limitations.

30. In one case the Court refused to hold the *Bank Annuities* of a *feme covert* liable, as stock could not, in the case of a person *sui juris* be taken in execution (*e*); but now that stock is available to the creditor (*f*), the distinction may be considered as obsolete. Stock settled to the separate use.

31. Process against the separate property of the wife in her lifetime being in the nature of an *equitable execution* may, like an execution at law, be defeated by a *bonâ fide* assignment to a purchaser or mortgagee (*g*). Assignment good against creditor.

32. After the death of the *feme covert* the creditor may bring an action for payment of his debt out of her separate estate (*h*); and Sir W. Grant ruled that all the creditors, whether by specialty or simple contract, should be paid *pari passu* (*i*). But Lord Romilly was of opinion that the debts should be paid in Creditor's suit after death of *feme covert*.

[(*a*) *Draycott* v. *Harrison*, 17 Q. B. D. 147; *Morgan* v. *Eyre*, 20 L. R. Ir. 541.]

[(*b*) *Robinson* v. *Pickering*, 16 Ch. Div. 660, reversing *S. C.* 16 Ch. D. 371.]

(*c*) *Norton* v. *Turvill*, 2 P. W. 144; [*Hodgson* v. *Williamson*, 15 Ch. D. 87;] *Vaughan* v. *Walker*, 6 Ir. Ch. Rep. 471; 8 Ir. Ch. Rep. 458.

[(*d*) *Re Lady Hastings*, 35 Ch. Div. 94, and see *Re Roper*, 39 Ch. D. 482, 489, and as to the effect of an acknowledgment or payment by her, or of her suffering judgment, see *Beck* v. *Pierce*, 23 Q. B. Div. 316, 322.]

(*e*) *Nantes* v. *Corrock*, 9 Ves. 182.

(*f*) 1 & 2 Vict. c. 110, s. 14.

(*g*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 520, *per* L. J. Turner.

(*h*) See *Owens* v. *Dickenson*, Cr. & Ph. 48; *Gregory* v. *Lockyer*, 6 Mad. 90.

(*i*) *Anon.* 18 Ves. 258; and see *Johnson* v. *Gallagher*, 3 De G. F. & J. 520.

order of priority (*a*). Two conflicting principles were in fact then at work in different branches of the Court (*b*): one was, that the general engagements of the wife were charges on the separate property equivalent to so many assignments, and if so, the debts would be payable in order of date: the other was, that the general engagements were not charges, but created a liability, the remedy for which if the *feme* were *sole*, would be against the person, but as she was *covert*, there was no remedy against the person, but the law gave an equitable execution against the property; and in this view the separate estate would be applicable as assets *pari passu*. Of these two principles the latter is clearly the more correct one (*c*).

[Earnings.] [33. The earnings of a *feme covert*, which under the Married Women's Property Acts belong to her for her separate use, are like her other separate estate divisible upon her death amongst her creditors *pari passu* (*d*).]

Funeral expenses. 34. It has been doubted whether the *funeral* expenses of the wife should be thrown upon her separate estate (*e*). [But in a recent case where a married woman exercised a general power of appointment (*f*), it was held that the husband, who was one of her executors, was entitled to retain out of the appointed property the amount of the expenses of her funeral (*g*).]

Savings. 35. The *savings* by a *feme covert* out of her separate estate form part of it, and are equally at her exclusive disposal, or, according to the language of an early authority, "the sprout is to savour of the root and to go the same way" (*h*); and the same has been held with respect to savings out of a maintenance allowed on separation (*i*). Where a fund is settled to the separate use of a married woman and her *anticipation is restrained*, as the income when actually accrued is at her absolute disposal, any savings from the income, though invested by

(*a*) *Shattock* v. *Shattock*, 2 L. R. Eq. 182. The decision in this case involved a sum of 14*l.* 15*s.* only, so that of course there was no appeal.

(*b*) Compare *Johnson* v. *Gallagher*, 3 De G. F. & J. 494, and *Shattock* v. *Shattock*, 2 L. R. Eq. 182.

(*c*) See now the observations of the Court in *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 594.

[(*d*) *Thompson* v. *Bennet*, 6 Ch. D. 739.]

(*e*) *Gregory* v. *Lockyer*, 6 Mad. 90.

[(*f*) As to the effect of such appointment, see *post*, p. 877.]

[(*g*) *Re McMyn*, 33 Ch. D. 575.]

(*h*) *Gore* v. *Knight*, 2 Vern. 535; *Molony* v. *Kennedy*, 10 Sim. 254; *Humphery* v. *Richards*, 2 Jur. N. S. 432; [*Fitzgibbon* v. *Pike*, 6 L. R. Ir. 487.]

(*i*) *Brooke* v. *Brooke*, 25 Beav. 347; and see *Messenger* v. *Clarke*, 5 Exch. 388.

her in the names of the trustees of the original settlement, will not be subject to the fetter against anticipation which attached to the *corpus* whence the savings proceeded (*a*). Savings out of money given to the wife by her husband for *household purposes, dress, or the like,* belong to the husband (*b*).

Power of disposition by will of separate estate.

36. A *feme covert* has always possessed as incident to her separate estate, a power to dispose of it, whether it be real or personal, not only by act *inter vivos,* but also by *testamentary instrument* in the nature of a will (*c*). [And her will will be effectual to pass after acquired separate property although she had no separate property at the time of making it (*d*),] and administration with the will annexed, where [no executors are appointed, or where] the executors die in her lifetime, will be granted not to her husband the survivor, but to her residuary legatees (*e*). And if a *feme* leave a will and make bequests, the usual course of administration will be observed. Thus, in the payment of her debts, the undisposed of interest will be first applied, then, general legacies, and, if there still be a deficiency, the specific legacies (*f*); and general legacies will, it is presumed, as in the ordinary case, carry interest, not from the death of the testator, but from the expiration of one year after the death (*g*). And a general residue will sweep all arrears of income due at the time of the death (*h*). [But as the separate property is, in the nature of equitable assets distributable *pari passu* amongst the creditors, the executor has no right of retainer in respect of money due to him (*i*).]

Separate estate undisposed of survives to the husband.

37. If a *feme covert* having personal estate settled to her separate use die without disposing of it, the husband will be

(*a*) *Butler* v. *Cumpston*, 7 L. R. Eq. 16.

(*b*) *Barrack* v. *M'Culloch*, 3 K. & J. 114; see *Mews* v. *Mews*, 15 Beav. 529.

(*c*) *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; *Rich* v. *Cockell*, 9 Ves. 369; *Humphery* v. *Richards*, 2 Jur. N. S. 432; *Moore* v. *Morris*, 4 Drew. 38; *Pride* v. *Bubb*, 7 L. R. Ch. App. 64; *Noble* v. *Willock*, 8 L. R. Ch. App. 778; *S. C. nom. Willock* v. *Noble*, 7 L. R. H. L. 580; *Taylor* v. *Meads*, 4 De G. J. & S. 597; [*Bishop* v. *Wall*, 3 Ch. D. 194. But the Married Women's Property Act, 1882, sect. 1, has not the effect of extending the power to property of the *feme*, married before the commencement of the Act, which is not separate property; *Re Cuno*, 43 Ch. Div. 12; and see *Re Drummond and Davie*, (1891) 1 Ch. 524, 534.]

[(*d*) *Charlemont* v. *Spencer*, 11 L. R. Ir. 347, 490.]

(*e*) [*Brenchley* v. *Lynn*, 2 Rob. 441; *Re Goods of Maria Bailey*, 2 Sw. & Tr. 135; and see] *Re Goods of Pine*, 1 L. R. P. & D. 388; *Re Goods of M. Fraser*, 2 L. R. P. & D. 183.

(*f*) *Norton* v. *Turvill*, 2 P. W. 144.

(*g*) See *Tatham* v. *Drummond*, 2 H. & M. 262; the case of a will executing a special power.

(*h*) See *Tatham* v. *Drummond*, 2 H. & M. 262.

[(*i*) *Thompson* v. *Bennett*, 6 Ch. D. 739.]

entitled to it; as to so much thereof as may consist of cash, furniture, or other *personal chattels*, in his marital right, and as to so much as may consist of "*choses en action*," upon taking out administration to his wife (*a*).

Executors take as appointees.

38. If a *feme covert* [in a case not governed by the Married Women's Property Act, 1882, make a will in exercise of a power and] appoint *executors*, they do not take all the separate property *jure representationis*, but as appointees under the power to the extent of the fund appointed (*b*). And therefore if the will do not dispose of [the separate property not subject to the power] the executors take only the [property] disposed of, while the husband takes such chattels as are in possession, and as regards *choses en action* there must be letters of administration (*c*). [But if the *feme covert* being possessed of separate personal estate make a will, not under a power, but by virtue of her right as a married woman to dispose of her separate estate, and appoint executors, and direct them to pay legacies, they are entitled to probate, and all the separate estate vests in them *jure representationis* (*d*). And since the Married Women's Property Act, 1882, if a married woman make a will in execution of a power and also appoint executors they are entitled to probate in general form and the right of the husband to administration *cæterorum* is excluded (*e*). And wherever there is evidence of the existence of separate property probate will be granted to the executor (*f*),

[*Secus*, where will not under a power, or made since the Married Women's Property Act]

(*a*) *Proudley* v. *Fielder*, 2 M. & K. 57; *Molony* v. *Kennedy*, 10 Sim. 254; *Bird* v. *Peagrum*, 13 C. B. 639; *Johnstone* v. *Lumb*, 15 Sim. 308; *Drury* v. *Scott*, 4 Y. & C. 264; *Askew* v. *Rooth*, 17 L. R. Eq. 426; *Tugman* v. *Hopkins*, 4 Man. & G. 389; *Archer* v. *Lavender*, 9 I. R. Eq. 220; [and the law in this respect is not affected by the Married Women's Property Act, 1882; *Re Lambert's Estate*, 39 Ch. D. 626, and see *Surman* v. *Wharton*, (1891) 1 Q. B. 491, 493; *Smart* v. *Tranter*, 43 Ch. Div. 587; *ante*, p. 849.]

(*b*) If a married woman execute a power by will, the instrument though in form a will is in fact a conveyance by means of the appointment exercised, and although an executor is appointed, he takes nothing in his character of personal representative, *per* Sir James Hannen, *Re Goods of Tomlinson*, 6 P. D. 209; [and see *Re Goods of Hornbuckle*, 59 L. J. P. D. 78; 63 L. T. N.S. 464; 39 W. R. 80; and on this principle probate has been refused of a will by a married woman appointing real estate under a power and constituting executors; *O'Dwyer* v. *Geare*, 1 Sw. & Tr. 465; *Re Goods of Barden*, 1 L. R. P. & D. 325; *Re Goods of Tomlinson*, *ubi supra*.]

(*c*) *Tugman* v. *Hopkins*, 4 Man. & G. 389.

[(*d*) *Brownrigg* v. *Pike*, 7 P. D. 61.]

[(*e*) *Re Goods of Jevers*, 13 L. R. Ir. 1; *Re Lambert's Estate*, 39 Ch. D. 626; *q.v.* as to effect of new Probate Rules of March, 1887, and see *ante*, p. 849.]

[(*f*) *Harding* v. *Sutton*, 59 L. T. N.S. 838; *Re Lambert's Estate*, 39 Ch. D. 627; and as to the effect of such probate, *vide sup.* p. 849. It may be observed that in *Smart* v. *Tranter*, 40 Ch. D. 165; *S. C.* 43 Ch. Div. 587, the decision of Kay, J., to the effect that the husband, in order to establish his right to the *choses en action* there

although the will deals only with real estate (*a*). By sect. 23 of the Married Women's Property Act, 1882, for the purposes of the Act the legal personal representative of any married woman is, in respect of her separate estate, to have the same rights and liabilities and be subject to the same jurisdiction as she would be if living; and the husband taking *jure mariti* is the legal personal representative of the wife within this section, and therefore liable to her debts to the extent to which the property was her separate estate (*b*).]

Separate property invested in land.

39. If a *feme covert*, having income settled to her separate use, lay out the savings in a *purchase of land* in the name of a trustee, [or in her own name,] the land on her dying intestate will descend to the heir and not be personal estate in equity for the benefit of the administrator (*c*).

[Appointment does not pass savings after the termination of the coverture.]

[40. A testamentary appointment by a *feme covert* will not pass dividends arising after the termination of the coverture from property settled to her separate use for life with a power of appointment by deed or will, and in default of appointment, in the event of her surviving her husband, for her, her executors, administrators, and assigns, or investments which have been acquired by her after the termination of the coverture from the sale and reinvestment of property subject to the power of appointment (*d*).

Whether property subject to power of appointment by *feme covert* becomes assets on exercise of the power.

41. The question whether (independently of the provision in the Married Women's Property Act, 1882, to be hereafter noticed) property subject to a power of appointment in a married woman becomes, on her exercising the power, assets available for the satisfaction of her engagements, has been the subject of conflicting opinions. In *Johnson* v. *Gallagher* (*e*), the question was treated by Turner, L.J., as an open one upon the authorities, though a distinction was drawn where the *feme covert* was guilty of fraud. V. C. Kindersley, on the general question, was of

in question, ought to take proceedings in the Probate Division to revoke the probate, proceeded on the footing that the married woman had no separate property, and therefore no power to make a will, whereas in fact, as appears from the report of the case on appeal in 59 L. J. Ch. 363, 364, she had some separate property.]

[(*a*) *Re Goods of Cubbon*, 11 P. D. 169.]

[(*b*) *Surman* v. *Wharton*, (1891) 1 Q. B. 491.]

(*c*) *Steward* v. *Blakeway*, 6 L. R. Eq. 479; 4 L. R. Ch. App. 603.

[(*d*) *Mayd* v. *Field*, 3 Ch. D. 587. See as to the effect of a will, made since the Married Women's Property Act, 1882, by a married woman, of property acquired after the termination of the coverture, *ante*, p. 850].

[(*e*) 3 De G. F. & J. 494, 517; see *Hughes* v. *Wells*, 9 Hare, 749; *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *Blatchford* v. *Woolley*, 2 Dr. & Sm. 204; *Hobday* v. *Peters* (No. 2), 28 Beav.

opinion that the appointed funds were not assets (*a*), but held that] if an estate were settled to the separate use of a *feme covert* for life, with a general power of appointment by will, and in default of appointment to her in fee, and she suppressed her real name, and holding herself out as a *feme sole*, mortgaged the estate, the mortgagee had a *lien* upon the estate as against the heir or appointee (*b*).

[Modern decisions, however, seemed, until very recently, to have established the proposition that on the married woman exercising the power, the property becomes assets available for the discharge of her liabilities in the same manner as her separate estate is available. Thus in a case in the Privy Council] where there was no fraud, and the *feme covert* had a general power of appointment *either* by instrument *inter vivos* or by will, [and there was a gift in default of appointment to her executors or administrators, and she exercised the power by will, it was] held that her general engagements were payable out of the property(*c*), and the Court went so far as to say, in the broadest terms, that such a settlement amounts in effect to what in common sense and to common apprehension it would be, viz., an absolute gift to the sole and separate use, and that such a form of settlement on a married woman, without restraint of anticipation, vests in equity the entire *corpus* in her for all purposes as fully as a similar gift to a man would vest it in him (*d*). The actual decision of the case in which this general doctrine was laid down was clearly supportable on the ground that there had been an imperfect execution of the power, and there being valuable consideration equity would supply the defect; and the Court did not mean what the generality of the expressions would imply, that where the *power is not executed* the property is available for the *feme covert's* engagements, for the Court expressly approved the doctrine laid down by Sir G. Turner, that where there is a limitation over in default of appointment and the power has not been exercised, the engagements of the married woman cannot prevail against the parties entitled in default of

354; *Shattock* v. *Shattock*, 2 L. R. Eq. 182; Sugd. on Powers, 8th ed. p. 476.]

[(*a*) *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *Blatchford* v. *Woolley*, 2 Dr. & Sm. 204.]

(*b*) *Vaughan* v. *Vanderstegen*, 2 Drew. 363; and see *Hobday* v. *Peters* (No. 2), 28 Beav. 354; [*Barrow* v. *Manning*, W. N. 1878, p. 122; *Re McIntyre's Trust*, 21 L. R. Ir. 42.]

(*c*) *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 572, and see *Brewer* v. *Swirles*, 2 Sm. & G. 219.

(*d*) *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. 595.

appointment (*a*). [In a later case (*b*), where personal property was settled upon such trusts as a *feme covert* should during coverture by deed or will appoint, and, subject thereto, for her separate use for life, and if she survived her husband (an event which happened) for her absolutely, and the *feme* appointed the property by will, the late M. R. held that the property was bound by her general engagements. Again, where property was settled on a *feme covert* for life for her separate use with a general power of appointing by will, with a gift over in default of appointment, V. C. Hall held that the property appointed by her will was assets for the payment of her debts in the same manner as if it had belonged to her for her separate use (*c*), and this decision has since been acted upon (*d*).

However, in the most recent case, in which the authorities [Re Roper.] were fully examined by Kay, J., a conclusion at variance with the previous decisions was arrived at, and it was held that the property appointed by the will of the *feme covert* was not liable to satisfy her obligations incurred before the Act of 1882, and that the exercise of the power did not make the appointed property available as assets to answer such obligations (*e*). The grounds upon which this decision was based were that as, according to the principle of *Pike* v. *Fitzgibbon* (*f*), the engagement of a married woman could only bind separate estate to which she was entitled at the time when the engagement was entered into, it followed that property which did not become part of the estate of the *feme* until the appointment took effect upon her death could not be resorted to to answer an antecedent engagement, and that the previous decisions, including that in the Privy Council already referred to, were based on the exploded doctrine of *Norton* v. *Turvill* (*g*), that the bond of a married woman operated as an appointment. The law, therefore, upon

(*a*) *S. C.* 592.

[(*b*) *Mayd* v. *Field*, 3 Ch. D. 587; see *Skinner* v. *Todd*, 51 L. J. N.S. Ch. 198.]

[(*c*) *Re Harvey's Estate*, 13 Ch. D. 216, and the V. C. observed that it might perhaps, even in the case of a man, be said to be a strong and arbitrary thing to decide that property which was not in the first instance his own, and which he could only appoint, was assets for the payment of his debts. But as to the decision in this case see the observations by L. J. Cotton in *Pike* v. *Fitzgibbon*, 17 Ch. Div. 466.]

[(*d*) *Hodgson* v. *Williamson*, 15 Ch. D. 87; *Hodges* v. *Hodges*, 20 Ch. D. 749; and see *Re De Burgh Lawson*, 41 Ch. D. 568.]

[(*e*) *Re Roper*, 39 Ch. D. 482.]

[(*f*) 17 Ch. Div. 454, see *ante*, pp. 863, 870.]

[(*g*) 2 P. W. 144, see *ante*, p. 873.]

this subject remains, at the present time, in a somewhat unsettled condition (*a*).

[Married Women's Property Act, 1882, sect. 4.]

42. Now by the Married Women's Property Act, 1882, sect. 4, it is provided that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

[Particular power and particular engagement.]

43. Where a married woman was tenant for life for her separate use without power of anticipation, and the trustees were "at her direction to direct repairs and do all such acts as should be proper for that purpose," and the tenant for life herself ordered the repairs, the Court gave effect to the particular engagement out of the particular power to direct repairs, and treated the power as being in effect exercised, and directed the trustees to raise the amount required for the repairs which had been executed, and to pay the amount to the builder employed by the tenant for life (*b*).]

Arrears of separate estate.

44. If the husband receive the wife's separate income, it is clear that neither the wife nor those entitled under her can claim against the husband or his estate, or any one standing in his place (*c*), *more than one year's arrears* (*d*), but it is still *sub judice* whether the wife or her representative can claim even so much. Lord Macclesfield (*e*), Lord Talbot (*f*), Lord Loughborough (*g*), Sir W. Grant (*h*), and Lord Chancellor Brady (*i*), held that the wife or her representative could claim nothing. On the other hand, in the judgment of Sir T. Sewell (*j*), Lord Camden (*k*), Lord King (*l*), Lord Hard-

[(*a*) In the case of *Re De Burgh Lawson*, 41 Ch. D. 568, *Re Roper* was relied on as an authority before Stirling, J., and it was there held that under the will of a married woman, directing her executors to pay her "debts," and appointing property to the persons named as executors, the principle of *Re Tanqueray-Willaume and Landau* (20 Ch. D. 465) applied, so that the so-called debts were a charge upon the appointed property, and his lordship based his judgment on the fact that there were, as found by the chief clerk's certificate, debts within the meaning of the direction in the will.]

[(*b*) *Skinner* v. *Todd*, 51 L. J. N.S. 198.]

(*c*) *Payne* v. *Little*, 26 Beav. 1.

[(*d*) See *Alexander* v. *Barnhill*, 21 L. R. Ir. 511, 516.]

(*e*) *Powell* v. *Hankey*, 2 P. W. 82.

(*f*) *Fowler* v. *Fowler*, 3 P. W. 353. (N.B. A case of pin-money.)

(*g*) *Squire* v. *Dean*, 4 B. C. C. 325; *Smith* v. *Camelford*. 2 Ves. jun. 716.

(*h*) *Dalbiac* v. *Dalbiac*, 16 Ves. 126.

(*i*) *Arthur* v. *Arthur*, 11 Ir. Eq. Rep. 511.

(*j*) *Burdon* v. *Burdon*, 2 Mad. 286, note.

(*k*) Ib. p. 287, note.

(*l*) *Countess of Warwick* v. *Edwards*, 1 Eq. Ca. Ab. 140. In *Thomas* v. *Bennet*, 2 P. W. 341, his Lordship probably held only that *ten years*' arrears could not be given.

wicke (*a*), Lord Eldon (*b*), Sir J. Leach (*c*), Sir J. Stuart (*d*), Lord St. Leonards (*e*), Smith, M. R. in Ireland (*f*), and Dobbs, J., in the Landed Estate Court (*g*), the husband's estate is liable to an account for one year (*h*). Where there is such a conflict of authority it is hard to say which way the balance inclines. The better opinion, independently of authority, is thought to be that the wife can recover *nothing* from the husband's estate. Should the husband die *insolvent*, could she recover anything from the trustees on the ground of misapplication? and if the payment by the trustees to the husband was a proper one, why should the amount be recoverable from the estate of the husband? The wife's assent must be deemed to continue until revoked by something either expressed or implied.

Wife's acquiescence in receipt of her separate income by husband presumed.

45. The principle upon which the relief against the husband's estate is thus denied is, that the Court *presumes* the acquiescence of the wife in the husband's receipt *de anno in annum* (*i*). If, therefore, the wife did not in fact consent to the husband's receipt, but remonstrated and required that the separate income should be paid to herself, the Court will carry back the account of the arrears to the time of the wife's assertion of her claim (*j*). But the Court requires very clear evidence that the demand was seriously pressed by the wife, and will not charge the husband's estate from any idle complaints against his receipt which the wife may have occasionally made (*k*). There can be no acquiescence by the wife, and, therefore, no waiver of her rights where

(*a*) *Townshend* v. *Windham*, 2 Ves. sen. 7; *Peacock* v. *Monk*, 2 Ves. sen. 190; *Aston* v. *Aston*, 1 Ves. sen. 267.

(*b*) *Parkes* v. *White*, 11 Ves. 225; *Brodie* v. *Barry*, 2 V. & B. 36.

(*c*) *Thrupp* v. *Harman*, 3 M. & K. 513.

(*d*) *Lea* v *Grundy*, 1 Jur. N. S. 953.

(*e*) Property as administered by D. P. p. 169.

(*f*) *Corbally* v. *Grainger*, 4 Ir. Ch. Rep. 173; *Mackey* v. *Maturin*, 15 Ir. Ch. Rep. 150.

(*g*) *Re Kirwan*, 1 Ir. Rep. Eq. 553.

(*h*) In *Howard* v. *Digby*, 9 Cl. & Fin. 643, 665, Lord Brougham thought that in *separate use*, as distinguished from *pin-money*, the wife or her representatives could recover the whole arrears, but this is clearly untenable; see *Arthur* v. *Arthur*, 11 Ir. Eq. Rep. 513. In the same case the V. C. of England, when the cause was before him, hesitated whether the general rule gave an account for a year or none at all; see *Digby* v. *Howard*, 4 Sim. 601.

(*i*) *Caton* v. *Rideout*, 2 H. & Tw. 41; 1 M. & G. 599; [see *Dixon* v. *Dixon*, 9 Ch. D. 587; *Re Lulham*, 53 L. J. N.S. Ch. 928; *Edward* v. *Cheyne*, 13 App. Cas. 385, 398; *Re Flamank*, 40 Ch. D. 461; *Re Blake*, 37 W. R. 441; 60 L. T. N.S. 663; *Hale* v. *Sheldrake*, 60 L. T. N.S. 292; *Alexander* v. *Barnhill*, 21 L. R. Ir. 511.]

(*j*) *Ridout* v. *Lewis*, 1 Atk. 269; *Moore* v. *Moore*, 1 Atk. 272; see *Moore* v. *Earl of Scarborough*, 2 Eq. Ca. Ab. 156; *Parker* v. *Brooke*, 9 Ves. 583; [*Dixon* v. *Dixon*, 9 Ch. D. 587.]

(*k*) *Thrupp* v. *Harman*, 3 M. & K. 512; *Corbally* v. *Grainger*, 4 Ir. Ch. Rep. 173.

the income has not actually come to the hands of the husband, as where it is still in the hands of a receiver (*a*).

Case of *feme covert* being *non compos.*

46. As the Court proceeds upon the notion of the wife's acquiescence, the question arises where she is *non compos*, and so *incapable* of waiving her right, whether the husband's estate shall not be liable for the entire arrears; and it would seem that in such a case the husband's estate must account for the whole, but will be entitled to an allowance for payments made for the wife's benefit, and which ought properly to have fallen on her separate estate (*b*).

Case of pin-money whether an exception.

47. In *Howard* v. *Digby* (*c*), a woman's *pin-money* was distinguished from ordinary *separate use*, and it was held as to *pin-money* that the wife's *representative* (*d*) could make no claim to any arrears. The ground upon which the House proceeded was that pin-money was for the personal use and ornament of the wife, and the husband had a right to see the fund properly applied, and that if the husband himself found the necessaries for which the pin-money was intended, the wife or her representative could have no claim against the husband's estate when the requirements for her personal use and ornament had ceased (*e*). Lord St. Leonards has justly questioned these principles (*f*), and it remains to be seen whether any distinction between *pin-money* and *separate use* generally can be maintained.

Gift of *corpus* to husband not presumed.

48. As regards the *corpus of the separate estate* no presumption arises in favour of a husband who has received it. He is *primâ facie* a trustee for his wife, and a gift from her to him will not be inferred without clear evidence (*g*), [enabling the Court to come to the conclusion that she deliberately gave the property to him (*h*). Thus, where a legacy bequeathed to the separate use of a wife was paid by a banker's draft payable to her order, and she indorsed the draft and handed it over to her husband, who paid it into his own bank, and had the amount

(*a*) *Foss* v. *Foss*, 15 Ir. Ch. Rep. 215.

(*b*) *Attorney-General* v. *Parnther*, 3 B. C. C. 441; 4 B. C. C. 409; *Howard* v. *Digby*, 2 Cl. & Fin. 671, 673.

(*c*) 2 Cl. & Fin. 634; 4 Sim. 588.

(*d*) Lord Brougham considered that the wife herself might in her lifetime have recovered one year's arrears; see 2 Cl. & Fin. 643, 653, 659.

(*e*) See too *Aston* v. *Aston*, 1 Ves. sen. 267; *Fowler* v. *Fowler*, 3 P. W. 355; *Barrack* v. *M'Culloch*, 3 K. & J. 110.

(*f*) Law of Property as administered by D. P., p. 162; [and see Vaizey on Settlements, pp. 788, *et seq.*]

(*g*) *Rich* v. *Cockell*, 9 Ves. 369; [*Re Flamank*, 40 Ch. D. 461; *Re Blake*, 37 W. R. 441; 60 L. T. N.S. 663.]

[(*h*) *Re Flamank*, 40 Ch. D. 461.]

carried over to a deposit account in his name, it was held that this was not sufficient to deprive the wife of her right (*a*). So where shares in a company, which were appropriated to a married woman as part of her share of a residue bequeathed to her for her separate use, were transferred into the name of the husband, and he made an entry in his ledger that the shares were part of his wife's portion of the testator's estate, the separate use of the wife was not destroyed (*b*); and the husband's estate was held liable for the proceeds of new shares which had been allotted in respect of the old shares, and had been sold by him (*c*), and it has been regarded as a material circumstance that the wife has concurred in the transfer to the husband without having previously had any independent advice (*d*).] But the employment of the money by the husband in his business and for his family expenditure with the knowledge and assent of his wife, will, in the absence of agreement to the contrary, amount to a gift by her (*e*). [And where a joint account was opened at a bank in the names of the husband and wife, and each of them had power to draw on the account, and each of them had also a separate account at other bankers, and the moneys credited to the joint account were chiefly derived from the wife's separate income, it was held that the moneys paid in had ceased to be part of the separate estate of the wife (*f*).]

Feme not bound to contribute to household expenses.

49. Occasionally a *feme covert* has a large income from property settled to her separate use, and being of penurious habits accumulates the whole, and yet looks to her much poorer husband for her support. This is a hard case, but it is said that the Court cannot advert to the question whether she accumulates or not (*g*).

[Trespass on wife's separate property.]

[50. Where the house in which the wife resides is settled to her separate use, and the husband has been guilty of improper conduct, and claims to use the house not for the purpose of consorting with his wife, but for his own purposes, the Court will grant an injunction to restrain him from entering the house (*h*).

And a married woman, in the sole occupation of a house

[(*a*) *Green* v. *Carlill*, 4 Ch. D. 882.]
[(*b*) *Re Curtis*, W. N. 1885, p. 29; 52 L. T. N.S. 244.]
[(*c*) *Re Curtis* (No. 2), W. N. 1885, p. 55.]
(*d*) *Re Flamank*, 40 Ch. D. 461; *Re Blake*, 37 W. R. 441; 60 L.T.N.S. 663.
(*e*) *Gardner* v. *Gardner*, 1 Giff. 126.
[(*f*) *Re Young*, 28 Ch. D. 705.]
(*g*) *Re Smith's Trusts*, W. N. 1867, p. 283.
[(*h*) *Symonds* v. *Hallett*, 24 Ch. Div. 346; *Green* v. *Green*, 5 Hare, 400, n.; *Wood* v. *Wood*, 19 W. R. 1049.]

bought out of her own earnings, can sue a stranger for a trespass in having entered the house without her leave, even though the entry was made under the authority of her husband (*a*).]

Separate use may extend to *corpus*, or to income beyond coverture.

51. It has never been questioned that if *personal* estate be given to a *feme covert* for her separate use, her power of disposition extends over the *corpus;* and so, if the income of property be limited to a *feme covert* for her *life*, either in possession or reversion, for her separate use, or if the absolute interest be given to her in reversion for her separate use, if it appear that the separate use applies not only to the income accruing during the *coverture*, but to the life estate, or absolute reversionary interest, the *feme* may aliene the whole life estate, or absolute reversionary interest (*b*). The question in these cases is one of construction only, and therefore where the fund was settled upon trust for a *feme covert* "absolutely," and "during her life for her separate use," her power was held not to extend beyond the life estate (*c*). But if personalty had been limited to the separate use upon a mere contingency (as on the insolvency of the husband, an event which had not yet occurred), it seems that the *feme covert* could not, *pending the contingency*, have aliened or otherwise disposed of her possible interest (*d*). [But since the Married Women's Property Act, 1882, as to cases falling within that Act, a married woman can dispose of a contingent interest (*e*).]

Separate use in reference to real estate.

52. As regards *realty* it was formerly held that the *feme covert* could not by virtue of the separate use, if there were no express power, dispose of the freehold, at least not for any larger interest than during her life (*f*), for between real and personal estate it was said there was this distinction, that on the death of the *feme* in her husband's lifetime, the absolute interest in the personal estate would devolve on the husband, but the inheritance of the real estate would descend upon the heir, who was not to

[(*a*) *Weldon* v. *De Bathe*, 14 Q. B. Div. 339; and see *Moore* v. *Robinson*, 48 L. J. N.S. Q. B. 156.]

(*b*) *Sturgis* v. *Corp*, 13 Ves. 190; *Stead* v. *Nelson*, 2 Beav. 245; *Hanchett* v. *Briscoe*, 22 Beav. 503; *Stamford, Spalding and Boston Bank* v. *Ball*, 10 W. R. 196; 4 De G. F. & J. 310; *Dudley* v. *Tanner*, W. N. 1873, p. 75.

(*c*) *Hanchett* v. *Briscoe*, 22 Beav. 496; *Crosby* v. *Church*, 3 Beav. 485; [*Shute* v. *Hogge*, 58 L. T. N.S. 546; but see 45 & 46 Vict. c. 75.]

(*d*) *Mara* v. *Manning*, 2 Jon. & Lat. 311; *Bestall* v. *Bunbury*, 13 Ir. Ch. Rep. 549; *S. C.* Ib. 349; *Keays* v. *Lane*, 3 Ir. R. Eq. 1; and see *Luther* v. *Bianconi*, 10 Ir. Ch. Rep. 194; [*Re Shakespear*, 30 Ch. D. 169.]

[(*e*) 45 & 46 Vict. c. 75, ss. 1, 2, 5.]

(*f*) *Churchill* v. *Dibben*, 2 Lord Kenyon's Rep. 2d part, 68, p. 84; case cited in *Peacock* v. *Monk*, 2 Ves. 192; and see 2 Rop. Husb. and Wife, 182, 2nd ed.; 1 Sand. on Uses, 345, 4th ed.; *Lechmere* v. *Brotheridge*, 32 Beav. 353.

be disinherited but in some formal mode. However, the favour shown anciently to the heir has in later times been disregarded; and at the present day, if lands be conveyed to a trustee and his heirs upon trust as to the *fee simple* for a *feme covert* "for her separate use," she may deal with the fee as if she were a *feme sole*. It is simply a question of intention. A married woman may have limited to her a power of disposition over a *fee simple* estate, and if it appear clearly that the separate use was meant to extend to the fee, she ought upon principle to be able to deal with the absolute property by virtue of the separate use, whether by act *inter vivos*, or by testamentary instrument, as fully as she might in the case of personal estate (*a*). And so it has been decided both in Ireland and England (*b*). But the *feme covert* has not been regarded as a *feme sole* in respect of the *fee simple*, unless it clearly appeared from the instrument itself that the *fee simple*, and not the mere life estate, was limited to the separate use (*c*).

[The mere renunciation by an intended husband of his marital rights in his wife's realty is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee (*d*).

Under the recent Act (*e*), the whole interest in real estate given to a married woman belongs to her as her separate estate, and can be disposed of by her accordingly (*f*).

(*a*) *Stead* v. *Nelson*, 2 Beav. 245; *Wainwright* v. *Hardisty*, 1b. 363; *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627; see p. 628; *Major* v. *Lansley*, 2 R. & M. 355; [*Stogdon* v. *Lee*, (1891) 1 Q. B. (C. A.) 166.] But see *Newcomen* v. *Hassard*, 4 Ir. Ch. Rep. 274; *Harris* v. *Mott*, 14 Beav. 169; *Moore* v. *Morris*, 4 Drew. 38.

(*b*) *Adams* v. *Gamble*, 11 Ir. Ch. Rep. 269; 12 Ir. Ch. Rep. 102; *Bestall* v. *Bunbury*, 13 Ir. Ch. Rep. 549; *Hall* v. *Waterhouse*, 6 N. R. 20; *Atchison* v. *Lemann*, 23 L. T. 302; *Pride* v. *Bubb*, 7 L. R. Ch. App. 64; [*Cooper* v. *Macdonald*, 7 Ch. Div. 288;] *Re Smallman*, 8 I. R. Eq. 249; *Taylor* v. *Meads*, 5 N. R. 348; *S. C.* 4 De G. J. & S. 597. In the last case the solicitor of the defendants, the tenant for life, and infant remainderman, petitioned for payment of his costs out of the estate, on the ground of his lien, and by an order made in the cause (though the bill had been dismissed), it was declared that the petitioner, as solicitor employed by or on behalf of the defendants to defend the said cause, was entitled to a charge on the premises for the amount at which his costs should be taxed, including the costs of the application, and directions were given for the sale, with the approbation of the Court, of a competent part of the estate for raising the costs; *Ex parte Marshall. Taylor* v. *Meads*, M. R. 6 May, 1865. See *Haymes* v. *Cooper*, 33 Beav. 431; *Bonser* v. *Bradshaw*, 4 Giff. 260; *Wilson* v. *Round*, 4 Giff. 416; and see *Allen* v. *Walker*, 5 L. R. Ex. 187.

(*c*) *Troutbeck* v. *Boughey*, 2 L. R. Eq. 534.

[(*d*) *Dye* v. *Dye*, 13 Q. B. Div. 147. But see *Rippon* v. *Dawding*, Amb. 565, in which case, however, the 7th sect. of the Statute of Frauds was not referred to, and see the observations of L. J. Turner in *Field* v. *Moore*, 7 De G. M. & G. 718, 719.]

[(*e*) 45 & 46 Vict. c. 75.]

[(*f*) As to the cases to which the Act applies see *ante*, p. 847, *et seq.*]

[*Feme covert* can bar an equitable entail.]

53. If a married woman be equitable tenant in tail in possession of real estate, which is settled to her separate use, she can under the provisions of the Fines and Recoveries Act bar the entail, with the concurrence of her husband (*a*), and the husband's power of concurring will not be affected by his bankruptcy (*b*); and in cases falling within the Married Women's Property Act, 1882, the concurrence of the husband is unnecessary (*c*).]

Feme covert as protector.

54. If a legal estate be limited to a married woman for her life for her *sole and separate use*, without the interposition of a trustee, with remainder in tail, the wife is the *sole protector* of the settlement, and the husband's consent in barring the entail is not necessary (*d*).

[Exception of settlements from the operation of the Married Women's Property Act, 1882.]

[55. A very important exception from the operation of the recent Act is contained in sect. 19, which controls the general powers of disposition conferred by the previous sections by providing that "nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement, made or to be made, whether before or after marriage, respecting the property of any married woman." The construction of this enactment is attended with great difficulty; but the effect of it, so far as can be gathered from the decided cases, is that the operation of a settlement is to be determined just as it would have been under the pre-existing law, so that no one who under that law could have taken any interest is to be deprived thereof (*e*). The true construction of the section, so far as it affects property of the married woman falling within the operation of sect. 5, has been said by Cotton, L.J., to be that "it prevents the previous enactment" (*i.e.* sect. 5) "from interfering with any settlement which would have bound the property if the Act had not passed" (*f*). Thus where a settlement contains a covenant for settlement of after-acquired pro-

[(*a*) 3 & 4 Will. 4, c. 74, ss. 15, 40.]

[(*b*) *Cooper* v. *Macdonald*, 7 Ch. Div. 288.]

[(*c*) See *supra*, notes (*e*), (*f*); and see *Re Drummond and Davie's Contract*, (1891) 1 Ch. 524, where it was held that the concurrence of the husband was not necessary to a deed by the *feme* (married after the recent Act) converting a base fee (created under a disentailing assurance executed by her when a spinster) into a fee simple absolute.]

(*d*) *Kerr* v. *Brown*, Johns. 138 [and see 45 & 46 Vict. c. 75.]

[(*e*) *Re Onslow*, 39 Ch. D. 622, 625, *per* Stirling, J.]

[(*f*) *Hancock* v. *Hancock*, 38 Ch. Div. 78, 86; and if this is its effect as regards the operation of sect. 5, it must, it would seem, be so generally. The result of this construction would apparently be to revive, so far as settlements are concerned, the repealed statutes of 1870 and 1874.]

perty belonging to the wife, such covenant will, it would seem, though entered into by the husband only, bind all her property as fully as it would if the Act had never been passed (*a*), and she will be obliged to bring into settlement property to which she would otherwise have been entitled as her separate property under the provisions of the Act. And a postnuptial settlement of a *feme covert's* property on herself with a restraint on anticipation, made by her subsequently to the passing of the Act and after she had contracted a liability, was held to be protected by the clause (*b*).

When, however, it has once been ascertained that a married woman takes an interest *under* a settlement, the incidents annexed by the Act to the property of married women attach to the interest so taken by her, and on her becoming discovert, and then marrying again, she will hold such interest as her separate property in accordance with the Act (*c*); and an alienation, whether voluntary or involuntary, by the married woman is not an interference with or an act affecting the settlement, even though such an alienation would not have been practicable before the Act. Thus where the feme carried on a trade separately from her husband and became bankrupt, her separate life interest under a settlement passed to her trustee in bankruptcy under sect. 1, sub-sect. 5 of the Act (*d*).

56. It still remains to treat of *restraint of anticipation.*

Clause restraining anticipation.

The clause against the *feme's* anticipation is of comparatively modern growth. In *Hulme* v. *Tenant* (*e*) it was held that a limitation to the separate use simply did not prevent the *feme* from aliening. In *Pybus* v. *Smith* (*f*) great pains had been taken in framing the separate use, and the income was made payable as the *feme* should by writing *under her proper hand from time to time appoint,* but it was again decided that the *feme* could even then dispose of her interest. After this Lord Thurlow happened to be nominated a trustee of Miss Watson's settlement, and he directed the insertion of the words "*and not by anticipation*" (*g*), from which time this has been the usual formulary, and the effect of it for the purpose of excluding the power of disposition has never been questioned.

[(*a*) *Re Whitaker*, 34 Ch. Div. 227; *Hancock* v. *Hancock*, 38 Ch. Div. 78; and see *Re Stonor's Trusts*, 24 Ch. D. 195; *Re Skelton*, 7 Times L. R. 638.]

[(*b*) *Hemingway* v. *Braithwaite*, 61 L. T. N.S. 224.]

[(*c*) *Re Onslow*, 39 Q. B. D. 622, 625.]

[(*d*) *Re Armstrong*, 21 Q. B. Div. 264.]

(*e*) 1 B. C. C. 16.

(*f*) 3 B. C. C. 340.

(*g*) See *Jackson* v. *Hobhouse*, 2 Mer. 487; *Parkes* v. *White*, 11 Ves. 221.

No particular form of words required to restrain anticipation.

57. But although these words are now almost universally employed they are not absolutely indispensable, for if the intention to restrain anticipation can be clearly collected from the whole instrument it is sufficient (*a*); as if there be a direction to pay the income to such persons *as the feme shall after it has become due appoint* (*b*), or for her sole separate and *inalienable* use (*c*); [or her receipt to the trustees is to be given after the rents shall become due from time to time (*d*).] But if the limitation be merely to the sole and separate use, or to pay *from time to time* upon her receipt under her own proper hand (*e*), or if the trust be to pay her upon her *personal appearance* (*f*), the *feme* is left at liberty to part with her interest, for such expressions are, as Lord Eldon observed, "only an unfolding of all that is implied in the gift to the separate use" (*g*). Where a testator directs a daughter's share of his estate to be "so settled that she may enjoy the income during her life for her separate use," the trust is *executory*, and the Court will insert a clause against anticipation (*h*); and if upon marriage a fund be articled to be vested in the wife and a co-trustee in trust for herself, but not to be disposed of *without the consent of both parties*, the wife cannot anticipate without the consent of the co-trustee (*i*).

Effect before marriage of the clause against anticipation.

58. A widow may, after her husband's death (*j*), and a *feme sole* may, before marriage (*k*), dispose absolutely of a gift limited to her separate use, though coupled with words purporting to restrain her power of anticipation; and the principle is briefly this—that *wherever a person possessing an interest, however remote a possibility, is* sui juris, *that person cannot be prevented by any intention of the donor from exercising the ordinary*

(*a*) *Ross's Trust*, 1 Sim. N.S. 199; *Doolan* v. *Blake*, 3 Ir. Ch. Rep. 340; and cases cited Ib.

(*b*) *Field* v. *Evans*, 15 Sim. 375; *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Estate of H. H. Molyneux*, 6 I. R. Eq. 411.

(*c*) *D'Oechsner* v. *Scott*, 24 Beav. 239; *Spring* v. *Pride*, 10 Jur. N. S. 876; *S. C.* 4 De G. J. & S. 395.

[(*d*) *Re Smith*; *Chapman* v. *Wood*, 51 L. T. N.S. 501.]

(*e*) *Ellis* v. *Atkinson*, 3 B. C. C. 565; *Clarke* v. *Pistor*, cited Ib. 568; *Brown* v. *Like*, 14 Ves. 302; *Acton* v. *White*, 1 S. & S. 429; *Witts* v. *Dawkins*, 12 Ves. 501; *Wagstaff* v. *Smith*, 9 Ves. 520; *Sturgis* v. *Corp*, 13 Ves. 190; and see *Scott* v. *Davis*, 4 M. & Cr. 87; *Hovey* v. *Blakeman* cited 9 Ves. 524.

(*f*) *Re Ross's Trust*, 1 Sim. N.S. 196.

(*g*) *Parkes* v. *White*, 11 Ves. 222.

(*h*) *Re Dunnell's Trusts*, 6 I. R. Eq. 322.

(*i*) *Hastie* v. *Hastie*, 2 Ch. Div. 304.

(*j*) *Jones* v. *Salter*, 2 R. & M. 208.

(*k*) *Woodmeston* v. *Walker*, 2 R. & M. 197; *Brown* v. *Pocock*, Ib. 210; *S. C.* 2 M. & K. 189; and see *Massey* v. *Parker*, 2 M. & K. 174. [In *Re Wood*, 61 L. T. N.S. 197, a covenant for the settlement of reversionary property entered into by a *feme sole* was held to remove the restraint on anticipation.]

rights of proprietorship. The fund may be limited "in trust for the separate use of the *feme*," or "in trust for her, and in the event of her marriage, for her separate use," or "in trust for her separate use in the event of her marriage," without the gift of any estate independently of that contingency; but in all these cases the interest, whether *vested* or *contingent*, is in favour of one who is now *sui juris*, and who therefore cannot be restrained from disposing of property to which she either now is, or may eventually become entitled.

The clause against anticipation will operate upon the marriage.

59. It was formerly held by Sir L. Shadwell, that while the *separate use* took effect upon marriage (*a*), a general *clause against anticipation* not made with reference to the marriage was nugatory (*b*). Lord Langdale, with more consistency, held that in the absence of alienation during discoverture, both the *separate use* and also the *clause against anticipation* came into operation upon marriage (*c*). And it was so finally decided by Lord Cottenham on appeal (*d*).

Brown *v.* Bamford.

60. It was also held in a case (*e*) before Sir L. Shadwell, that if a fund be vested in trustees upon trust to pay the proceeds to such persons and for such purposes as a *feme covert* shall, when and as they become due, appoint, but so as not to *charge or anticipate* the same, and in default of appointment to pay the same into the hands of the *feme* for her *separate use* (without the addition of any words to restrain her *power of anticipation*), if the *feme covert* assign the life estate limited to her *in default of appointment*, it destroys the power, and the restriction upon the anticipation annexed to it is nugatory. Such a doctrine would have led to great inconvenience, as the precedents of the most approved conveyancers were known to have been frequently expressed in that form, and the decision after failing to secure the assent of other judges (*f*) was ultimately reversed on appeal (*g*). The substantial intention was taken to be, that the *payment* into her hands, as well as the *power* to appoint, was not to operate until the annual proceeds had become actually due.

(*a*) *Davies* v. *Thornycroft*, 6 Sim. 420.

(*b*) *Brown* v. *Pocock*, 5 Sim. 663; *Johnson* v. *Freeth*, 6 Sim. 423 n.

(*c*) *Tullett* v. *Armstrong*, 1 Beav. 1.

(*d*) *S. C.* 4 M. & Cr. 390; and see *Sanger* v. *Sanger*, 11 L. R. Eq. 470.

(*e*) *Brown* v. *Bamford*, 11 Sim. 127.

(*f*) *Moore* v. *Moore*, 1 Coll. 54; *Harrop* v. *Howard*, 3 Hare, 624; *Harnett* v. *Macdougall*, 8 Beav. 187.

(*g*) 1 Ph. 620. The case of *Medley* v. *Horton*, 14 Sim. 222, was decided before the decision of the Vice-Chancellor in *Brown* v. *Bamford* had been overruled, and cannot be considered as law.

[Release of power of appointment.]

[Where property was held in trust for a married woman for life for her separate use, without power of anticipation, and after her death for such persons as she should by will appoint, it was held by the Court of Appeal in Ireland, reversing the decision of the Judge of first instance, that she could, while under coverture, extinguish the power (*a*).

[Gift over on anticipating income.]

Where by a will a life interest was given to a married woman with a restraint on anticipation and a gift over on her decease or on her anticipating the income, and she afterwards executed an assignment by way of mortgage, it was held that the assignment being wholly inoperative no forfeiture had taken place, and that the word "anticipating" could not be read as equivalent to attempting to anticipate (*b*).]

Absolute gift followed by restraint of anticipation.

61. Where there is an absolute gift of bank annuities—*i.e.* of a perpetual annuity redeemable by the State, to a married woman, followed by a restraint against anticipation, she cannot aliene during coverture (*c*); and generally where property is given absolutely to a married woman, but clogged with a clause restraining anticipation, [and an intention is shown by the instrument giving the property that the income only is to be paid to her,] she cannot aliene either income or corpus during the coverture (*d*). [But where a testatrix gave the proceeds of a mixed fund of realty and personalty to trustees upon trust to invest *the residue* after payment of debts, funeral and testamentary expenses, and legacies in specified securities, and to pay the income to A. for life, and after her death (which occurred in the testatrix's lifetime) *to divide and pay the said residue* between B. and C., one of whom was a married woman, and there was a declaration that every gift to a married woman was to be for her separate use without power of anticipation, V. C. Bacon drew a distinction between a gift of a sum of money and of a fund producing income, and held that in that case the gift was equivalent to a gift of a sum of money, and that the re-

[(*a*) *Heath* v. *Wickham*, 5 L. R. Ir. 285; 3 L. R. Ir. 376.]

[(*b*) *Re Wormald*, 43 Ch. D. 630. The Court in ordering payment of dividends to a woman so restrained from anticipation added a direction that they were not to be paid to any attorney "except upon an affidavit or statutory declaration by such attorney that he receives them on her behalf, and for her use, and not for any other person to whom she has assigned or purported to assign them;" *Stewart* v. *Fletcher*, 38 Ch. D. 627.]

(*c*) *Re Ellis' Trusts*, 17 L. R. Eq. 409; [*Re Bown*, 27 Ch. Div. 411; *Re Currey*, 32 Ch. D. 361.]

(*d*) *Re Ellis' Trust*, 17 L. R. Eq. 412; [*Re Benton*, 19 Ch. D. 277; *Re Sarel*, 4 N. R. 321; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Bown*, *ubi sup.*; *Re Grey's Settlements*, 34 Ch. D. 85; 34 Ch. Div. 271.]

straint against anticipation would not prevent the married woman from receiving her share of the residue (*a*).

But this distinction has been disapproved of, and cannot be supported upon principle; and the true test, as to whether a clause against anticipation is effectual to prevent a married woman from requiring the payment or transfer of property given absolutely to her subject to such a restraint, is whether upon the construction of the whole document the intention is or is not shown that the trustees should retain the property and pay the income to the married woman (*b*). And the mere circumstance that the property given absolutely to the married woman is subject to a particular estate, is not a sufficient ground for confining the restraint to the continuance of that estate (*c*). But if the interest of the married woman is reversionary, a clause against anticipation, even though not effectual to interfere with her right to receive the property when it falls into possession, may be an effectual restraint on her power of assigning it by way of anticipation so long as it is reversionary (*d*).

[Where interest reversionary.]

62. A married woman cannot, by a deed acknowledged under the Fines and Recoveries Act, dispose of an interest in land as to which her anticipation is restrained (*e*). But where an equitable estate tail was limited to a married woman for her separate use, and it was also provided that the rents and profits were to be paid to her without power of alienation or anticipation, it was held that this did not prevent her from barring the entail and limiting the equitable fee to herself. For that was not an alienation so as to deprive herself of anything; it was not, strictly speaking, an alienation at all, except in a very wide sense of the term. It was what was always called an enlargement of the estate (*f*).

[Enlarging equitable entail into an equitable fee.]

[(*a*) *Re Croughton's Trusts*, 8 Ch. D. 460; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Taber*, 51 L. J. N.S. Ch. 721; *Re Coombes*, W. N. 1883, p. 169.]

[(*b*) *Re Bown*, 27 Ch. Div. 411; *Re Spencer*, 30 Ch. D. 183; *Re Currey*, 32 Ch. D. 361; *Re Grey's Settlements*, 34 Ch. Div. 85, 712; *Re Hutchings to Burt*, 58 L. T. N.S. 6; *Re Tippett and Newbould*, 37 Ch. Div. 444; and see *Re Wood*; *Wood* v. *Hooper*, 61 L. T. N.S. 197, where the restraint was removed by the covenant of the *feme* while *sole* to settle, though her interest was then in reversion.]

[(*c*) *Re Tippett and Newbould*, 37 Ch. Div. 444.]

[(*d*) *Re Bown*, *ubi sup.*]

[(*e*) *Baggett* v. *Meux*, 1 Ph. 627; *Heath* v. *Wickham*, 3 L. R. Ir. 376. The Irish statute 4 & 5 Will. 4. c. 92, s. 69, contains a clause which is not in the English Act, preventing alienation by a married woman where the settlement contains a valid restriction against anticipation. But this was considered by Lord Lyndhurst, L.C., in *Baggett* v. *Meux*, as an expression by the legislature of what was meant by the English Act.]

[(*f*) *Cooper* v. *Macdonald*, 7 Ch. Div.

[Enlarging long term into a fee.]

63. So a married woman entitled to a long term for her separate use may, if the case falls within the Conveyancing and Law of Property Act, 1881, enlarge the term into a fee simple, notwithstanding her anticipation may be restrained (*a*).

[Restraint against anticipation not avoided by fraud.]

64. The clause against anticipation cannot be got over even in the case of deliberate fraud by the *feme covert*. Thus where a *feme covert*, by fraudulently suppressing the restraint on anticipation, obtained an advance on the mortgage of property limited to her separate use, it was held upon an application by her that the property was protected against the mortgage by the clause restraining her anticipation (*b*).]

Court could not discharge the clause against anticipation.

65. Where the clause against anticipation had once attached, even a Court of equity [could not until a recent Act have] discharged it, though alienation [might have been] for the *feme covert's* own advantage (*c*). An estate so settled may, however, be subject to *paramount equities*, as for raising costs of suit, [or for antenuptial debts (*d*),] which may enable the Court to direct a sale (*e*); and in case of adultery by the wife may be dealt with by the Divorce Court under the provisions of 22 & 23 Vict. c. 61, s. 5 (*f*); and as a married woman whose anticipation is restrained may still employ a *solicitor* to defend her right to the separate use, the solicitor so employed may acquire a lien on the separate estate for his costs thereby incurred (*g*).

[In a recent case where a married woman entitled to the income of a trust fund for her life with a restraint upon anticipation took proceedings for the execution of the trust, in the course of which an application by her was dismissed with costs, Pearson, J., gave the trustees liberty to retain their costs out of the plaintiff's income, and said "that the restraint on anticipa-

288; and see *Hilbers* v. *Parkinson*, 25 Ch. D. 200.]

[(*a*) 44 & 45 Vict. c. 41, s. (2) (i), 65.]

(*b*) *Thomas* v. *Price*, 46 L. J. N.S. Ch. 761; *Stanley* v. *Stanley*, 7 Ch. D. 589; [*Re Glanvill*, 31 Ch. Div. 532; *Cahill* v. *Cahill*, 8 App. Cas. 420, 427; see *S. C. nom. Cahill* v. *Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361.]

(*c*) *Robinson* v. *Wheelwright*, 21 Beav. 214; 6 De G. M. & G. 535.

[(*d*) *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; 45 & 46 Vict. c. 75, s. 19; and see *post*, pp. 900, 903, and *ante*, p. 866.]

(*e*) *Fleming* v. *Armstrong*, 34 Beav. 109. [Where a *feme* while *sole* mortgaged her life interest, and afterwards became *covert*, and effected a second mortgage, which was inoperative to the extent of a part of her interest as to which she was restrained from anticipation, it was held that the securities must be marshalled so that the interest due to the first mortgagee should be paid out of the portion of the income which was not available for the second mortgagee; *Re Loder's Trusts*, 56 L. J. Ch. 230; 35 W. R. 58.]

(*f*) *Pratt* v. *Jenner*, 1 L. R. Ch. App. 493.

(*g*) *Re Keane*, 12 L. R. Eq. 115; and see p. 885, note (*b*).

tion was intended for the protection of a married woman outside the Court; it was not intended to enable her to do a wrong in the Court. It did not fetter the power of the Court in any case in which it thought that she was not entitled to that protection" (*a*). But this is inconsistent with principle and with the earlier authorities, and has since been overruled (*b*).

66. Now, by the Conveyancing and Law of Property Act, 1881, s. 39, the Court may, "notwithstanding that a married woman is restrained from anticipation, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property." [May now, under 44 & 45 Vict. c. 41.]

Applications under this section should be made by summons, and not on petition (*c*).

The power of the Court is discretionary, and only to be exercised where a strong case is made out (*d*). The Court must be satisfied that it will be for the benefit of the wife to accede to the application (*e*), and will not bind her interest where the object is to benefit the husband (*f*); or to benefit herself by releasing a power conferred on her to appoint amongst her children (*g*); but where a married woman, who was entitled to the income of a fund for her life for her separate use without power of anticipation, with remainder in the events which happened for her appointees by will, and in default of appointment for herself absolutely, had contracted debts and was being harassed by her creditors, the Court made an order binding the property (*h*). So in a case where the wife, who was entitled to a considerable income, was living with her husband who had been adjudged bankrupt, was being harassed by his creditors to

[(*a*) *Re Andrews*, 30 Ch. D. 159; *Re Jordan*, 55 L. J. N.S. Ch. 330; and see *Re Prynne*, W. N. 1885, p. 144.]

[(*b*) *Re Glanvill*, 31 Ch. Div. 532.]

[(*c*) *Re Lillwall's Settlement Trusts*, 30 W. R. 243; *Latham* v. *Latham*, W. N. 1889, p. 171. An order under the section enabling a married woman to mortgage her life interest was made without requiring the trustees to be served; *In re Little's Will*, 36 Ch. Div. 701, *q.v.* also as to form of order.]

By 52 & 53 Vict. c. 47, s. 10, as regards land and estates in the county palatine of Durham, the Palatine Court of that county may exercise the power conferred by the Act; and as to the jurisdiction of the Lancaster Palatine Court, see 53 & 54 Vict. c. 23.]

[(*d*) *Re Little*, 40 Ch. Div. 418.]

[(*e*) *Re Flood's Trusts*, 11 L. R. Ir. 355; *Re Jordan*, 55 L. J. N.S. Ch. 330; *Re Currey*, 56 L. J. Ch. N.S. 389; *Re Seagrave's Trusts*, 17 L. R. Ir. 373; *Re Millar*, 25 L. R. Ir. 107; *Re Tennant's Estate*, 25 L. R. Ir. 522.]

[(*f*) *Tamplin* v. *Miller*, 30 W. R. 422.]

[(*g*) *Re Little*, 40 Ch. Div. 418, following *Cunynghame* v. *Thurlow*, 1 Russ. & My. 436; and see *Re Radcliffe*, 39 W. R. 457.]

[(*h*) *Hodges* v. *Hodges*, 20 Ch. D. 749; *Sedgwick* v. *Thomas*, 48 L. T. N.S. 100.]

whom she had given acceptances, and was suffering in health from pecuniary embarrassment, the Court made an order relieving part of the income from the restraint (*a*). And where two married women were tenants in common, and by reason of their being restrained from anticipation there was a difficulty in granting leases, the Court made an order (*b*). The restraint has also been removed for the purpose of enabling the retention of an unauthorized but beneficial investment (*c*), and the carrying on of a trade by trustees for the benefit of a married woman separated from her husband (*d*), and to preserve from eviction an estate to which the *feme* was entitled in reversion for life (*e*). The Court has no power simply to remove the restraint; it can only bind the married woman's interest in spite of the restraint, when a disposition is made of the property which the Court considers to be for her benefit (*f*).

Where the Court is satisfied by the evidence of the consent of the married woman, it will not require her separate examination (*g*).

Restraint of anticipation void for perpetuity

67. The restraint against alienation may also be *void for perpetuity*, as if a fund be settled on A.'s marriage upon himself for life, with a power to A. to appoint to his issue, A. cannot appoint to his daughters as the issue of the marriage for their sole and separate use *without power of anticipation*, for this would prevent alienation for more than a life in being, and twenty-one years, which the law does not allow (*h*).

[Where, in a postnuptial settlement, the trusts were, after the death of the husband and wife and in default of appointment, for sons at twenty-one and daughters at twenty-one, or marriage, but the daughters' shares were for their separate use without power of anticipation, it was held that as to the daughters *in*

[(*a*) *Re C.'s Settlement*, 56 L. J. Ch. N.S. 556.]

[(*b*) *Re Currey* (No. 2), 56 L. J. Ch. N.S. 389.]

[(*c*) *Re Wright*, 15 L. R. Ir. 331.]

[(*d*) *Re Thompson*, W. N. 1884, p. 28.]

[(*e*) *Re Seagrave*, 17 L. R. Ir. 373, *q.v.* generally as to the circumstances under which the Court will discharge the restraint.]

[(*f*) *Per* Cotton, L.J., *Re Warren's Settlement*, 52 L. J. N.S. Ch. 928; 49 L. J. N.S. 696.]

[(*g*) *Hodges* v. *Hodges*, 20 Ch. D. 749; but see *Musgrave* v. *Sandeman*, 48 L. T. N.S. 215.]

(*h*) See *Armitage* v. *Coates*, 35 Beav. 1, and the cases there cited; and *Re Teague's Settlement*, 10 L. R. Eq. 564; *Re Cunynghame's Settlement*, 11 L. R. Eq. 324; *Re Michael's Trusts*, 46 L. J. N.S. Ch. 651; *Re Ridley*, 11 Ch. D. 645, in which case the late M. R. followed the previous decisions, though he at the same time expressed his disapproval of them; [*Re Errington*, W. N. 1887, p. 23;] *Herbert* v. *Webster*, 15 Ch. D. 610, in which V. C. Hall expressed dissatisfaction with his own decision in *Re Michael's Trusts*.

esse at the time of the settlement the restraint against anticipation was valid (*a*). In one case a restraint on anticipation attached to the interests of the children of a woman who, at the date of the will creating the interests, was past child-bearing, was held valid (*b*), but this decision has been questioned on the ground that evidence that a person is past child-bearing is not admissible for the purpose of giving validity to a gift which would otherwise be void for remoteness (*c*).

[Election where property subject to the restraint.]

68. Opinions have differed as to whether a *feme covert* can be put to her election to give up, or make compensation out of, property as to which her anticipation is restrained, and the authorities on the point were for some time about evenly balanced (*d*), but it has now been decided by the Court of Appeal that she cannot be called upon to elect (*e*).]

Settlement of accounts.

69. It has been held that a clause against anticipation, though applicable to the fund when raised, does not prevent a *feme covert* from *adjusting the amount* of the fund with the trustees (*f*).

Breach of trust.

70. Compensation for a breach of trust by a *feme covert* in respect of settled property cannot be enforced, even against a fund limited by the *same settlement* to her separate use without power of anticipation (*g*).

Interest due but not payable.

71. Interest accrues due *de die in diem;* but if the interest, though *due,* be not *payable* under the contract before a particular day, which has not arrived, the interest so accrued is not re-

[(*a*) *Herbert* v. *Webster*, 15 Ch. D. 610; and see *Wilson* v. *Wilson*, 4 Jur. N. S. 1076.]

[(*b*) *Cooper* v. *Laroche*, 17 Ch. D. 368.]

[(*c*) *Re Dawson*, 39 Ch. D. 155, following *Jee* v. *Audley*, 1 Cox, 324, and *Re Sayer's Trusts*, 17 Ch. D. 368.]

[(*d*) See *Willoughby* v. *Middleton*, 2 J. & H. 344; *Smith* v. *Lucas*, 18 Ch. Div. 531; *Robinson* v. *Wheelwright*, 6 De G. M. & G. 535; *Cahill* v. *Cahill*, 8 App. Cas. 420, 427; *S. C. nom. Cahill* v. *Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361; *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, 28 Ch. Div. 124; *Re Queade's Trusts*, 54 L. J. N.S. Ch. 786; 53 L. T. N.S. 74; 33 W. R. 816.]

[(*e*) *Re Vardon's Trusts*, 28 Ch. Div. 124; but a special condition in the will may put her to election; *Whitwell* v. *Wilson*, W. N. 1890, p. 171.]

(*f*) *Wilton* v. *Hill*, 25 L. J. N. S. Ch. 156; and in *Stroud* v. *Gwyer*, M.R. 27 April, 1865, it was ruled that Mrs. Heath, whose share was settled by the will for her separate use without power of anticipation, was bound by a settlement of accounts which had been executed by her. M.S. And see *Derbyshire* v. *Home*, 3 De G. M. & G. 113.

(*g*) *Clive* v. *Carew*, 1 J. & H. 199; *Pemberton* v. *M'Gill*, 8 W. R. 290; *Sheriff* v. *Butler*, 12 Jur. N. S. 329; *Arnold* v. *Woodhams*, 16 L. R. Eq. 29. See however the observations of M. R. (but which were extra-judicial) in *Davies* v. *Hodgson*, 25 Beav. 186. As to breaches of trust by *femes covert*, see further, *ante*, p. 867; [and as to the provision in sect. 6 of the Trustee Act, 1888, whereby the whole or any part of the interest of a beneficiary at whose instigation or request or with whose written consent a breach of trust has been committed by a trustee may be (notwithstanding a restraint on anticipation) impounded by way of indemnity to the trustee, see *post*, Chap. xxx. s. 3.]

garded in the light of arrears but of future income, and therefore the *feme covert*, if anticipation be restrained, has no power over it (*a*).

Arrears of income.

72. The clause against anticipation does not prevent the operation of the rule, that if the husband be allowed to receive the wife's income she or her personal representative cannot recover more than one year's income, if so much (*b*) ; and the contracts or other engagements of the wife, which would affect her separate use generally, may be enforced against arrears already accrued, and which consequently have become emancipated from the clause against anticipation (*c*); [and the period of the restraint is determined by the instrument creating it, and will not be enlarged or its cesser arrested by an order of Court, made for convenience of administration and directing payment on specified days (*d*).

[Liability to costs.]

Where a married woman is suing under sect. 1, sub-sect. 2 of the Married Women's Property Act, 1882 (*e*), damages or costs recovered against her are payable out of her separate property, and arrears of income as to which anticipation by her was restrained, which have accrued due to her, and which she could therefore validly charge in the hands of her trustees, are available for payment of costs which she is ordered to pay to them in proceedings instituted by her while the restraint was still subsisting (*f*).

[Restraint of anticipation unaffected by the late Act.]

73. The 19th section of the Married Women's Property Act, 1882, after the provision already noticed protecting settlements and agreements for settlements from the operation of the Act (*g*), proceeds to enact further that nothing in the Act contained "shall interfere with or render inoperative any restriction against anticipation at present attached or hereafter to be attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction on anticipation contained in any settlement or agreement for a settlement of a *woman's own property* to be made or entered into by herself shall have any validity against *debts contracted by her before marriage*, and no settlement or agreement for a settlement shall have any

(*a*) *Re Brettle, Jollands* v. *Burdett*, 2 De G. J. & S. 79; 10 Jur. N. S. 349.

(*b*) *Rowley* v. *Unwin*, 2 K. & J. 138 ; see *ante*, p. 880.

(*c*) *Fitzgibbon* v. *Blake*, 3 Ir. Ch. Rep. 328 ; *Moore* v. *Moore*, 1 Coll. 54.

[(*d*) *Cox* v. *Bennett*, (1891) 1 Ch. (C. A.) 617.]

[(*e*) 45 & 46 Vict. c. 75.]

[(*f*) *Cox* v. *Bennett*, *ubi supra*.]

[(*g*) *Ante*, p. 886.]

greater force or validity against *creditors* of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

The effect of this section, construed together with section 1 of the Act (*a*), is that the contract or engagement of a married woman does not bind any property as to which anticipation by her is restrained, whether such property belongs to her at the time when the contract is entered into or is acquired subsequently, though the coverture may have afterwards determined (*b*); but where the restraint on anticipation determines *during the coverture* the property which has thus become free separate property of the *feme* will fall within the provisions of sect. 1, and be bound by any contract subsequently entered into by her under the Act, or by any contract previously entered into whereby her other separate property is bound (*c*).

A debt contracted by the *feme* during a previous coverture is a debt contracted by her before marriage within the meaning of the section (*d*).

The concluding clause of the section applies only to settlements made after the passing of the Act (*e*). It is to be read in connection with the first clause (*f*), and does not prevent a married woman, as against creditors whose debts were incurred *after her marriage*, from settling her separate property by a postnuptial settlement on herself with a restraint on anticipation (*g*).

[Powers under Settled Land Act, 1882, not impaired by restraint on anticipation.]

74. A restraint on anticipation in a settlement will not prevent a married woman from exercising any power given to her as tenant for life, or as a person having the powers of a tenant for life, by the Settled Land Act, 1882 (*h*).

Married Women's Property Act, 1870.

75. It will be convenient to conclude this section by a reference to the principal provisions of the recent statutory enactments relating to married women.] By the Married Women's Property Act, 1870 (*i*), it was enacted:—

S. 1. That the *wages and earnings* of any married woman acquired or gained after the passing of the Act, *9th August,*

[(*a*) *Ante*, p. 847.]

[(*b*) *Myles* v. *Burton*, 14 L. R. Ir. 258; *Pelton* v. *Harrison*, (1891) 2 Q. B. (C. A.) 422; *Beckett* v. *Tasker*, 19 Q. B. D. 7.]

[(*c*) See *ante*, p. 866; *Cox* v. *Bennett*, (1891) 1 Ch. (C. A.) 617.]

[(*d*) *Jay* v. *Robinson*, 25 Q. B. Div. 467.]

[(*e*) *Beckett* v. *Tasker*, 19 Q. B. D. 7; *Myles* v. *Burton*, 14 L. R. Ir. 258; *Smith* v. *Whitlock*, 55 L. J. Q. B. 286.]

[(*f*) *Hemingway* v. *Braithwaite*, 61 L. T. N.S. 224.]

[(*g*) *S. C.*

(*h*) 45 & 46 Vict. c. 38, s. 61 (6).]

(*i*) 33 & 34 Vict. c. 93.

Married Women's Property Act, 1870.

1870, in any employment, occupation or *trade* in which she was engaged, or which she carried on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, should be deemed and taken to be property held and settled to her separate use (*a*).

S. 2. That any *deposit* made or *annuity* granted by the Commissioners for the Reduction of the National Debt after the passing of the Act, in the name of a married woman, or a woman who might marry after such deposit or grant, should be deemed to be her separate property.

S. 3. That any married woman, or any woman about to be married, might cause any sum in the *public stocks or funds*, and not being less than 20*l.*, to which she was entitled, or which she was about to acquire, to be transferred into the books of the Governor and Company of the Bank of England to, or made to stand in, her name or *intended name* to her separate use, which should thenceforth be deemed her separate property (*b*).

S. 4. That any married woman, or woman about to be married, might cause any fully paid up *shares*, or any *debenture or debenture stock*, or any *stock* of an incorporated or joint stock company, *to the holding of which no liability was attached*, to be registered in the books of the company in her name or intended name to her separate use, which should thenceforth be deemed her separate property (*c*).

S. 5. That any married woman, or woman about to be married, might cause any share, benefit, debenture, right or claim in, to,

[(*a*) In *Ashworth* v. *Outram*, 5 Ch. D. 923, 939, Lord Coleridge commenting upon this section, observed, "It clearly means to protect the wages and earnings gained or acquired by a woman, while married, in any employment or trade carried on separately from her husband. It seems to me the Vice-Chancellor was justified in finding as a fact that this person was engaged in an 'employment, occupation or trade,' after the marriage separately from her husband, and the wages and earnings acquired in such employment, occupation or trade, are admitted to be protected. But how far does this carry us? It seems to me that it must carry the protection, I will not say beyond the wages and earnings, but it must carry the protection of the wages and earnings to those things which are necessary to make the wages and earnings which are to be protected. Therefore, the effect of the Act, if fairly construed, is to protect the trade or business of the married woman which she carries on separately from her husband, for without the protection of the trade itself it is manifest that the protection of the wages and earnings of the trade is impossible;" and see *Lovell* v. *Newton*, 4 C. P. D. 7; *Re Dearmer*, 53 L. T. N.S. 905.]

(*b*) See *Re Bartholomew's Estate*, 23 L. T. N.S. 433; 19 W. R. 95; *Re Tanner's Trust*, W. N. 1874, p. 198; *Howard* v. *Bank of England*, 19 L. R. Eq. 295.

(*c*) See *The Queen* v. *Carnatic Railway Company*, 8 L. R. Q. B. 299.

Married Women's Property Act, 1870.

or upon the funds of any *industrial and provident society*, or any *friendly society, benefit building society* or *loan society*, to the holding of which share, benefit, or debenture *no liability was attached*, to be entered in her name to her separate use, which should thereupon be deemed her separate property.

S. 7. That where any woman married after the date of the Act should during coverture become entitled to any *personal property* as *next of kin* (*a*), or any sum not exceeding 200*l.* under any *deed* or *will*, such property should belong to her for her separate use.

S. 8. That where any *freehold or copyhold property* should descend upon any woman married after the passing of the Act, the *rents and profits* (*b*) thereof should belong to her for her separate use.

S. 10. That a married woman might effect a *policy of insurance* upon her *own life*, or the *life of her husband* for her separate use, and that a policy of insurance effected by any *married* man on his *own life*, and expressed upon the face of it to be for the benefit of his wife or his wife and children, should be deemed a trust for the benefit of the wife for her separate use, and of the children; [and that when the sum secured by the policy should become payable, or at any time previously, a trustee (*c*) thereof might be appointed by the Court of Chancery, or the Judge of the County Court of the district in which the insurance office was situated, and that the receipt of such trustee should be a good discharge (*d*).]

(*a*) The amount coming to her as next of kin appears to be without limit; [so now decided *Re Voss*, 13 Ch. D. 504.]

[(*b*) The object of this section has been held by Stirling, J., to be simply to remove and put aside the interest of the husband, and not to give the wife an enlarged dominion over her property; and accordingly the separate use created by the section does not authorize a dealing with the fee; *Johnson* v. *Johnson*, 35 Ch. D. 345.]

[(*c*) Where the fund was to be retained on behalf of infants, the Court declined to appoint a single trustee under this section; *Re Howson's Policy Trusts*, W. N. 1885, p. 213.]‖

[(*d*) Upon an application under this section the Court declared the rights and interests of the wife and children of the deceased, and directed a proper settlement of the fund; *Re Mellor's Policy Trusts*, 6 Ch. D. 127. In this case a husband effected a policy on his own life under the Married Women's Property Act, for the benefit of his wife and children, but the interest they were to take was not expressed on the face of the policy. On an application to the Chancery Division by the widow and children (who were two daughters) V. C. Malins at first appointed two trustees of the policy moneys, and declared that they were "to hold the moneys when received upon trust to pay thereout the costs, and to invest the residue in securities authorized by the Court, and to pay the income to the widow for life for her separate use without power of anticipation, with remainder (as to both capital and income) for the children on attaining 21 or marriage under

Married Women's Property Act, 1870.

S. 12. That a husband should not by reason of any marriage after the passing of the Act be liable for the *debts of his wife contracted before marriage* (*a*), and that the wife should be liable to be sued for, and any property belonging to her for her separate use should be liable to satisfy such debts, as if she had continued unmarried (*b*).

Married Women's Property Act, 1874.

[76. By the Amendment Act of 1874 (*c*), as to marriages which took place after the 30th July, 1874, by the 1st section the liability of the husband was restored, but by the subsequent sections his liability was confined to the extent of the fortune of the wife received, or which ought to have been received, by him, if he pleaded that limit to his liability; but it was in the option of the husband either to claim this limit to his liability or not, and if he did not so claim it, he was liable for the wife's debts in the same manner as the husband originally was at common law. Under this Act, therefore, in a statement of claim by a creditor

that age in equal shares, and if but one the whole for that one, with remainder (as to both capital and income) if neither child attained 21 or married under that age for the widow absolutely." But on a subsequent application in the same matter, 7 Ch. D. 200, the V. C. reconsidered this decision, and directed the policy moneys to be distributed in thirds between the widow and two children. This case was disapproved of in *Re Adam's Policy Trusts*, 23 Ch. D. 525, where Chitty, J., held that the Court had no jurisdiction under this section to do more than make an order appointing a trustee, and intimated an opinion that a policy by a husband under this section "for the benefit of his wife and children," should be read in conjunction with the section, and that the proper construction was, by virtue of the words "separate use" in the section, for the benefit of the wife for her life with remainder to the children as joint tenants. But in *Re Seyton*, 34 Ch. D. 511, North, J., disapproved of the case last cited, and held that under such a policy, whether it was to be considered alone (as he appears to have thought it ought to be) or jointly with the Act, the widow and children took as joint tenants. It is doubtful whether, since the Act of 1882, this section now remains in force for any purpose (see sect. 11 of that Act, *post*, p. 903). Where the appointment by the Court of a new trustee is required, the petition should be entitled also in the matter of the Trustee Act, and in the matter of the Act of 1882, *Re Soutar's Policy Trusts*, 26 Ch. D. 236; and the Court can under its general jurisdiction appoint two new trustees, *Schultze* v. *Schultze*, 56 L. J. Ch. 356; 56 L. T. N.S. 231.]

(*a*) *See Conlon* v. *Moore*, 9 I. R. C. L. 190. [If the husband survives the wife and takes out administration to her estate, he will, notwithstanding this section, be liable to the extent of her assets to the wife's antenuptial debts; *Turner* v. *Caulfield*, 7 L. R. Ir. 347; and these debts will be payable *pari passu* out of the wife's separate estate and her general personal estate, *S. C.*]

(*b*) The separate property will be made available for payment of the debts [even although anticipation be restrained, *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; *Re Hedgeley*, 34 Ch. D. 379; *Axford* v. *Reid*, 22 Q. B. Div. 548;] but the *feme covert* herself cannot be made a bankrupt, *Ex parte Holland*, 9 L. R. Ch. App. 307, [unless she be trading separately from her husband, 45 & 46 Vict. c. 75, s. 1; *Re Gardiner*, 20 Q. B. D. 249; and as to form of judgment, &c., see *Downe* v. *Fletcher*, 21 Q. B. D. 11.]

[(*c*) 37 & 38 Vict. c. 50.]

of the wife against the husband and wife, it was not necessary for the plaintiff to allege that the husband had received or with reasonable diligence might have received assets of the wife, but the husband, intending to rely upon the Act, was put to claim the benefit of it in his defence (*a*).

[Repeal of Acts of 1870 and 1874.]

77. The Married Women's Property Act, 1870, and the Amendment Act of 1874, have now been repealed by the Married Women's Property Act, 1882, but without prejudice to "any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the 1st January, 1883, to sue or be sued under the provisions of the repealed Acts, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued" before that date (*b*). It may therefore still be necessary in many cases to refer to the provisions of the repealed Acts.

[Married Women's Property Act, 1882.]

78. By the Married Women's Property Act, 1882, it is in effect enacted:—

S. 1. sub-s. (5). That every married woman carrying on a *trade* separately from her husband shall, in respect of her separate property (*c*), be subject to the *bankruptcy laws* as if she were a *feme sole* (*d*).

S. 3. That any *money* or other estate *of the wife lent* or intrusted (*e*) by her *to her husband* for the purposes of any trade or business carried on by him or otherwise, shall be treated as assets of his estate *in case of his bankruptcy*, she being entitled to a dividend as a creditor for the amount or value of such money or estate after all claims of the other creditors for valuable consideration have been satisfied (*f*).

[(*a*) See *Matthews* v. *Whittle*, 13 Ch. D. 811. The liability of the husband ceases on the death of the wife; *Bell* v. *Stocker*, 10 Q. B. D. 129.]

[(*b*) 45 & 46 Vict. c. 75, s. 22.]

[(*c*) As to what is separate property within the section, and that it does not include property over which the married woman has only a general power of appointment (by deed or will), which she has not exercised; see *Ex parte Gilchrist*, 17 Q. B. Div. 167, 521.]

[(*d*) As to the position before the Act of a married woman in regard to the bankrupt law; see *Ex parte Jones*, 12 Ch. Div. 484; and that her trustee in bankruptcy claiming her life interest under a settlement is "not interfering with or affecting" the settlement within the meaning of sect. 19; see *Re Armstrong*, 21 Q. B. Div. 264, *ante*, p. 887.]

[(*e*) Property of the wife mortgaged by her to secure a debt of her husband, which debt was afterwards discharged by realization of the property so mortgaged, was held in *Alexander* v. *Barnhill*, 21 L. R. Ir. 511, not to come within the words "lent or intrusted by her to her husband."]

[(*f*) This section does not apply to a case where the husband is in partnership and the money of the wife is lent not to him but to his firm; *Re Tuff*, 19 Q. B. D. 88. The section is not retro-

[45 & 46 Vict. c. 75.]

S. 6. That all *deposits* in any post office or other savings bank, or in any other bank, all *annuities* granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the *public stocks or funds*, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which, at the commencement of the Act (1st January, 1883), are standing in the sole name of a married woman, and *all shares, stock, debentures, debenture stock*, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of the Act are standing in her *name* (*a*), shall be deemed, unless and until the contrary be shown, to be the *separate property* of such married woman; and the fact that such property is standing in the sole name of a married woman shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify persons mentioned in the Act in respect thereof.

S. 7. That all such deposits, annuities, sums, shares, *stock*, debentures, debenture stock, and other interests as referred to in the last section, which after the commencement of the Act shall be allotted to or made to stand *in the sole name of a married woman* shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which, so far as any liability may be incident thereto, her separate estate shall alone be liable.

But nothing in the Act is to require or authorize any corporation or company to admit any married woman to be a holder

spective; *Re Home*, 54 L. T. N.S. 301.

The words "or otherwise" mean either alone or in partnership, and either personally or by an agent, so that the section has no application to a loan by the wife to the husband for purposes unconnected with his trade or business; *Re Tidswell*, 56 L. J. Q. B. 548; 35 W. R. 669; but see *Alexander* v. *Barnhill*, 21 L. R. Ir. 511. And as the section refers only to the *bankruptcy* of the husband it does not preclude a widow as administratrix from retaining out of the insolvent estate of her intestate husband money advanced by her out of her separate property to him for the purposes of his business; *Re May*, 45 Ch. D. 499. On the other hand, in the case of the bankruptcy of the husband the onus will be on the wife, proving for such an amount, to show that it was not lent for the purposes of his trade or business; *Re Genese*, 16 Q. B. D. 700.]

[(*a*) This is apparently an error for "*sole* name."]

of any shares or stock therein, *to which any liability* may be *incident*, contrary to the provisions of the instrument regulating such corporation or company. [45 & 46 Vict. c. 75.]

S. 8. That the provisions of sects. 6 and 7 shall apply, so far as relates to the estate, right, title, or interest of the married woman, to any deposits, &c., in the name of any married woman *jointly* with any persons or person other than her husband.

S. 9. That it shall not be necessary for the husband of any married woman in respect of her interest to join in the *transfer* of any deposit, &c., affected by the 6th, 7th, or 8th sects.

S. 11. That a married woman may effect a *policy* upon her own life or the life of her husband for her separate use.

And that a *policy* of assurance effected by any man on his own life, and expressed to be *for* the *benefit* of his *wife*, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her *husband*, or of her children, or of her husband and *children*, or any of them, shall create a trust in favour of the objects therein named. And that the insured may by the policy, or by any memorandum, appoint a trustee or trustees of the monies payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the policy monies; and that in default of any such appointment such policy shall vest in the insured in trust for the purposes aforesaid. If, at any time, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees the appointment may be made by any Court having jurisdiction under the Trustee Act, 1850, or the Acts amending the same.

S. 13. That a woman after her marriage shall continue liable to the extent of her separate estate for her *ante-nuptial debts*, contracts, or wrongs, and may be sued accordingly, and all sums recovered against her shall be payable out of her separate property, and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be primarily liable (*a*).

S. 14. That a husband shall be liable for his wife's ante-nuptial debts, contracts and wrongs, to the extent of her property which

[(*a*) Under this section a husband cannot maintain an action against his wife for money lent to her or money paid for her before their marriage at her request; *Butler* v. *Butler*, 14 Q. B. D. 831.]

he shall have acquired or become entitled to, from or through his wife, after deducting payments made by him, and sums for which judgment may have been recovered against him, in respect of such debts, contracts, or wrongs (*a*).

S. 15. That a husband and wife may be jointly sued in respect of any such debt or liability if the plaintiff shall seek to establish his claim against both of them.

S. 21. That a married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren (*b*) as the husband is now by law subject to for the maintenance of her children and grandchildren: provided that nothing in the Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Various other important provisions of the Act are incorporated into this work in places which seemed convenient. For the provisions of minor importance the Act should be referred to.

[Agricultural Holdings Act.]

79. The Agricultural Holdings (England) Act, 1883 (*c*), enacts in sect. 26, that "a woman married before the commencement of the Married Women's Property Act, 1882, entitled for her separate use to land, her title to which accrued before such commencement as aforesaid, and not restrained from anticipation, shall for the purposes of this Act be in respect of land as if she were unmarried." And that "where *any other woman* married before the commencement of the Married Women's Property Act, 1882, is desirous of doing any act under this Act in respect of land, her title to which accrued before such commencement as aforesaid, her husband's concurrence shall be requisite," and she is to be separately examined by the County Court, or by the Judge of the County Court, for the place where she for the time being is.

The words "any other woman" here used are inaccurate, but are apparently intended to apply to a woman who does not, under the preceding clause, acquire the powers of an unmarried

[(*a*) It will be observed that the language of the 14th section, the effect of which is given shortly in the text, differs materially from that of the Act of 1874, and *Matthews* v. *Whittle*, 13 Ch. D. 811, has no application to a case under the Act of 1882. Under this and the following section the husband can avail himself of the Statute of Limitations in respect of his wife's ante-nuptial debt as from the time when the debt accrued due against her; *Beck* v. *Pierce*, 33 Q. B. Div. 316.]

[(*b*) The corresponding section in the Act of 1870, did not include grandchildren, *Coleman* v. *Overseers of Birmingham*, 6 Q. B. D. 615.]

[(*c*) 46 & 47 Vict. c. 61.]

woman. It is, however, conceived that there is nothing in the section empowering a married woman whose anticipation is restrained to bind her interest.

By the same section the County Court is empowered to appoint, and change or remove any next friend of a married woman required for the purposes of the Act (*a*).]

SECTION VII.

OF JUDGMENTS AGAINST THE CESTUI QUE TRUST.

BEFORE entering upon this topic, it may be useful to notice briefly how *legal* interests stand affected by judgments.

Writs of Execution at common law.

1. At *common law* the plaintiff in the action had only two writs of execution open to him against the property of the defendant: the *fieri facias*, to levy the debt *de bonis et catallis*; and the *levari facias*, to levy it *de terris et catallis* (*b*). The execution under the latter writ, however, embraced no interest in *land* of a higher description than a mere chattel interest, and affected not the *possession* of the lands (*c*), but merely enabled the sheriff, besides taking the chattels, to levy the debt from the present profits, as from the rents payable by the tenants (*d*), and the emblements (*e*), that is, the corn and other crops at the time growing on the lands (*f*). If the sheriff, when he made his return, had not levied the full amount of the debt, a new *levari facias* might have issued, to be executed by the sheriff in like manner (*g*) (1).

[(*a*) 46 & 47 Vict. c. 61, s. 26.]
(*b*) Finch's Law, 471.
(*c*) Ib.; *Sir E. Cooke's case*, Godb. 290.
(*d*) Finch's Law, 472; *Davy* v. *Pepys*, Plowd. 441.
(*e*) 4 Com. Ab. 118.
(*f*) *Harbert's case*, 3 Rep. 11 b.; 2 Inst. 304; 2 Bac. Ab. Execution (C) 4, note (*b*).
(*g*) F. N. B. 265.

(1) There was also another species of *levari facias*, of which the plaintiff might under particular circumstances, have indirectly availed himself. In case the defendant was *outlawed* in the action, the sheriff, on the issuing of the *capias utlagatum*, took an inquisition of the lands of the debtor, and extended their value, and made his return to the *Exchequer*. A *levari facias* from the Crown then followed, commanding the sheriff to levy the extended value *de exitibus*, from the *issues* of the lands, till the plaintiff should be satisfied his debt. These issues were defined to be the "rents and revenues of the land, corn in the grange, and all moveables, except horses, harness, and household stuff;" 13 Ed. 1. c. 39, st. 1; 2 Inst. 453. The sheriff might have agisted or mown the grass; *Britten* v. *Cole*, 5 Mod. 118, *per* Lord Holt. But if at the date of the inquisition,

Statute of Westminster.

2. In order to provide for the creditor a more effectual remedy, the Statute of Westminster (*a*) introduced the writ of *elegit*, and enacted, that when the debt was recovered or knowledged, or damages awarded, the suitor should at his *choice* (whence the term *elegit*) have a writ of *fieri facias* (*b*), from the debtor's lands and chattels, or that the sheriff should deliver to him all the chattels of the debtor, except his oxen and beasts of the plough, and *one-half of his land until the debt should be levied upon a reasonable price or extent.* It was by virtue of this statute that judgment creditors were first enabled to sue execution of *one moiety* of the debtor's *lands*, whether vested in him at the time of the judgment or subsequently acquired.

[*Levari facias* abolished in civil proceedings.]

[Now by the Bankruptcy Act, 1883 (*c*) it is enacted that (1), The sheriff shall not under a writ of *elegit* deliver the goods of a debtor nor shall a writ of *elegit* extend to goods; and (2), No writ of *levari facias* shall hereafter be issued in any civil proceeding.]

We now come to the inquiry, what is the effect of judgments upon *equitable* interests.

Fieri facias as regards trusts.

1. With respect to the *fieri facias*, it is clear that under the system of *uses* no relief could have been granted; for the creditor, coming in by operation of law, did not possess that *privity* of estate which could alone confer upon him the right to sue a *subpœna*. During the earlier period of *trusts* the same technical notions prevailed; but Lord Nottingham introduced more liberal doctrines, and established the principle that a creditor, prevented from executing the legal process by the interposition of a trust, might come into Chancery, and prosecute an *equitable fieri facias* (*d*).

Trusts not bound by it before execution sued out.

2. But, as the analogy to law must be strictly pursued, the

(*a*) 13 Ed. 1. st. 1, c. 18.

(*b*) This includes the writ of *levari facias*; 2 Inst. 395.

[(*c*) 46 & 47 Vict. c. 52, s. 146.]

(*d*) *Pit* v. *Hunt*, 2 Ch. Ca. 73; *Anon. case*, cited 1 P. W. 445; and see *Scott* v. *Scholey*, 8 East, 485; *Estwick* v. *Caillaud*, 5 T. R. 420; *Kirkby* v. *Dillon*, C. P. Cooper's Rep. 1837–38, 504; *Simpson* v. *Taylor*, 7 Ir. Eq. Rep. 182; *Bennett* v. *Powell*, 3 Drew. 326; *Gore* v. *Bowser*, 3 Sm. & G. 1; *Smith* v. *Hurst*, 1 Coll. 705; *Partridge* v. *Foster*, 34 Beav. 1; *Horsley* v. *Cox*, 4 L. R. Ch. App. 92.

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the agistment was already let, the money agreed to be paid was a sum *in gross*, and was not subject to the *levari facias*; *S. C.* 1 Raym. 307, *per eundem.* The cattle of a stranger, if *levant and couchant* on the land, were seizable under the writ, as included in the word "issues"; *S. C.* Ib. 305. The lands were bound by the *levari facias* from the date of the writ, so that any subsequent disposition, though it served to pass the freehold and possession, yet did not interrupt the king's title to the profits; Ib. 307, *per* Lord Holt.

trust of a chattel could never have been attached in equity until the *writ of execution* was actually sued out; for till that time there was no *lien* upon the debtor's effects, which was the very ground of the application (*a*).

Nor where the legal estate is not liable.

3. And as equity only follows, and does not enlarge the law, the judgment creditor has no title to relief where the chattel of which the trust has been created, is not in itself amenable to any legal process. An opinion, indeed, is subjoined to the case of *Horn* v. *Horn* in Ambler (*b*), that a trust of *stock* might, before the late Act, have been taken by a judgment creditor in equitable execution; and *Taylor* v. *Jones* (*c*), before Sir W. Fortescue, M.R., was even a decision to the same effect; but such a doctrine, inasmuch as stock could not have been reached at law, was clearly contrary to all principle, and afterwards incurred the express disapprobation of Lord Thurlow (*d*), Lord Manners (*e*), Sir W. Mac-Mahon (*f*), Sir Archibald Macdonald (*g*), and Lord Eldon (*h*); Lord Thurlow observing, that the opinion in *Horn* v. *Horn* was so anomalous and unfounded, that forty such would not satisfy his mind (*i*). However, by the Act of 1 & 2 Vict. c. 110 (*j*) various descriptions of property, formerly exempt, are now liable to be taken in execution, and the remedy of the creditor in equity must be deemed to be enlarged accordingly (*k*); and the same statute provides a special procedure for reaching a judgment debtor's interest in *stock*, whether legal or equitable (*l*).

Equity of redemption.

4. The judgment creditor is entitled to the like relief against the *equity of redemption of a chattel*, as against any other equitable interest in a chattel (*m*).

Whether equity can adopt the *elegit* by analogy.

5. The *elegit* owing its origin to a statute, a doubt may suggest itself *in limine*, whether, when the legislature has passed an enactment against the *legal estate*, a Court of equity can consistently with its general principles, apply by analogy the same provision to the case of a trust. A legal estate, for example,

(*a*) *Angell* v. *Draper*, 1 Vern. 399; *Shirley* v. *Watts*, 3 Atk. 200; *Smith* v. *Hurst*, 1 Coll. 705; *Partridge* v. *Foster*, 34 Beav. 1.

(*b*) Amb. 79.

(*c*) 2 Atk. 600.

(*d*) *Dundas* v. *Dutens*, 2 Cox, 240; and see a note of *S. C.* in *Grogan* v. *Cooke*, 2 B. & B. 233.

(*e*) *Grogan* v. *Cooke*, 2 B. & B. 233.

(*f*) *Plasket* v. *Dillon*, 1 Hog. 328.

(*g*) *Caillaud* v. *Estwick*, 2 Anst. 384.

(*h*) *Rider* v. *Kidder*, 10 Ves. 368.

(*i*) See 2 B. & B. 233.

(*j*) Sect. 12.

(*k*) See cases p. 80, note (*d*); and see *Stokoe* v. *Cowan*, 29 Beav. 637.

(*l*) See *infra*, p. 917.

(*m*) *King* v. *Marissal*, 3 Atk. 192; *Shirley* v. *Watts*, Ib. 200; *Burdon* v. *Kennedy*, Ib. 739; *Thornton* v. *Finch*, 4 Giff. 515; and see *King* v. *De la Motte*, For. 162.

was by Act of Parliament made forfeitable without inquest for treason, and, as the Statute enumerated "*uses*," it was contended, and seems to be the better opinion (*a*), that *trusts* also under that expression became forfeitable to the Crown; but it was never suggested that, had "uses" not been inserted in the Act, a Court of equity could have subjected trusts to forfeiture by any inherent jurisdiction of its own. But the Act which originated the *elegit* was, like the statute *de donis*, prior to the introduction of the use; and as equity, by analogy to the Statute of Westminster, admitted *entails* and remainders of trusts, why might it not, by analogy to another Act of the same statute, allow equitable interests to be affected by *judgments* (*b*)?

Trusts formerly not subject to *elegit*. *Secus* now.

6. It would seem that in Lord Keeper Bridgman's time a trust was not subject to an *elegit* (*c*). But it was long ago established that a judgment creditor might redeem a mortgage in fee (*d*), and it is now equally well settled that he may prosecute his *elegit* against any other equitable interest (*e*).

Land to be converted into personalty not bound by a judgment.

7. An estate given by A. to trustees *upon trust to convert* into personalty for the benefit of B. has in equity all the properties of *personality*; and even under the *old law* therefore, a judgment against the person to whom the proceeds of the sale were directed to be paid conferred no lien upon the proceeds (*f*).

Judgment against vendor, after contract to sell.

8. Whether the same principle applied where a judgment was entered up against a person after he had *contracted to sell* real estate was much doubted.

(*a*) See *infra*, pp. 931, 932.

(*b*) See *Ryall* v. *Rolle*, 1 Atk. 184.

(*c*) See *Pratt* v. *Colt*, Freem. 139.

(*d*) *Greswold* v. *Marsham*, 2 Ch. Ca. 170; *Crisp* v. *Heath*, 7 Vin. Ab. 52. (The former case has been compared with Reg. Lib., A. 1685, f. 399, and the report appears substantially correct: the latter case has not been found). *Plucknet* v. *Kirk*, 1 Vern. 411; Reg. Lib. 1686, B. fol. 181, 184, see *infra*; *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538, and the cases cited Ib. 541; *Stileman* v. *Ashdown*, 2 Atk. 477; *Fothergill* v. *Kendrick*, 2 Vern. 234; and see *Steele* v. *Philips*, 1 Beat. 188; *Forth* v. *Duke of Norfolk*, 4 Mad. 503; *King* v. *De la Motte*, Forr. 162; *Freeman* v. *Taylor*, 3 Keb. 307; *Hatton* v. *Haywood*, 9 L. R. Ch. App. 229.

(*e*) *Tunstall* v. *Trappes*, 3 Sim. 286; *Forth* v. *Duke of Norfolk*, 4 Mad. 504, *per* Sir J. Leach; Serj. Hill's opinion, Ib. 506, note (*a*); *Foster* v. *Blackstone*, 1 M. & K. 311, *per* Sir J. Leach; and see *Lodge* v. *Lyseley*, 4 Sim. 70; *Kirkby* v. *Dillon*, C. P. Cooper's Rep. 1837-38, 504; *Neate* v. *Duke of Marlborough*, 9 Sim. 60, 3 M. & Cr. 407; *Adams* v. *Paynter*, 1 Coll. 530; *Lewis* v. *Lord Zouche*, 2 Sim. 388. *Davidson* v. *Foley*, 2 B. C. C. 203; 3 B. C. C. 598; and *Plasket* v. *Dillon*, 1 Hog. 324 (commonly cited upon this subject), were cases of a *legal elegit*, and the judgment creditor was seeking to remove an impediment to the *legal execution* of it.

(*f*) *Foster* v. *Blackstone*, 1 M. & K. 297; and see *Browne* v. *Cavendish*, 1 Jon. & Lat. 633.

Upon this subject we have the following opinion of Mr. Serj. Hill :—H. A. S., seised in fee of an estate, subject to his mother's jointure and to younger children's portions, *contracted for the sale* of the property in lots to different purchasers. After the date of the contract, H. A. S. executed a conveyance to trustees, upon trust to convey to the different purchasers, and to invest part of the purchase money in the funds as an indemnity against the jointure and portions and to pay the residue to himself. *Subsequently to the deed of trust* H. A. S. acknowledged a judgment. Mr. Serj. Hill was consulted on the part of the trustees, whether they would be safe in paying the money to H. A. S., as against the judgment of which they *had notice*, and also as against judgments, if any, of which they *had no notice*. The opinion was as follows: "As to the judgment of which the trustees had *notice*, though, to many purposes, the estate agreed to be sold is from the time of the contract the estate of the purchaser; yet I think the vendor is not before payment of the money to be considered a mere trustee, for the estate continues his at *law*, and even in *equity* he has a right to detain it until payment of the purchase money; and, therefore, the judgment creditor hath a right to so much of the purchase money as is sufficient to satisfy the judgment; and the trustees having notice of his right ought to pay it, if the money is in their hands. As to the judgments, if any, of which the trustees have *no notice*, I think a Court of equity will not make them pay the money over again, if they apply it according to the deed of trust, because I think equity in the case of a judgment creditor and a *bonâ fide* purchaser or a trustee without notice, will not interpose on either side, but will leave the law to take its course" (*a*). Serjeant Hill's opinion.

And Sir J. Leach appears to have concurred in this opinion, that the vendor's interest after the contract was bound by a judgment; for in *Forth* v. *The Duke of Norfolk* (*b*), where a person had mortgaged an estate in fee, and then contracted to sell, and afterwards, before the conveyance, acknowledged a judgment, Sir J. Leach said, "An assignee for valuable consideration is discharged of the claim of the judgment creditor, *unless he had notice of it before the consideration paid.* If A., before the actual conveyance to him, had received *notice* of the judgment, then, being a purchaser of an equitable interest in a freehold Sir J. Leach's opinion.

(*a*) Cited *Forth* v. *Duke of Norfolk*, 4 Mad. 506, note (*a*).

(*b*) 4 Mad. 503.

estate from the debtor, and not having paid his purchase money, he would have been equally affected with the judgment as the debtor himself: and if he had afterwards paid the whole purchase money to the debtor, he would have still remained liable to the judgment creditor."

Dictum of Sir L. Shadwell.

But in a subsequent case Sir L. Shadwell said "he should not have given the opinion which the learned Serjeant had done, for it appeared to him that from the time H. A. S. entered into binding contracts to sell the lands, he not having judgments against him at that time, the purchasers had a right to file a bill against him and have the legal estate conveyed" (*a*). And it may be argued that if the vendor die after the contract, but before the conveyance, the purchase money would go to the executor (*b*); and that if the contract work a notional conversion of the land into money in respect of the vendor's representatives, the same consequence ought to follow in respect of the vendor's judgment creditors.

Whether in case of conveyance upon trust to sell or mortgage, with power of sale, surplus proceeds are bound by a judgment.

9. The case became still more difficult where A. conveyed to trustees upon trust to sell for the discharge of incumbrances, and to pay the surplus to *himself*, and before sale, a judgment was entered up against A. (*c*); or where a mortgage was given with power of sale to the mortgagee and a judgment was entered up against the mortgagor before sale (*d*). It was clear that in either case the power of giving receipts was binding as against the judgment creditor, so that a purchaser from the trustee or mortgagee was not concerned to see that the judgments were satisfied (*e*); but this still left open the question whether the judgment was or not a lien or charge on the proceeds in the hands of the mortgagee or trustee.

How much of the estate may be taken in execution.

10. The question whether under the old law the *lien* of the judgment creditor extended to the *whole* or a *moiety* of the trust estate was also one of considerable difficulty, and the authorities can only be reconciled by the aid of a somewhat subtle distinction.

On what grounds a judgment creditor may apply to a Court of equity.

A judgment creditor might have come into a Court of equity

(*a*) *Lodge* v. *Lyseley*, 4 Sim. 75; and see *Craddock* v. *Piper*, 14 Sim. 310, where, however, it does not appear whether the judgments were entered up before the actual sale or the decree for sale.

(*b*) See *Farrar* v. *Winterton*, 5 Beav. 1; *Curre* v. *Bowyer*, Ib. 6, note.

(*c*) See *Bayden* v. *Watson*, 7 Jur. 245; *Re Underwood*, 3 K. & J. 745.

(*d*) See *Wright* v. *Rose*, 2 S. & S. 323, and *Clarke* v. *Franklin*, 4 K. & J. 260.

(*e*) *Lodge* v. *Lyseley*, 4 Sim. 75; *Alexander* v. *Crosbie*, 6 Ir. Eq. Rep. 513; *Drummond* v. *Tracy*, Johns. 608.

upon two grounds. *First*, upon a *legal* title, where he either sought to remove an impediment to the execution of his legal *elegit*, or, after the death of his conusor, sued for payment of his debt out of the conusor's personal assets, and, if they should be insufficient, then by sale (*a*) of the real estate; or, *Secondly*, upon an *equitable elegit*, on the ground that he had no legal *lien*, and therefore could have no legal process (*b*).

Execution of a moiety only of a trust estate.

As the extent of relief ought in both these cases to be the same, and the Court never attempted to make a difference, the authorities determined upon either head may be relied upon as applicable to the other. The result of the cases upon this principle, notwithstanding an early authority to the contrary (*c*), appears to be that a judgment creditor could under the old law sue an equitable *elegit* of a *moiety* only of a trust estate (*d*).

Execution of the whole of an equity of redemption.

11. An *equity of redemption* was, however, governed by a different rule. If A., seised of an estate, mortgaged it to B. in fee, and then confessed a judgment to C., it was clear that C. had a *lien* which entitled him to redeem B. But should he redeem the whole or a moiety? So far as the judgment creditor had any claim of his own, a moiety only; but as B. could not be compelled to part with the smallest fraction of the estate until he had been satisfied his whole debt, C. was under the necessity of redeeming the entirety. Again, when C. had taken a transfer of the security, it followed, that as mortgagee with a judgment against the mortgagor he had a right to tack, and no one could

(*a*) An *elegit* would at law give the *possession* of the lands till the satisfaction of the debt, but equity assumes the jurisdiction of facilitating the remedy by a *sale*. See *Barnewall* v. *Barnewall*, 3 Ridg. 61; *O'Fallon* v. *Dillon*, 2 Sch & Lef. 19; *O'Gorman* v. *Comyn*, Ib. 139; *Stileman* v. *Ashdown*, 2 Atk. 610; but see *Bedford* v. *Leigh*, 2 Dick. 709; *Neate* v. *Duke of Marlborough*, 3 M. & Cr. 417.

(*b*) These grounds of suit still subsist, in addition to that conferred by the 13th section of 1 & 2 Vict. c. 110, giving the judgment creditor a charge in equity. [See *Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275.]

(*c*) *Compton* v. *Compton*, cited in *Stileman* v. *Ashdown*, Amb. 15; Reg. Lib. A. 1711, f. 134. The authority of this case cannot, however, have much weight, for, as was observed by Lord Hardwicke (*Stileman* v. *Ashdown*, Amb. 17), the point whether the whole or a moiety should be sold appears not to have been discussed.

(*d*) *Stileman* v. *Ashdown*, 2 Atk. 477, 608; *Rowe* v. *Bant*, Dick. 150; Reg. Lib. B. 1750, f. 427; *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 24; *O'Dowda* v. *O'Dowda*, 2 Moll. 483; *Anon. case*, Ib.; *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 137; *Burroughs* v. *Elton*, 11 Ves. 33; *Williamson* v. *Park*, 2 Moll. 484; *Armstrong* v. *Walker*, Ib. In *O'Fallon* v. *Dillon*, 2 Sch. & Lef. 13, the sale of the estate was *not* confined to a moiety; but there the creditor had entered up *two* judgments the *same term*, and then as both judgments were of the same date, the creditor might at *law* have taken both moieties in execution. See *Attorney-General* v. *Andrew*, Hard. 23.

redeem any part of the estate out of his hands until payment not only of the original mortgage debt but also of the judgment. Thus it arose from a kind of necessity, and not from any wanton violation of principle, that in the instance of an equity of redemption the judgment creditor was paid by a sale of the *whole* estate (*a*) (1).

In *Stileman* v. *Ashdown* (*b*), Lord Hardwicke, at the same time that he gave a judgment creditor a moiety only of the *trust estate*, ordered a sale of the *whole* of the lands in *mortgage* (*c*). So, where there were several incumbrancers by judgment upon an equity of redemption, and the Court decreed a sale, the first judgment creditor was not confined to a moiety of the estate, but the decree was, that the incumbrancers should be paid their full demands out of the proceeds of the sale, according to their priority (*d*).

Case of a trust by way of mortgage.

12. [The cases of a mortgage by way of trust or of an annuity deed, though the interests derived thereunder border closely upon the nature of an equity of redemption, yet present some features of distinction, for here the legal estate never becomes absolute in the mortgagee or grantee of the annuity but is held in trust for the mortgagor or grantor, and there is nothing to be redeemed, but merely a trust to be executed. However, even in the case of a conveyance of land to ordinary uses to secure an annuity, where the grantor] confessed a judgment, and the question was whether it should affect the whole or only a moiety of the estate, Sir L. Shadwell, on the ground that a judgment creditor might redeem the entirety of the lands in mortgage, held that the lien should extend to the whole (*e*).

Execution of a trust estate by *elegit* at law, under Statute of Frauds.

13. We come next to the provision in the 10th section of the Statute of Frauds (*f*), which enables a judgment creditor in certain cases to sue a writ of execution at *law* against an equitable estate.

(*a*) *Stonehewer* v. *Thompson*, 2 Atk. 440; *Sish* v. *Hopkins*, Blunt's Amb. 793.

(*b*) 2 Atk. 477.

(*c*) Sir A. Hart, not observing the ground of the distinction, has charged Lord Hardwicke with inconsistency, *Leahy* v. *Dancer*, 1 Moll. 322.

(*d*) *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538; the cases cited Ib. 541; and see *Berrington* v. *Evans*, 3 Y. & C. 384.

(*e*) *Tunstall* v. *Trappes*, 3 Sim. 286, see 300. [The question is more fully discussed in the last edition of this work at pp. 801, 802.]

(*f*) 29 Car. 2. c. 3.

(1) It was ruled, upon a similar principle, that, where freeholds and copyholds were blended in one mortgage, the equity of redemption of the whole was liable as assets to a bond creditor, though copyholds by themselves were not assets; *Acton* v. *Pierce*, 2 Vern. 480.

The 10th section enacts in substance that it "shall be lawful for the sheriff to deliver execution unto the party suing of all such lands and hereditaments as any other person may be in any manner of wise *seised or possessed* in trust for the party against whom execution is so sued, like as the sheriff might or ought to have done, if the said party against whom execution is so sued had been *seised* of such lands and hereditaments of such estate as they are *seised* of in trust for him *at the time of the said execution sued.*"

14. Upon the construction of this section the following points have been resolved :—

Construction of the Statute.

α. As the statute, though using in one case the words *seised or possessed,* speaks elsewhere only of lands, &c., of which others are *seised* in trust for the debtor, it does not extend to trusts of chattels real of which the legal proprietor is said not to be *seised,* but *possessed* (*a*).

β. An *equity of redemption* is not within the terms of the Act (*b*).

γ. A *bare* and *simple* trust only is intended—not one of a complicated nature, where the interests of other parties are mixed up with the debtor's title (*c*).

δ. If after the judgment is entered up, but before actual execution, the estate has been disposed of to a purchaser, so that when execution is sued there is no trust for the debtor in *esse,* in that case the words of the statute fail to provide a remedy, and the judgment creditor cannot be put in possession (*d*).

Whether equitable *elegit* may be had where no legal *elegit* of a trust under the Statute.

The question has been much discussed whether in the last case, though the judgment creditor could not prosecute a *legal* execution, he might not subject the purchaser, if affected with notice, to an *equitable elegit* (*e*). It was said, that as there was no execution at law, and equity followed the law, the creditor was without redress; but in this argument the principle that equity followed the law seems to be wrongly applied. A judgment bound a *legal* estate, and, as equity followed the law, a judgment was therefore in equity a *lien* upon the trust. The Statute of Frauds introduced an additional remedy by enabling the judgment

(*a*) *Lyster* v. *Dolland,* 3 B. C. C. 478; *S. C.* 1 Ves. jun. 431; *Scott* v. *Scholey,* 8 East, 467; *Metcalf* v. *Scholey,* 2 Bos. & Pul. N. R. 461.

(*b*) *Lyster* v. *Dolland, Scott* v. *Scholey, Metcalf* v. *Scholey, ubi supra; Burdon* v. *Kennedy,* 3 Atk. 739.

(*c*) *Doe* v. *Greenhill,* 4 B. & Ald. 684; *Harris* v. *Booker,* 4 Bing. 96; *Forth* v. *Duke of Norfolk,* 4 Mad. 504, *per* Sir J. Leach.

(*d*) *Hunt* v. *Coles,* 1 Com. 226; *Harris* v. *Pugh,* 4 Bing. 335.

(*e*) See 2 Sugden's Vend. & Purch. 386, 10th ed.; Coote on Mortg. 3rd ed. p. 53; 2 Powell, Mortg. 606.

creditor, in certain cases, to take *legal* execution of a trust. But affirmative statutes do not abridge the common law (*a*), and therefore the creation of a *legal* remedy in certain cases provided for by the Act could not preclude the judgment creditor from prosecuting his equitable *elegit* in other cases for which the statute had made no provision. The enactment was clearly meant to be remedial, but the doctrine contended for would impress on it a restrictive character, and convert it into a disabling statute. The difficulty in the way of the relief was said to be, that no instance of it could be found after the most diligent search. The reason probably was, that judgments had only in modern times been held to bind equitable interests at all; the doctrine was certainly not established before the Statute of Frauds. But the system of trusts had from that period downwards been gradually maturing, and the principles which governed uses, and were thence transferred into trusts, had since, not indeed been abandoned, but received a much more enlarged and liberal application, and as judgments were acknowledged to be *liens* upon equitable interests, the consequence necessarily followed that a purchaser was bound by notice of a judgment, as he would be bound by notice of any other equitable incumbrance.

15. We now proceed to an examination of the more recent statutes.

1 & 2 Vict. c. 110. By the Act for extending the remedies of creditors (1 & 2 Vict. c. 110) it is enacted—(I.) By sect. 11, That execution at *law* may be had under an *elegit* of all such lands, including copyholds, as the debtor or any person in trust for him was seised or possessed of, or over which he had a disposing power which he might without the assent of any other person exercise for his own benefit (*b*), *at the time of entering up the judgment or at any time afterwards.* (II.) By section 13, That in *equity* a judgment shall operate as a *charge* upon the whole of the lands, freehold and copyhold, of which the debtor was seised or possessed for any estate or interest whatever at law or in equity, or over which he had a disposing power, at or subsequently to

(*a*) *Attorney-General* v. *Andrew*, Hard. 27; 2 Inst. 472.

(*b*) A trust for the separate use of a married woman was held not to be an estate over which she had a disposing power within the meaning of the Act; *Digby* v. *Irvine*, 6 Ir. Eq. Rep. 149. Neither is the power of the settlor to defeat a voluntary settlement by means of the 27 Eliz. c. 4, *a disposing power* within the Act of Vict.; *Beavan* v. *Earl of Oxford*, 6 De G. M. & G. 507.

the entering up of the judgment, with a proviso that the creditor shall not be entitled to proceed in equity to obtain the benefit of such charge until after the *expiration of a year* from the date of the judgment, and that the protection in equity of purchasers for valuable consideration without notice shall not be disturbed. (III.) By sect. 18, That *decrees and orders* of Courts of Equity, *rules* of Courts of Common Law, &c., whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments (*a*). But, (IV.) By sect. 19, That no *judgments, decrees, or orders,* shall affect real estate *by virtue of the Act,* unless and until they have been *registered* with the senior master of the Court of Common Pleas (*b*).

Remarks on the Statute.

16. It is observable upon these clauses, that an *equitable* estate, whether of freehold or copyhold tenure, and whether of freehold or leasehold interest, and without any restriction *to the time of execution sued,* as in the 10th section of the Statute of Frauds, is subjected by the Act to execution at *law* by writ of *elegit* (s. 11), and to *quasi* execution in *equity* by way of charge (s. 13). In the latter case purchasers without notice are expressly protected (s. 13), but in the former case not: a purchaser, therefore, even of an equitable interest, after the commencement of the Act, was obliged by this statute to search the registry for judgments entered up against the vendor, and that whether before or subsequently to the Act, for the time for entering up the judgments was immaterial, provided they had been registered. It may be thought anomalous and inconsistent that a purchaser should not be protected at *law* by want of notice, while he was in *equity;* but the intention of the legislature probably was, in giving a remedy both at law and in equity, not to disturb the principles upon which the respective Courts acted, and therefore if the trust was a *plain* one, and so amenable to a legal *elegit,* the judgment creditor might take the lands in execution even against a purchaser without notice; but if the trust was so complicated as to oblige him to apply to a Court of equity, and treat the judgment as a charge,

(*a*) A decree for an account merely is not within the section; *Chadwick* v. *Holt,* 2 Jur. N. S. 918; [*Widgery* v. *Tepper,* 6 Ch. Div. 364.] Neither is a rule of a Court of Common Law which does not specify the sum to be paid; *Jones* v. *Williams,* 11 Ad. & Ell. 175; *Doe* v. *Amey,* 8 M. & W. 565; though, as respects costs, the case is different; *Jones* v. *Williams,* 8 M. & W. 349; *Doe* v. *Barrell,* 10 Q. B. 531.

[(*b*) The registration is now effected in the Judgments Department of the Central Office, see Rules of Court, 1883, O. lvi. rr. 1, 1*a*, 22.]

the Court by the Act was not to disregard its established rules, but, as in all other cases, was to protect a purchaser without notice.

Estate or interest in land capable of being taken in execution.

17. The following cases have been decided upon this Act. A. was entitled to an *annuity* secured by a covenant and an assignment of leaseholds in *trust to sell*, and it was held that A.'s interest under the deed might, under the Act, be made available for payment of a judgment debt due from her (*a*). A testator gave real estate to trustees upon trust to levy and raise, during the life of A., an *annuity* of 400*l*., and directed the annuity to be held upon trust for the support, clothing, and maintenance of A., and the Court, having previously decided that the trust was one for the benefit of A. generally (*b*), held that a judgment creditor of A. was entitled to a charge on the annuity under the Act (*c*). A person covenanted to pay A. 5000*l*., and that the sum should be a *charge* on certain land, and it was held that a judgment creditor of A. was entitled to a charge on the land in respect of A.'s interest therein (*d*). A mortgage was executed with a power of sale, and the surplus made payable to the mortgagor, his heirs, appointees, or assigns, and before a sale judgment was entered up against the mortgagor, who was subsequently discharged under the Insolvent Act, and after such discharge the mortgagee sold under the power of sale, and it was held that the judgment creditor was entitled to the *surplus proceeds* of sale (*e*). A. was tenant for life of one-third of a trust fund, which at the time was invested on *real* securities, and it was held, though the trustees had a power of varying the securities, that A.'s interest was bound by the judgment (*f*). A *feme*, trustee for sale with a power of signing receipts, married, and then with the concurrence of her husband contracted to sell, and the purchaser objected that, as the *feme covert* was *beneficially entitled to one-third* of the produce, and the judgments were entered up, but after the contract, against the husband, the wife could not make a title; however, the Court held that the judgments could not neutralize or prejudice the power of sale and signing receipts (*g*). Where a testator devised an estate to his

(*a*) *Harris* v. *Davison*, 15 Sim. 128.

(*b*) *Younghusband* v. *Gisborne*, 1 Coll. 400.

(*c*) *S. C.* 1 De G. & Sm. 209.

(*d*) *Russell* v. *M'Culloch*, 1 K. & J. 313; and see *Clare* v. *Wood*, 4 Hare, 81. But by 18 & 19 Vict. c. 15, s. 11, when the mortgagee is paid off, the judgment against him ceases to bind the land.

(*e*) *Robinson* v. *Hedger*, 13 Jur. 846; 14 Jur. 784; 17 Sim. 183; and see *Thornton* v. *Finch*, 4 Giff. 515.

(*f*) *Avison* v. *Holmes*, 1 J. & H. 530.

(*g*) *Drummond* v. *Tracy*, Johns. 608.

wife for life, with remainder upon trust to sell and *divide the proceeds* amongst the testator's sons for life, of whom James was one, it was held by V. C. Kindersley that the share of James was not "any estate or interest in land" within the meaning of the statute (*a*). But it is observable that of the several previous decisions one only (*Harris* v. *Davison*) appears to have been brought to the attention of the Court.

Proviso against suing in equity until a year after judgment.

18. The object of the proviso in *sect.* 13, *restraining the creditor from suing for a year*, is not obvious; but most probably the framers of the Act considered, that since he would obtain, as incident to his charge, a right to a sale in equity, while under the *elegit* he could only hold the land and take the rents and profits, some delay might reasonably be interposed before the exercise of the larger statutory remedy. And, notwithstanding the proviso, it has been held that the judgment creditor is entitled to have the interest of his debtor at once *secured* for the creditor's protection (*b*); and as between *two judgment creditors* the one who first obtains the charging order has priority (*c*).

Consideration of the *Charging Order* provisions.

19. The 14th section of the Act, which introduces a species of execution against *stock* and *shares* in *public funds* and *public companies*, which before were not liable, deserves a separate consideration. By that section it is enacted that if any person against whom any judgment (*d*) shall have been entered up in any of Her Majesty's superior Courts at Westminster, shall have any Government stock, funds, or annuities, or any stock or shares of or in any company in England, standing in his name in his own right (*e*), *or in the name of any person in trust for*

(*a*) *Thomas* v. *Cross*, 2 Dr. & Sm. 423.

(*b*) *Yescombe* v. *Landor*, 28 Beav. 80; *Partridge* v. *Foster*, 34 Beav. 1; *Tillett* v. *Pearson*, 43 L. J. N.S. Ch. 93. And see *Smith* v. *Hurst*, 1 Coll. 705, and *S. C.* 10 Hare, 43; *Mackinnon* v. *Stewart*, 1 Sim. N. S. 76, 91.

(*c*) *Thomas* v. *Cross*, 2 Dr. & Sm. 423.

(*d*) Extended to *Decrees*, &c., by sect. 18; and by 3 & 4 Vict. c. 82, s. 1, the property intended to be embraced by this section is further defined, so as to include any interest (as a life estate) in stock or shares.

[(*e*) Where shares in a company had been transferred by a father without consideration into the name of his son in order to qualify the son to be a director of the company, to be retransferred to the father upon request, it was held that the shares were not standing in the son's name in his own right within the meaning of the Act; *Re Blakely Ordnance Company, Frederick Coates's case*, 46 L. J. N.S. Ch. 367; but see *Jeffryes* v. *Reynolds*, 52 L. J. N.S. C. L. 55; 48 L. T. N.S. 358. The section does not extend to cash, but by way of equitable execution and in aid of the power conferred by 1 & 2 Vict. c. 110, s. 12, of taking money, &c., under a *fieri facias*, a charging order on cash in court standing to the credit of a judgment debtor can be made under the general jurisdiction of the Court of Chancery

him, it shall be lawful for the Judge of one of the superior Courts, on the application of any judgment creditor, to order, that such *stock, &c.*, shall stand charged with the payment of the amount for which judgment may have been recovered, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor, provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of *six calendar months* from the date of such order; and by the next following section of the Act it is provided that the order of the Judge shall be *ex parte* in the first instance, and shall restrain the Bank or Company from permitting a transfer of the Government stock, funds, annuities, stock, or shares affected by the order, and that no disposition of the judgment debtor in the meantime shall be valid as against the judgment creditor, [and that unless the judgment debtor shall within a time to be mentioned in the order show cause, the order shall be made absolute, but the Judge may, upon the application of the judgment debtor or any person interested, discharge or vary the order (*a*).]

20. The leading points decided with reference to this new species of execution are the following:—

By whom charging order should be made.

a. [Under the old practice it was held that] in the ordinary case of a *judgment at law*, the application for the charging order must be made to one of the *Common Law Judges*, even though the stock to be charged were standing in the name of the Paymaster-General (*b*). But where a charging order was to be made in furtherance of a *decree of the Court of Chancery*, it could properly be made by a *Judge of the Court of Chancery* (*c*). [But now the charging order may be made by any Divisional Court or by any Judge (*d*).] The charging order is made *ex parte* and *nisi* in the first instance, but when confirmed absolute it operates from the order *nisi* (*e*).

Charging order will be made at law without deciding the *quantum* of interest charged.

β. Where stocks or funds are *vested in trustees*, and a judgment debtor appears to be interested therein, the charging order will be made at law, so as to affect the *interest of the*

now vested in the High Court of Justice: *Brereton* v. *Edwards*, 21 Q. B. Div. 488.]

[(*a*) For forms of orders, see Seton on Judgments, 5th ed., pp. 423, *et seq.*]

(*b*) *Hulkes* v. *Day*, 10 Sim. 41.

(*c*) *Stanley* v. *Bond*, 7 Beav. 386; *Westby* v. *Westby*, 5 De G. & Sm. 516; *Wells* v. *Gibbs*, 22 Beav. 204.

[(*d*) See Order 46, R. 1 of the Rules of the Supreme Court.]

(*e*) *Haly* v. *Barry*, 3 L. R. Ch. App. 452; [*Burns* v. *Irving*, 3 Ch. D. 291; *Brereton* v. *Edwards*, 21 Q. B. Div. 488, 495;] and see *Widgery* v. *Tepper*, 6 Ch. Div. 364.

judgment debtor, whatever it may be, leaving it to the trustees, if the precise amount of the debtor's interest is not sufficiently defined, to say they will not act except under the direction of the Court (*a*). [But a charging order cannot be made affecting stocks and shares forming part of a residuary estate in which the debtor is interested, but which are meanwhile subject to a direction for conversion (*b*), and a charging order on a fund standing to the credit of a lunatic ought to be an unconditional order on a specified amount of the fund, and not an order directing that the amount to be charged should be determined by the Lords Justices (*c*).]

Bank or public company bound to pay dividends to trustee, notwithstanding charging order on interest of *cestui que trust*.

γ. Where a charging order is made upon the partial interest of a *cestui que trust in stock or shares* standing in the names of trustees, the Bank or public company whose stock or shares are affected by the charging order, is not concerned with questions arising between the judgment creditor and other persons interested in the trust fund, but is bound, in like manner as before the charging order, to pay the dividends to the trustees (*d*).

[Judgment payable *in futuro*.]

[δ. A charging order may be made in respect of a judgment made payable on a future day (*e*), but not of a mere order for an account of what is due in respect of an annuity and for payment, while the account is still pending (*f*), nor an order for payment of money to the credit of an action (*g*).]

Proviso at the end of sect. 14 does not forbid suit for protecting interest of judgment creditor.

ε. The proviso at the end of the 14th section, forbidding proceedings until *after six calendar months*, applies only to proceedings for enforcing *immediate payment* of the debt by realizing the security, and does not prevent the judgment creditor from taking steps to prevent the security given him by the statute from being in the meantime defeated or diminished. Thus, where the funds are standing in the name of the Paymaster-General, the judgment creditor may, *within the six months*, apply for a stop order to restrain the debtor from receiving dividends accruing within the six months (*h*).

(*a*) *Fowler* v. *Churchill*, 11 M. & W. 57; *Rogers* v. *Holloway*, 5 M. & Gr. 292; *Cragg* v. *Taylor*, 12 Jur. N.S. 320; 1 L. R. Ex. 148; 2 L. R. Ex. 131; [*South Western Loan Company* v. *Robertson*, 8 Q. B. D. 17.]

[(*b*) *Dixon* v. *Wrench*, 4 L. R. Ex. 154.]

[(*c*) *Horne* v. *Pountain*, 23 Q. B. D. 264.]

(*d*) *Churchill* v. *Bank of England*, 11 M. & W. 323; [*South Western Loan Company* v. *Robertson*, 8 Q. B. D. 17.]

[(*e*) *Younghusband* v. *Gisborne*, 1 De G. & Sm. 209; *Bagnall* v. *Carlton*, 6 Ch. D. 130.]

[(*f*) *Widgery* v. *Tepper*, 6 Ch. Div. 364; *Chadwick* v. *Holt*, 8 D. M. & G. 584.]

[(*g*) *Ward* v. *Shakeshaft*, 1 Dr. & Sm. 269.]

(*h*) *Watts* v. *Jefferyes*, 3 Mac. & G.

As to effect of charging order in reference to other incumbrances.

ζ. It must be considered as now settled, notwithstanding a decision of the Court of Queen's Bench to the contrary (*a*), that a judgment creditor who obtains a charging order against stock vested in a trustee is only entitled to such interest therein as the debtor has, and must take subject to all *specific charges*, whether *notice* thereof may or not have been given to the trustee before he has notice of the charging order (*b*).

Where debt void.

η. And a charging order has no greater effect than an instrument of charge executed by the judgment debtor would have had, so that, if the debt on which the judgment and charging order were founded was void, the charging order is inoperative (*c*); [but this limitation has reference to the extent and priority of the charge, and not to the *capacity* of the judgment debtor, so that a charging order on stock of a lunatic is binding as against his representatives (*d*).

[Remedies under charging order.]

θ. The judgment creditor is entitled under the charging order to such and the same remedies as he would have had if the charge had been created by contract between himself and the debtor; and must therefore, to enforce the charge, institute fresh proceedings for foreclosure or sale, without which the Court has no jurisdiction to order a sale of the shares (*e*).

[Order absolute cannot be discharged.]

ι. After the order has been made absolute, it cannot be discharged, even upon the application of a person who shows that the shares were standing in the name of the judgment debtor as a mere trustee for the applicant (*f*).

372; and see *Bristed* v. *Wilkins*, 3 Hare, 235. [Under the new practice it is not necessary as a preliminary to obtaining a stop order on a fund in Court in the Chancery Division by a person who has a judgment in an action in another Division, that he should obtain a charging order in that Division; *Hopewell* v. *Barnes*, 1 Ch. D. 630; *Shaw* v. *Hudson*, 48 L. J. N.S. Ch. 689; and under the Judicature Acts and Supreme Court Fund Rules, 1886, r. 99, notice of the charging order given at the pay office will operate as a stop order to prevent a transfer; *Brereton* v. *Edwards*, 21 Q. B. Div. 488.]

(*a*) *Watts* v. *Porter*, 3 Ell. & Bl. 743; Erle, J., *diss.*

(*b*) *Beavan* v. *Earl of Oxford*, 6 De G. M. & G. 507; *Kinderley* v. *Jervis*, 22 Beav. 34; *Scott* v. *Hastings*, 4 K. & J. 633; [*Re Bell*, W. N. 1886, p. 46; 54 L. T. N.S. 370; *Re Leavesley*, (1891) 2 Ch. (C. A.) 1; *Punchard* v. *Tomkins*, 31 W. R. 286, in which case a prior unregistered specific charge of lands in Middlesex, was held to have priority over a subsequent general and roving charge.]

(*c*) *Re Onslow's Trusts*, 20 L. R. Eq. 677. It has been held under the Irish Act that a conditional charging order made *ex parte* can be served on a person out of the jurisdiction; *Re Gethin*, 9 Ir. R. Eq. 512. [And see *Re Blakely Ordnance Company, Frederick Coates's Case*, 46 L. J. N.S. Ch. 367.]

[(*d*) *Re Leavesley, ubi supra.*]

[(*e*) *Leggott* v. *Western*, 12 Q. B. D. 287.]

[(*f*) *Jeffryes* v. *Reynolds*, 52 L. J. N.S. C. L. 55; 48 L. T. N.S. 358; *Drew* v. *Lewis*, 60 L. J. Q. B. 264; 39 W. R. 310.]

κ. An order *nisi* is not "an execution against the goods of a debtor" within sect. 45 of the Bankruptcy Act of 1883 (*a*). [Execution under Bankruptcy Act.]

λ. A charging order, being an involuntary alienation, will not work a forfeiture under a forfeiture clause determining a life interest on attempt to assign, charge or incumber (*b*), but it will determine a life interest which is only to endure until the tenant for life makes some assignment, or does or suffers some act, whereby the interest may be encumbered, or the dividends become payable to another person (*c*). [Forfeiture on alienation.]

μ. A charging order is not a contract, and therefore a person desiring to enforce it cannot, under the Rules of Court, obtain leave for service out of the jurisdiction (*d*).] [Service out of jurisdiction.]

21. The 1 & 2 Vict. c. 110, was soon followed by another statute (2 & 3 Vict. c. 11), by which it was enacted:—(I.) By section 2, that no *judgment* whatsoever should affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless previously *registered* according to the provisions of the Act 1 & 2 Vict. c. 110. (II.) By section 4, that all *judgments, decrees, rules, and orders* registered, or to be registered, according to the provisions of the Act 1 & 2 Vict. c. 110, should, at the expiration of *five years*, be null and void against lands, tenements, and hereditaments, as to *purchasers, mortgagees, or creditors* (*e*), unless they should have again been registered within five years before the right, title, estate, or interest of such purchasers, mortgagees, or creditors accrued (*f*). (III.) By 2 & 3 Vict. c. 11.

[(*a*) *Re Hutchinson*, 16 Q. B. D. 515.]

[(*b*) *Re Kelly's Settlement*, 59 L. T. N.S. 496, and *vide sup.*, p. 104.]

[(*c*) *Montefiore* v. *Behrens*, 1 Eq. 171; *Roffey* v. *Bent*, 3 Eq. 759; and see *Hurst* v. *Hurst*, 21 Ch. D. 279.]

[(*d*) *Moritz* v. *Stephen*, 36 W. R. 779.]

[(*e*) These words mean *purchasers, mortgagees, or creditors* becoming such after the omission to re-register, so that, if A. and B. be respectively first and second judgment creditors who both duly register, A. does not, by subsequently omitting to re-register, lose his priority over B.; *Beavan* v. *Earl of Oxford*, 6 De G. M. & G. 492; *Shaw* v. *Neale*, 6 H. L. Cas. 581; and see *Simpson* v. *Morley*, 2 K. & J. 71; *Benham* v. *Keane*, 1 J. & H. 697. Where A., B., and C. were successive judgment creditors, and A. registered his judgment on the 12th of March, 1840, but never re-registered; B. registered his judgment in April, 1842, and re-registered in March, 1848; C. registered his judgment on the 18th of March, 1845, and re-registered on the 16th of March, 1850, it was held that though, by not re-registering, A. did not lose the priority which he had gained over B., nor B. the priority which he had gained over C., yet as A.'s judgment was bad as against C., the result was that C. was first entitled to take the amount due on A.'s judgment, and then that B. was entitled to be paid the full amount of his judgment before C. took anything more in respect of his judgment; *Re Lord Kensington*, 29 Ch. D. 527; and as to the effect of the Acts generally, see *ibid.*, pp. 531, 532.]

(*f*) And see 18 & 19 Vict. c. 15, s. 6.

section 5, that as against purchasers and mortgagees *without notice*, no *judgment, decree, or order* should have a greater effect than a judgment would have had against such purchaser or mortgagee before the passing of 1 & 2 Vict. c. 110. (IV.) By section 8, that judgments, statutes, and recognizances to the *Crown* should not bind purchasers or mortgagees unless registered as Crown debts (*a*). By virtue of the above clauses the execution that might under the former statute have been taken out at *law* against an equitable interest in the hands of a *purchaser for value without notice* was, in common with every other advantage given by the former statute against such purchaser, recalled, and the purchaser was relieved from the necessity of carrying his search back beyond the period of five years; except as regarded Crown debts, to which the enactment requiring re-registration did not apply.

Old law still applicable in case of purchase for value *without notice*.

A singular result of the 5th section was, that in the occasional, though rarely occurring case of a purchase or mortgage *without notice* of a previously *registered* judgment, the old law, as it existed before 1 & 2 Vict. c. 110, was resorted to for guidance. Thus, by 1 & 2 Vict. c. 110, judgments were a lien upon leaseholds, but by 2 & 3 Vict. c. 11, s. 5, if a purchaser or mortgagee had no notice of a registered judgment (for registration is not notice *per se*), he was not bound by the judgment unless at the time of the purchase or mortgage an elegit had been issued, for by the old law a judgment did not become a lien upon chattels until the writ of execution was lodged in the hands of the sheriff (*b*).

3 & 4 Vict. c. 82. Notice ineffectual without registration.

22. This Act, however, still left open the question whether, by analogy to the cases under the Registry Acts, a purchaser, mortgagee, or creditor, if he had actual notice of an unregistered judgment, was not bound by it; and a subsequent Act, 3 & 4 Vict. c. 82, was passed to obviate this. It was thereby enacted, by the second section, that no *judgment, decree, order, or rule* (not mentioning Crown debts) should, *by virtue of the said Act* (1 & 2 Vict. c. 110), affect any lands at law or in equity as to purchasers, mortgagees, or creditors, until registration (*c*) under

(*a*) The Act speaks only of recognizances to the *Crown*, and not of recognizances in general, as on receiverships, which are also liens on real property. The 27 & 28 Vict. c. 112, s. 1, extends to recognizances *generally*; but the Act is not retrospective, and therefore does not apply to recognizances entered up before the passing of the Act, 29th July, 1864. Recognizances to the Crown are further provided for by 28 & 29 Vict. c. 104, s. 48.

(*b*) *Westbrook* v. *Blythe*, 3 Ell. & Bl. 737.

(*c*) The framer of this Act appears

the said Act, any notice of such judgment, decree, order, or rule to any purchaser, mortgagee, or creditor, in anywise notwithstanding.

18 & 19 Vict. c. 15.

23. It being, however, doubted whether this Act protected a purchaser, mortgagee, or creditor from the effect of notice as to any remedy against him which the judgment creditor had before, independently of 1 & 2 Vict. c. 110, or whether its effect was not limited to protection against the additional remedy given to the judgment creditor by that Act (*a*), it was, in order to obviate this inconvenience, enacted generally, by 18 & 19 Vict. c. 15, s. 4, that no *judgment, decree, order, or rule* (*b*), which might be registered under 1 & 2 Vict. c. 110, should affect any lands, &c., at law or in equity, as to purchasers, mortgagees, or creditors, unless and until the memorandum, &c., should have been left with the proper officer, any notice of any such judgment, decree, &c., to any such purchaser, mortgagee, or creditor, in anywise notwithstanding.

22 & 23 Vict. c. 35. Crown Debts.

24. The 22 & 23 Vict. c. 35, s. 22, put *Crown debts* on the same footing as judgments as regards the necessity of re-registration from time to time, thus reducing the period over which the search for Crown debts should extend to five years, as in the case of judgments, &c.

23 & 24 Vict. c. 38. Issue and registration of writ of execution required.

25. By the Law of Property Amendment Act, 23 & 24 Vict. c. 38, s. 1, freehold, copyhold and leasehold estates, were, in respect of *judgments* (*c*), *statutes and recognizances*, as against purchasers and mortgagees, placed upon the same footing, and no such judgments, &c., entered up after the date of the Act (23*rd July*, 1860), were to affect lands in the hands of purchasers or mortgagees, unless a *writ of execution should have been issued and registered* before the conveyance or mortgage, and unless execution should be put in force within three calendar months from the registration. A purchaser, therefore, was thus precluded from objecting to the title on the ground of his having notice of a judgment entered up after the Act, and registered at the Common Pleas, but upon which no execution had been issued (*d*).

to have overlooked the intermediate Act of 2 & 3 Vict. c. 11, and to have left it doubtful whether re-registration within five years was necessary to exclude the title of a purchaser with notice. This doubt is now set at rest by sect. 5 of 18 & 19 Vict. c. 15.

(*a*) See *Beere* v. *Head*, 3 Jon. & Lat. 340.

(*b*) N.B. Not mentioning Crown debts.

(*c*) This, by sect. 5, includes decrees, orders in equity and bankruptcy, and other orders having the operation of a judgment.

(*d*) *Wallis* v. *Morris*, 10 Jur. 740;

Who are purchasers.

26. As to the meaning of the word *purchasers*, it has been held that a wife and children are purchasers under a marriage settlement of the interests limited to them out of the husband's estate, but the husband as to a life-interest limited to himself out of his own estate is not a purchaser, and a judgment therefore would attach upon it just as if it were not the subject of settlement (*a*).

Construction of the Acts.

27. And the construction of the Acts extending the remedies of the judgment creditor, is that as to *equitable interests* they are to receive the same construction as the Statute of Frauds, and consequently that simple trusts only can be taken in execution at law (*b*).

27 & 28 Vict. c. 112.

28. We now come to the more recent Act, 27 & 28 Vict. c. 112, which enacts, by the first section, that no *judgment, statute or recognizance* to be entered up after *29th July*, 1864, shall affect any land until *actual delivery of the land in execution by a writ of elegit or other lawful authority* (*c*). And by the third section, that every writ or other process of execution must be *registered* in the name of the *debtor*. And by the fourth section, that the creditor to whom any land shall have been actually delivered in execution (*d*), is entitled forthwith to obtain from the Court of Chancery, upon petition, an order to be served upon the debtor only for the *sale of the debtor's interest* in the land; and thereupon inquiries are to be directed as to the nature and particulars of such debtor's interest (*e*). And by the fifth section, that if it be found that the land is charged with *any other debt* due on any judgment, statute, or recognizance, whether prior or subsequent to the charge of the petitioner, such other creditor is to be served with notice of the order for sale, and is to be at liberty to attend the proceedings; and the proceeds of sale are then to be distributed amongst the parties entitled according to their priorities. It is to be noticed also that judgments are made by the second section to comprise "registered decrees, orders of the Courts

and see *Thomas* v. *Cross*, 2 Dr. & Sm. 423.

(*a*) *Re Browne*, 13 Ir. Ch. Rep. 283.

(*b*) *Digby* v. *Irvine*, 6 Ir. Eq. Rep. 149.

(*c*) The provisions of this Act are by 28 & 29 Vict. c. 104, s. 48, extended, as from 1st November, 1865, to *Crown debts*.

(*d*) As to the effect of these words, see *Re Cowbridge Railway Company*, 5 L. R. Eq. 413.

(*e*) As to the inquiries which the Court directs, see *Re Ventnor Harbour Company*, W. N. 1866, p. 9; *Re Hull and Hornsea Railway Company*, 2 L. R. Eq. 262; *Gardner* v. *London, Chatham and Dover Railway Company*, 2 L. R. Ch. App. 385.

of equity and bankruptcy, and other orders having the operation of a judgment."

The Act as affecting equitable interests.

29. This Act has a most important bearing upon *equitable* interests. The object of it, as expressed in the preamble, was "to assimilate the law affecting freehold, leasehold, and copyhold estates to that affecting pure personal estates," and it extends to land "or *any interests therein*," and therefore comprises all equitable interests. For the future, therefore, judgments are not to affect any equitable interest "until actual delivery of the land in execution by a writ of *elegit* or *other lawful authority*." But the words "actual delivery" are to be construed in a liberal sense, for incorporeal hereditaments and equities are not capable of manual delivery, and yet are included in the Act. Indeed, as Lord Justice Mellish observed, "The sheriff (as to a *legal elegit*) does not give the creditor *actual possession* of the land itself, but the effect of his return is to vest the legal estate in the creditor, who can then bring an ejectment" (*a*). The Act speaks of delivery of possession, not only by writ of elegit, but "by *other lawful authority*," and this has been held to mean, "any lawful authority which could cause such a delivery in execution as the subject matter is capable of, and where a judgment creditor comes into equity to remove a legal impediment, the relief given is substantially a delivery in possession whether in form it be a *writ of assistance* or of *sequestration*, or the *appointment of a receiver*" (*b*).

Present state of the law.

A judgment creditor, therefore, who comes under the operation of the Act may still obtain equitable execution against an equitable interest, but the judgment forms no *lien* upon the equitable interest until the creditor has reached some process in equity corresponding to actual execution at law, such as sequestration, or the appointment of a receiver, or an order for sale. Thus a creditor having a judgment against a mortgagor may obtain equitable execution against him by the appointment of a receiver, subject to the right of the mortgagee (*c*), or he may take proceedings against the mortgagor and mortgagee for redemption of the mortgage and foreclosure of the mortgagor (*d*).

(*a*) *Hatton* v. *Haywood*, 9 L. R. Ch. App. 236.

(*b*) *Hatton* v. *Haywood*, 9 L. R. Ch. App. 235, *per* Lord Selborne; [*Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275; *Ex parte Evans*, 11 Ch. D. 691; 13 Ch. Div. 252;] and see *Re Bailey's Trust*, 38 L. J. N.S. Ch. 237.

(*c*) *Wells* v. *Kilpin*, 18 L. R. Eq. 298; [*Kidd* v. *Tullentire*, W. N. 1877, p. 21; *Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275; *Re Pope*, 17 Q. B. Div. 743.]

(*d*) *Beckett* v. *Buckley*, 17 L. R. Eq.

[Appointment of receiver by way of equitable execution, when and how obtainable.]

[So a judgment creditor may obtain the appointment of a receiver of a reversionary interest in a trust estate (*a*), or of a life interest in settled funds (*b*), or of a debt or sum of money payable to the judgment debtor, to which garnishee proceedings are not applicable (*c*), and the appointment of a receiver may be made *ex parte* upon an interlocutory application immediately after the institution of the action (*d*), or without the institution of a fresh action on an interlocutory application in the action in which the judgment was obtained (*e*). The appointment, though made conditional upon the receiver's giving security, operates as an *immediate* equitable execution (*f*); and if the property is already in the hands of a receiver, the Court may appoint another receiver but not to act until the earlier receiver has been discharged, which will amount to equitable execution (*g*); and where a receiver of a partnership had been appointed in a Chancery action, the Court gave a judgment creditor of the firm a charge for his debt and costs on all the partnership moneys come or coming to the receiver, the creditor undertaking to deal with the charge according to the order of the Court (*h*). If the appointment of the receiver is merely for the purpose of giving a charge, and it is not intended that he should go into possession, the Court will make the appointment without security, on the judgment creditor and the receiver undertaking that the receiver shall not act without the leave of the Court (*i*).] But equitable execution by the appointment of a receiver will not be granted where there is no legal impediment to obtaining execution in the ordinary course of law by *fieri facias* or attachment of debt, unless special circumstances are shown such as will satisfy the Court that it is "just and convenient" to appoint a receiver within the meaning of the Judicature Act, 1873, sect. 25, sub-s. 8 (*j*), and such relief, though styled "equitable execution," is subject to the ordinary rule that equitable relief can be granted

435; and see *Ford* v. *Wastell*, 6 Ha. 229; *Messer* v. *Boyle*, 21 Beav. 559.

[(*a*) *Fuggle* v. *Bland*, 11 Q. B. D. 711.]

[(*b*) *Oliver* v. *Lowther*, 42 L. T. N.S. 47; 28 W. R. 381.]

[(*c*) *Westhead* v. *Riley*, 25 Ch. D. 413; and see *Beamish* v. *Stephenson*, 18 L. R. Ir. 319.]

[(*d*) *Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275; *Ex parte Evans*, 11 Ch. Div. 691; 13 Ch. Div. 252.]

[(*e*) *Smith* v. *Cowell*, 6 Q. B. D. 75; *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Salt* v. *Cooper*, 16 Ch. Div. 544; *Re Pope*, 17 Q. B. Div. 743; *M'Garry* v. *White*, 16 L. R. Ir. 322.]

[(*f*) *Ex parte Evans*, *ubi supra*.]

[(*g*) *Per* Jessel, M.R., *Salt* v. *Cooper*, 16 Ch. Div. 544.]

[(*h*) *Kewney* v. *Attrill*, 34 Ch. D. 345.]

[(*i*) *Hewett* v. *Murray*, W. N. 1885, p. 53; 54 L. J. Ch. 572.]

[(*j*) *Manchester and Liverpool District Banking Company* v. *Parkinson*, 22 Q. B. Div. 173.]

only when proper parties are before the Court. Therefore a receiver by way of equitable execution of the property of a deceased person cannot be appointed in the absence of any person to represent the estate (*a*).

Proceedings before equitable execution, when premature.

Should a judgment creditor, without taking proceedings for equitable execution, present a *petition in a summary way under the Act for sale of the equitable interest,* the petition would be dismissed, as the creditor has no *lien* by virtue of the *judgment itself,* and the Court has not yet awarded any *equitable execution* (*b*); and so, if a creditor having a judgment against a mortgagor bring an action for execution against the equity of redemption, and, *before the Court has made any order amounting to equitable execution,* the mortgagor becomes bankrupt, the action must be dismissed, for previously to the bankruptcy, which vested the property in the trustees for the benefit of all the creditors equally, no *lien* had attached (*c*).

Property not capable of actual delivery.

Where the subject matter is *not in possession,* and therefore is in its nature not capable of *actual delivery* by the sheriff, as in the case of a remainder expectant on a particular estate, there, although the sheriff may have made a *return of actual delivery,* yet, as such return is false in law and therefore null, a *petition* for sale under the Act founded upon such return cannot be sustained (*d*).

An *elegit* need not be actually sued out.

30. The mode of proceeding in equity appears to be this: if the creditor seek to remove some impediment to the *legal* execution of the judgment, he must lay a foundation for the interference of equity [by showing that the legal remedies have been exhausted. For this purpose it was, prior to the Judicature Act, necessary for the creditor to sue] out an *elegit* at law (*e*); and the same rule prevailed where the judgment was merely an *equitable lien* (*f*); but the *elegit* need not have been returned (*g*); and where the trust estates were in three counties an *elegit* in one was held to be sufficient (*h*). [But since the Judicature Act

[(*a*) *Re Sheppard*, 43 Ch. Div. 131.]

(*b*) *Re Duke of Newcastle*, 8 L. R. Eq. 700; and see *Re Cowbridge Railway Company*, 5 L. R. Eq. 413; *Re South*, 9 L. R. Ch. App. 369.

(*c*) *Hatton* v. *Haywood*, 9 L. R. Ch. App. 229.

(*d*) *Re South*, 9 L. R. Ch. App. 369.

(*e*) See *Dillon* v. *Plasket*, 2 Bligh, N.S. 239; *Neate* v. *Duke of Marlborough*, 3 M. & Cr. 407; Mitford on Plead. 126, 4th edit.

(*f*) *Neate* v. *Duke of Marlborough*, 9 Sim. 60; 3 M. & Cr. 407; *Godfrey* v. *Tucker*, 33 Beav. 280; *Imperial Mercantile Credit Association* v. *Newry and Armagh Railway Company*, 2 Ir. Rep. Eq. 23, *per Cur.*; but see *Tunstall* v. *Trappes*, 3 Sim. 286; *Rolleston* v. *Morton*, 1 Conn. & Laws. 257.

(*g*) *Dillon* v. *Plasket*, 2 Bligh, N.S. 239; and see *Campbell* v. *Ferrall*, Rep. *t.* Plunket, 388; [*Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275.]

(*h*) *Dillon* v. *Plasket*, 2 Bligh, N.S. 239.

it is not necessary to sue out an *elegit* if it can be otherwise shown that there is no property of the debtor against which the *elegit* could be issued for the purpose of satisfying the judgment, and where an affidavit to that effect was made by the creditor, a receiver was appointed although no *elegit* had issued (*a*); and a judgment creditor may in the same action establish a charge and enforce it (*b*).

[Registration not necessary to give priority where land actually delivered in execution.]

[But necessary before sale.]

31. If land has been actually delivered in execution to a creditor it is not necessary to register the judgment, writ, or other process of execution in order to give the creditor a charge on the land in priority to persons claiming under the debtor, including a purchaser for value without notice (*c*). But the writ or other process of execution must be registered before a summary order for sale can be obtained under sect. 4 of 27 & 28 Vict. c. 112 (*d*).]

Fi. fa. sufficient in case of equitable chattel real.

32. When the interest sought to be affected is an *equitable chattel real*, it is sufficient to sue out a writ of *fieri facias* (*e*). And when the assistance of the Court is sought in favour of a County Court judgment against an equitable chattel real, it is sufficient to pursue the analogous step of placing a writ of execution in the hands of the high bailiff, pursuant to the County Court Act (*f*).

Redemption of a mortgage.

33. A judgment creditor may *redeem a mortgage* without suing out an *elegit*; for inasmuch as the Court finds the creditor in a condition to acquire a power over the estate by suing out a writ, it gives to the party the right to come in and redeem other incumbrancers upon the property (*g*).

Proceedings in equity of judgment creditor after death of conusor.

34. Whether the judgment be *legal* or *equitable*, if the creditor take proceedings in equity *after the death of the conusor* for satisfaction of his claim out of the personal assets, and in case of their deficiency, by a sale of the real estate, an actual *elegit* is *not* an essential requisite (*h*).

[Attachment under Order 45.]

[35. In order to found an attachment under Order 45 of the Rules of the Supreme Court, there must be an actual debt at

[(*a*) *Ex parte Evans*, 11 Ch. D. 691; 13 Ch. Div. 252; *Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275; *In re Whiteley*, 56 L. T. N.S. 846, 848.]

[(*b*) *Beckett* v. *Buckley*, 17 L. R. Eq. 435.]

[(*c*) *Re Pope*, 17 Q. B. Div. 743.]

[(*d*) *Re Pope*, *ubi supra*.]

(*e*) *Gore* v. *Bowser*, 3 Sm. & G. 1; *Smith* v. *Hurst*, 10 Hare, 30; *Smith* v. *Hurst*, 1 Coll. 705; *Partridge* v. *Foster*, 34 Beav. 1.

(*f*) *Bennett* v. *Powell*, 3 Drew. 326.

(*g*) *Neate* v. *Duke of Marlborough*, 3 M. & Cr. 416, *per* Lord Cottenham; and see *Godfrey* v. *Tucker*, 33 Beav. 284.

(*h*) *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 24. See the observations of Lord Fitzgibbon, p. 61; *Neate* v. *Duke of Marlborough*, 3 M. & Cr. 416.

the time, although it need not be then due. Therefore, where a judgment debtor was entitled for life to the income of a trust fund payable half-yearly, and the trustees had duly made the last half-yearly payment and had no money representing income in their hands, it was held that there was nothing to attach. The proper course in such a case is to obtain equitable execution by the appointment of a receiver (*a*).

[Effect of bankruptcy.]

36. A creditor who has issued execution against the goods or lands of a debtor, or has attached any debt due to him, is not entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. And an execution against goods is completed by seizure and sale; an attachment of a debt by receipt of the debt; and an execution against land by seizure, or, in the case of equitable interest, by the appointment of a receiver (*b*).]

Case of lands lying in a register county.

37. The law as to priority of judgments in the case of lands lying in a *register county* is, as to judgments which have been entered up on or before 29th July, 1864 (the date of the last Act), by the combined effect of the County Register Acts and of the Acts of the Queen before referred to, in a singular position.

Judgment postponed to subsequent purchase or mortgage without notice, unless registered both in County Register and at the Common Pleas.

It is clearly settled that the County Register Acts are still in force, and consequently, in order to give a *locus standi* to a judgment creditor over a subsequent purchaser or mortgagee *without notice*, his judgment must be registered both in the County Register and in the Common Pleas (or Central Office), before the completion of the purchase or mortgage (*c*).

Rights of two judgment creditors *inter se*.

38. But the doctrine of notice does not apply as between *two judgment creditors;* and therefore a judgment creditor who, by first registering in Middlesex, has gained priority at law over a judgment of previous date duly registered in the Common Pleas, but not in Middlesex, will not be postponed in equity because he had, at the time of so registering, notice of the prior judg-

[(*a*) *Webb* v. *Stenton*, 11 Q. B. Div. 518; see *Re Cowan's Estate*, 14 Ch. D. 638.

[(*b*) 46 & 47 Vict. c. 52, s. 45.]

[(*c*) *Westbrook* v. *Blythe*, 3 Ell. & Bl. 737.]

ment (*a*). And, therefore, generally, as between two judgment creditors, the one who first registers in the County Register obtains precedence over one who registers afterwards in the County Register, though he may not have registered first at the Common Pleas (*b*).

Case where subsequent purchaser or mortgagee *has notice*.

39. Where the subsequent purchaser or mortgagee *has notice* of a prior judgment, the question is, whether the judgment was registered at the Common Pleas before the completion of the purchase or mortgage, since, as we have before seen, unless so registered it cannot bind, *notwithstanding the notice*. But if duly registered in the Common Pleas, then notice to the *purchaser* or *mortgagee* will, *in equity*, though not in law, supply the want of registration in the county (*c*).

27 & 28 Vict. c. 112.

40. As to judgments entered up since 27 & 28 Vict. c. 112 (29th July, 1864), there must now be not only registration at the Common Pleas (or Central Office), in addition to the County Registry, but also *actual delivery of the land in execution* under the writ (*d*).

SECTION VIII.

OF EXTENTS FROM THE CROWN.

Extent binds trust.

1. THE equitable interest of a term, or of a freehold held in trust, is liable to an extent from the Crown (*e*); and this not by the effect of any legislative enactment, but *per cursum scaccarii* at common law (*f*). The words of the writ issued to the sheriff are to hold inquest of the lands whereof the debtor, not *seisitus fuit*, but *habuit vel seisitus fuit*, and a person might be said to *have* lands, when by subpœna in Chancery he might exercise any dominion over them (*g*).

Sale of the lands extended.

2. At common law the extent of the Crown did not authorize

(*a*) *Benham* v. *Keane*, 1 J. & H. 685; and on appeal, 3 De G. F. & J. 318.

(*b*) *Hughes* v. *Lumley*, 4 Ell. & Bl. 274; *Neve* v. *Flood*, 33 Beav. 666.

(*c*) *Benham* v. *Keane*, 1 J. & H. 685; *Tunstall* v. *Trappes*, 3 Sim. 302; *Davis* v. *Earl of Strathmore*, 16 Ves. 427.

(*d*) See *Re Bailey's Trusts*, 38 L. J. N.S. Ch. 237.

(*e*) *King* v. *Lambe*, M'Clel. 422, *per* Sir W. Alexander; *Chirton's case*, Dyer, 160, a; *S. C.* cited *Sir E. Coke's case*, Godb. 293; the cases cited Id. 294; Id. 298; *Babington's case*, cited Id. 299; *King* v. *Smith*, Sugd. Vend. & Purch. Append. No. xv. 11th edit. *per* Ch. Baron Macdonald.

(*f*) *Attorney-General* v. *Sands*, Hard. 495, *per* Lord Hale.

(*g*) See *Sir E. Coke's case*, Godb. 294.

a *sale* of the lands, but only the perception of the *rents and profits*, until the amount of the debt was levied (*a*). This defect was supplied partially by a statute of Elizabeth (*b*), and more effectually by 25 G. 3. c. 35. It is by the latter statute enacted, that "it shall be lawful for the Court of Exchequer, and the same Court is thereby authorized, on the application of the *Attorney-General* (*c*) in a summary way by *motion* (*d*) to the same Court, to order that the *right, title, estate, and interest* of *any debtor* to the Crown, and the right, title, estate, and interest of the heirs and assigns of such debtor, which have been or shall be extended under or by virtue of any extent or *diem clausit extremum*, shall be sold as the Court shall direct, and the conveyance shall be made by the Remembrancer in the said Court of Exchequer or his deputy, under the direction of the said Court, by a deed of bargain and sale to be inrolled in the said Court."

Equity of redemption.

3. By the effect of this enactment, a trust or equity of redemption (*e*) of a Crown debtor may now be sold upon summary application to the Queen's Bench Division by motion.

SECTION IX.

OF FORFEITURE.

Trust not forfeitable at common law for attainder.

1. A TRUST of lands was never *forfeitable* at *common law* for attainder of either treason or felony (*f*); for forfeiture worked only upon *tenure*, and a trust was *holden* of nobody. The ground of the forfeiture at *law* was that all estates were *held* upon condition of duty and fidelity to the lord, and upon breach of allegiance they returned to the Crown, from whom they originally proceeded (*g*).

26 H. 8. c. 13.

2. The exemption of the *use* from forfeiture was remedied in the case of *treason*, by 26 H. 8. c. 13, s. 5, whereby it was enacted, that, "every offender convicted of high treason by *presentment, confession*, or *process of outlawry*, should forfeit to the King all

(*a*) *Rex* v. *Blunt*, 2 Y. & J. 122, *per* Baron Hullock.
(*b*) 13 Eliz. c. 4.
(*c*) See *Rex* v. *Bulkeley*, 1 Y. & J. 256.
(*d*) See *Rex* v. *Blunt*, 2 Y. & J. 120.
(*e*) *King* v. *De la Motte*, Forr. 162.
(*f*) *Attorney-General* v. *Sands*, Hard. 495, *per* Lord Hale; 1 Hale's P. C. 247; Jenk. 190.
(*g*) Gilb. on Uses, 38.

such lands, &c., which such offender should have of any estate of inheritance in *use* or *possession*."

27 H. 8. c. 10.

3. The following year was passed the 27 H. 8. c. 10, by which *uses* were abolished, and, as the *trust* which grew up in the place of the use was held to be an interest *sui generis*, and not within reach of the statutes directed against uses, the legislature was again called upon to interpose by special enactment to remedy the defect.

33 H. 8. c. 20.

4. The 33 H. 8. c. 20, s. 2, declared, that "if any person or persons should be attainted of high treason by the course of the *common laws or statutes of the realm*, every such attainder by the *common law* (*a*) should be of as good strength, value, force, and effect, as if it had been done by authority of Parliament; and that the King's Majesty, his heirs and successors, should have as much benefit and advantage by such attainder, as well of *uses, rights, entries, conditions*, as possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of Parliament, and should be deemed and adjudged in *actual and real possession* of the lands, tenements, hereditaments, uses, goods, chattels, and all other things of the offenders so attainted, which his highness ought lawfully to have and which they, being so attainted, ought or might lawfully lose and forfeit, if the attainder had been done by authority of Parliament, *without any office or inquisition to be found of the same*."

King *v.* Daccombe.

5. Notwithstanding this statute, it was laid down extra-judicially in the reign of James I., and was said to have been so resolved previously (*b*), that the *trust* of a freehold was *not* forfeited upon attainder of treason; and it has been remarked by the highest legal authority, that this doctrine "may be thought to be founded on reason, because it is not pretended that the statute of 26 H. 8. can embrace trusts which have succeeded to uses, and it does not appear to have been the intention of the 33 H. 8. to create a forfeiture of any equitable estate which has sprung up since the former Act. The statute had other objects" (*c*).

Construction of 33 H. 8.

6. To understand the scope of the enactment it must be observed—1. That previously to 33 H. 8. it was only in the case

(*a*) This includes the general statutes of the realm, as opposed to a special Act attainting a particular individual.

(*b*) *King* v. *Daccombe*, Cro. Jac. 512.

(*c*) Gilb. on Uses, by Lord St. Leonards, 78, note 9; and see *Burgess* v. *Wheate*, 1 Eden, 221.

of a person attainted by Act of Parliament, and then by a special proviso, that the King was put in *immediate possession* of the offender's lands, for in attainders by ordinary course of law, whether by common law or under a statute, the King was not in possession *until office found*. 2. That 26 H. 8. had extended the forfeiture to lands in *use* or *possession*, but not to *rights, entries*, or *conditions;* and now that 27 H. 8. had passed, the 26 H. 8. was not even applicable to *uses*, or, as they were henceforth to be called, *trusts*. 3. That 26 H. 8. had embraced attainders by *presentment, confession, verdict*, or *process of outlawry*, but had omitted other cases, as where the offender stood mute. The intention of the legislature, then, in passing 33 H. 8. was, as resolved in *Dowtie's case* (*a*),—1. To vest the actual possession in the King by the attainder *without office;* 2. To extend the forfeiture to *rights, entries, conditions*, &c., which had hitherto not been affected by attainder; and, 3. To apply the statutory provisions to all cases of attainder, including those which 26 H. 8. had accidentally omitted.

Assuming the Act to have had a remedial scope, can it be supposed that, when "rights, entries, and conditions" were, for the first time, made forfeitable by virtue of this enactment, the word "*uses*," which occupies the first place in the series, should have been inserted as mere surplusage, remembering that uses, by having been turned into possessions by 27 H. 8. had escaped the forfeiture imposed upon them by 26 H. 8 ? The insertion of the word "uses" can be no argument that "trusts" were not intended, for at that day both words were employed indifferently, as terms perfectly synonymous.

In support of this reasoning may be cited the opinions expressed by Baron Turner and Lord Hale, in the well-considered case of *Attorney-General* v. *Sands* (*b*). And Lord Hale afterwards recurs to the subject in his Pleas of the Crown (*c*), and argues the point there with considerable strength of reasoning:— "By the statute of 27 H. 8.," he says, "all uses were drowned in the land; but there have succeeded certain equitable interests called *trusts*, which differ not in substance from uses; nay, by that very statute they come under the same name—viz. uses or trusts. By the statute 33 H. 8. there is a special clause that the person attainted shall forfeit all 'uses'; and what other uses there could be at the making of the statute 33 H. 8. but only

(*a*) 3 Rep. 9, b.
(*b*) Hard. 495; *S. C.* Nels. 131; *S. C.* Freem. 130.
(*c*) 1 P. C. 218.

trusts such as are now in practice and retained in Chancery, I know not. It was agreed in the *Earl of Somerset's case*, and so resolved in *Abington's case*, that a trust of a freehold was not forfeited by attainder of treason. But how this resolution in *Abington's case* can stand with the statute of 33 H. 8. I see not; for certainly the uses there mentioned could be no other than trusts; and therefore the *equity* or *trust itself*, in cases of attainder of treason, seems forfeited by the statute, though possibly the *land itself* be *not* in the King" (*a*).

Whether equities of redemption subject to forfeiture.

7. *Equities of redemption* appear to have been made forfeitable for attainder of treason by 33 H. 8. (*b*); for the statute enumerates *conditions*, and the interest of the mortgagor is a condition, which, though broken at law, is saved whole to him in a Court of equity.

Trusts of chattels forfeitable upon conviction.

8. Trusts of *chattels*, whether real or personal, were always forfeitable to the Crown upon conviction (*c*); and if a term was in trust for the *wife* of the felon, but not for her separate use, it seems the trust was affected by the forfeiture of the husband (*d*). But the wife would still be entitled to a provision under her equity to a settlement (*e*).

Crown entitled to *subpœna*.

9. In these cases the forfeiture did not reach the legal estate vested in the trustee, but entitled the Crown to sue a *subpœna* in equity (*f*).

No forfeiture of property to which a felon is entitled only contingently.

10. If a felon at the time of his conviction was only contingently entitled, and before the interest vested he had undergone his punishment, no forfeiture accrued (*g*). But otherwise, if the interest vested before the term of imprisonment expired (*h*). And it was held that where a felon was entitled to a share of proceeds from the sale of real estate, but the sale was not to be

(*a*) In *Attorney-General* v. *Sands*, it was laid down, according to Nelson's report (p. 131), that the estate was executed in the King by force of the statute; but, according to Freeman (p. 130), that the estate was to be executed in the King by a Court of equity, which seems the better opinion.

(*b*) *Anon. case*, cited *Reeve* v. *Attorney-General*, 2 Atk. 223.

(*c*) *Wikes's case*, Lane, 54, agreed; *King* v. *Daccombe*, Cro. Jac. 512; Jenk. 190, case 92; *Attorney-General* v. *Sands*, Hard. 405; *Pawlett* v. *Attorney-General*, Hard. 467, *per* Lord Hale; *Sir J. Dack's case*, cited *Rex* v. *Holland*, Aleyn, 16; *Re Thompson's Trusts*, 22 Beav. 506.

(*d*) *Wikes's case*, Lane, 54, *per* Barons Snig and Altham.

(*e*) See *ante*, p. 842.

(*f*) *Rex* v. *Holland*, Al. 14; *Sir J. Dack's case*, as cited by Rolle, J., Id. 16; *Attorney-General* v. *Sands*, Hard. 495, *per* Lord Hale; and see *Kildare* v. *Eustace*, 2 Ch. Ca. 188; *S. C.* 1 Vern. 405, 419, 423, 428, 437.

(*g*) *Stokes* v. *Holden*, 1 Keen, 14; and see *Gough* v. *Davies*, 2 K. & J. 623; *Re Bateman's Trust*, 15 L. R. Eq. 355.

(*h*) *Roberts* v. *Walker*, 1 R. & M. 752.

made till after the death of A., and the felon had undergone his punishment in the lifetime of A., in this case, as the Crown had no equity during the life of A. to compel a conversion, the Crown was not entitled; otherwise, where the time of sale had arrived and the sale had been actually made *before* the felon had suffered his punishment (*a*). *Money* liable to be laid out in the purchase of *land* was regarded as land and so protected from being forfeited as *personal* estate (*b*).

11. Now by 33 & 34 Vict. c. 23, it is enacted that "from and after the passing of the Act (4th July, 1870), no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se* shall cause any attainder or corruption of blood, or any *forfeiture* or escheat; provided that nothing in the Act shall affect the law of forfeiture consequent upon *outlawry*" (*c*). 33 & 34 Vict. c. 23.

12. At *law* a tenant for life might, until a modern statute (*d*), by certain tortious acts, as by a feoffment of the fee-simple, have forfeited his estate to the remainderman (*e*); but had an *equitable* tenant for life affected to dispose of the *equitable* fee, no forfeiture would have accrued, for nothing passed beyond the grantor's actual interest (*f*). By the Act above referred to all conveyances are now innocent, that is, they pass nothing but what the grantor can lawfully part with. Of forfeiture by equitable tenant for life.

SECTION X.

OF ESCHEAT.

1. [UNTIL the Intestates Estates Act, 1884 (*g*)] a trust in fee of lands was not subject to escheat (*h*). This was determined in the great case of *Burgess* v. *Wheate* (*i*), before Lord Northington, assisted by Lord Mansfield and Sir T. Clarke. The arguments of these eminent judges will amply repay a very careful perusal. It may be mentioned generally, that Sir T. Clarke and Lord Trust formerly not subject to escheat. Burgess v. Wheate.

(*a*) *Re Thompson's Trusts*, 22 Beav. 506.
(*b*) *Harrop's Estate*, 3 Drew. 726.
(*c*) See *supra*, p. 26.
(*d*) 8 & 9 Vict. c. 106, s. 4.
(*e*) See Co. Lit. 251, a.
(*f*) *Lethieullier* v. *Tracy*, 3 Atk. 728, 730; *Lady Whetstone* v. *Bury*, 2 P. W. 146.
[(*g*) 47 & 48 Vict. c. 71.]
(*h*) *Attorney-General* v. *Sands*, Hard. 488; and see 1 Harg. Jurid. Exerc. 383.
(*i*) 1 Eden, 176; *S. C.* 1 W. Bl. 123.

Mansfield, while they pursued different lines of reasoning, carried their principles to too great an excess. Sir Thomas Clarke contended that trusts must be governed strictly by *uses*, and, therefore, as no escheat in equity was of a use, there could be none of a trust. But this position is too large; for trusts do not follow absolutely the law of uses: for then no curtesy would be of a trust, the judgment creditor would have no lien, and equitable interests would not be assets. Lord Mansfield, on the other hand, advanced the doctrine that, as lands escheat at law, so trusts must escheat in equity: that trusts, since the statute of H. 8., are not regulated by uses, but the maxim is "Equity follows law,"—"The *trust* is the *estate*." But to this it must be answered that a trust has always been recognised as a thing *sui generis*, and not as identical with the legal fee: it binds not, for instance, a purchaser for valuable consideration without notice. The intermediate opinions of Lord Northington are to be regarded as those most in accordance with the general system: trusts, he thought, were to be administered on the footing of uses; but not, as Sir Thomas Clarke maintained, to the exclusion of the improvements adopted subsequently to the statute of H. 8.: he agreed with Lord Mansfield, that trusts imitated the legal possession; but he added the qualification, *as between the privies to the trust only*, and not as respected strangers: his objection to the claim of the lord was, that it was for the execution of a trust that did not exist: where there was a trust, it should be considered in that Court as the real estate *between the cestui que trust and the trustee, and all claiming by or under them;* and the trustee should take no beneficial interest that the *cestui que trust* could enjoy; but he knew no instance where that Court ever permitted the creation of a trust to *affect the right of a third person* (*a*).

Trustee retained the estate.

2. The result of the determination in *Burgess* v. *Wheate*, as followed in more recent cases, was, that where the owner of the equitable fee died intestate without heirs the trustee retained the estate (*b*).

Principle applied to equity of redemption.

3. The same principle was applied by Sir John Romilly, M.R.,

(*a*) 1 Eden, 251.

(*b*) *Taylor* v. *Haygarth*, 14 Sim. 16; *Davall* v. *New River Company*, 3 De G. & Sm. 394; *Cox* v. *Parker*, 22 Beav. 168; [*Keogh* v. *M'Grath*, 5 L. R. Ir. 478; *Re Mary Hudson's Trusts*, 52 L. J. N.S. Ch. 789.] As to estates *pur autre vie*, see p. 780, *supra*. And where a trust of real estate was created in favour of an *alien*, the Crown was entitled to the benefit of the trust as against both the trustee and the heir at law of the settlor; *Barrow* v. *Wadkin*, 24 Beav. 1; and see p. 44, *supra*.

to an equity of redemption; and his Honour decided, that, where there was a mortgage in fee and then the mortgagor died intestate without heirs, the equity of redemption did not escheat to the Crown, but belonged to the mortgagee, subject to the mortgagor's debts (*a*).

[4. Where a testatrix, who died without heirs, devised copyholds in trust for one for life with remainder to charitable uses which were void, so that there was a resulting trust for the testatrix, the customary heiress of the survivor of the trustees of the will appointed by the Court was held entitled to be admitted as tenant for her own benefit (*b*). [Copyholds.]

5. Now by "The Intestates' Estates Act, 1884" (*c*), where after the passing of that Act (14th August, 1884) a person dies without an heir and intestate as to any equitable estate or interest in any corporeal or incorporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest were a legal estate in corporeal hereditaments.] [Trust estate now subject to escheat.]

SECTION XI.

THE DESCENT OF THE TRUST.

1. A TRUST is governed by the same rules of descent as the legal estate is on which the trust is engrafted, and *that* whether the legal estate descends according to the course of common law, or is subject to a *lex loci*. Trust descends as the legal estate.

2. If one seised of land *ex parte maternâ* convey to a person in fee upon trust, and no trust is expressed, the resulting interest is part of the original estate, and will descend in the maternal line, and, failing the heirs on the part of the mother, would rather absolutely determine, than pass into the paternal line (*d*). But if one seised *ex parte maternâ* devise to A. and his heirs upon trust for a person for life, and then in trust to *convey* to *Seisin ex parte maternâ.*

(*a*) *Beale* v. *Symonds*, 16 Beav. 406.

[(*b*) *Gallard* v. *Hawkins*, 27 Ch. D. 298.]

[(*c*) 47 & 48 Vict. c. 71, s. 4; as to procedure in cases of escheat, see the Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53).]

(*d*) *Burgess* v. *Wheate*, 1 Eden, 177, see 186, 216, 256; *Langley* v. *Sneyd*, 1 Sim. & St. 45; *Nunson* v. *Barnes*, 7 L. R. Eq. 250; [see now 22 & 23 Vict. c. 35, ss. 19, 20, under which, on failure of heirs of the purchaser, the heirs of the person last entitled succeed.]

the testator's heir at law, this breaks the descent, and the heir *ex parte paternâ* is entitled to the equitable remainder (*a*).

Gavelkind.

3. If the land be subject to *gavelkind, borough English,* or other *custom,* the equitable interest will follow the same course of inheritance (*b*).

Copyholds.

4. And a trust of *copyholds* as well as of freeholds is governed by the descent of the legal estate (*c*).

Possessio fratris.

5. The analogy to law is so strictly preserved that, until an Act of 1834, if the last *cestui que trust* had no seisin of the equitable estate corresponding to *possessio fratris* at law, the trust would have descended to the *brother of the half blood,* not to the *sister of the whole blood* (*d*). By the Act referred to, the *half blood* is now in all cases (but subject to the preferable claim of the whole blood) capable of inheriting estates, whether legal or equitable (*e*).

Proceeds from sale of gavelkind lands.

6. If a settlement contain a power of sale, with a trust to reinvest the proceeds in a purchase to the same uses, and the lands are sold, but the proceeds are not reinvested, though the bulk of the estate sold was of *gavelkind* tenure, yet if one of the uses be to A. and his heirs, the proceeds of the sale will descend to the *heirs of A. at common law,* and not to the heirs by the custom of gavelkind (*f*).

Limitation to heirs as purchasers.

7. And if *gavelkind* or *borough English* lands (*g*) be limited to a person's heirs as *purchasers,* the *common law heirs* and not the customary heirs are entitled; as, where a testator directed trustees to stand seised of gavelkind lands for the separate use of A. for life, and so as her husband should not intermeddle therewith, and after her death upon trust to convey to the heirs of her body for ever, Lord Hardwicke held that the trust was executory, and that the Court must therefore look to the intention, which was to give a life-estate to A., and the remainder to the heirs as *purchasers* (*h*); for, as the husband was not to intermeddle therewith, his curtesy was to be excluded, which would not be the case if A. were tenant

(*a*) *Davis* v. *Kirk*, 2 K. & J. 391; [and see *Re Douglas*, 28 Ch. D. 327.]

(*b*) *Fawcet* v. *Lowther*, 2 Ves. Sen. 304, *per* Lord Hardwicke; *Banks* v. *Sutton*, 2 P. W. 713, *per* Sir J. Jekyll; *Cowper* v. *Cowper*, 2 P. W. 720; *Jones* v. *Reasbie*, 22 Vin. Ab. 185, pl. 7; *Buchanan* v. *Harrison*, 1 J. & H. 662.

(*c*) *Trash* v. *Wood*, 4 M. & Cr. 324.

(*d*) *Banks* v. *Sutton*, 2 P. W. 713, *per* Sir J. Jekyll; *Cowper* v. *Earl Cowper*, Ib. 736, *per eundem*; *Cunningham* v. *Moody*, 1 Ves. 174; Co. Lit. 14 b; and see the cases cited, *Casborne* v. *Scarfe*, 1 Atk. 604.

(*e*) 3 & 4 W. 4. c. 106, s. 9.

(*f*) *Hougham* v. *Sandys*, 2 Sim. 95, see 153.

(*g*) *Polley* v. *Polley* (No. 2), 31 Beav. 363; [*Garland* v. *Beverley*, 9 Ch. D. 213.]

(*h*) Now by 3 & 4 W. 4. c. 106, s. 3, a *limitation* in a deed to the settlor or his heirs, or in a will to the *testator's heirs,* confers an estate *by purchase.*

in tail. A conveyance of the legal estate was therefore directed to the *eldest* son and the heirs of his body, with remainder to the second son, and the heirs of his body, &c. "Not," added Lord Hardwicke, "according to the custom of gavelkind, because it must go according to the rule of common law, being not a trust executed, but executory" (*a*).

SECTION XII.

OF ASSETS.

THE general law relating to *assets*, as it stood previously to the Statute of Frauds may be thus stated.

Legal assets.

1. The executor or administrator of the deceased was bound to apply his *personal estate* in payment of his debts; and this in the order of their legal priorities, as first of judgments, then of specialties, and then of simple contract debts; or, as it was expressed, the personal estate was *legal assets*.

Assets *by descent*.

2. Again, where the deceased had executed an instrument binding himself and his *heirs*, the heir to the extent of the real estate (except copyholds) which came to him, was bound to satisfy this obligation of his ancestor, or, in other words, the lands so inherited were *assets by descent*.

Equitable assets.

3. The 32 Henry 8. c. 15, which first gave the power of *devising* lands, inadvertently opened a door to fraud, since it was held that if the owner of land devised it away, a creditor claiming by bond or other instrument binding the heir could not sue the *devisee*, and if he sued the *heir*, the latter might plead he had no land by descent. Where, however, the owner had by his will *charged* his lands with or devised them subject to the payment of debts, a Court of equity viewed the creditors as *cestuis que trust*, and made the land available in satisfaction of the debts; and in doing this it paid all the creditors *pari passu* without reference to their legal priorities, that is, the lands so charged or devised were *equitable assets*.

Equitable interests.

4. With these prefatory remarks we proceed to the consideration of *equitable interests* as assets *before the Statute of Frauds*.

Trusts of chattels are assets.

5. The trust of a *chattel* was always accounted assets in

(*a*) *Roberts* v. *Dixwell*, 1 Atk. 607; 90; *Sladen* v. *Sladen*, 2 J. & H. 369. and see *Thorp* v. *Owen*, 2 Sm. & G.

equity (*a*); by which is meant, not *equitable assets*, but assets for the due application of which in payment of debts the personal representative was responsible in *equity*, if not at law.

Trusts of a freehold.

6. But whether the trust of a *freehold* should be assets in the hands of the heir for payment of debts by specialty in which the heirs were bound was for a long time *vexata quæstio*. On the one hand it was argued, that the trust ought to follow the use, and that the use was *not* liable to a bond creditor; on the other hand it was said, that trusts since the Statute of Uses had been conducted by the Courts on more liberal principles, and, as the legal fee was available to the discharge of specialty debts at law, so a Court of equity ought to adopt the same rule in the administration of trusts.

Bennet v. Box.

It was determined by Lord Hale, Chief Justice Hyde, and Justice Windham, in the case of *Bennet* v. *Box*, that a trust in fee should not be assets (*b*); and Lord Keeper Bridgman afterwards felt himself bound by the authority of this decision in respect of a *trust* (*c*), though he doubted somewhat as to an *equity of redemption* (*d*); and so the law as to a trust was laid down by Lord Hale in *Attorney-General* v. *Sands* (*e*).

Grey v. Colvile.

The question was renewed before Lord Nottingham in *Grey* v. *Colvile* (*f*), when trust estates were declared to be *assets in equity*. The case was afterwards reheard before Lord Guildford, and is reported by Vernon under the title of *Creed* v. *Colvile* (*g*), and his Lordship said, he "should be much governed by the case of *Bennet* v. *Box*, unless they could show that the latter precedents had been otherwise," and directed them to attend him with precedents towards the latter end of the term. The cause was brought on again the December following, and the Court ordered that the parties should attend the two Chief Justices and the Lord Chief Baron, who were desired to certify their opinion on the question (*h*). In Michaelmas term the next year, upon the motion of the defendants, it was ordered, that, unless plaintiffs, the creditors, procured the certificate of the Lords Chief Justices' and Lord Chief Baron's opinion by the first day of the next term, *the bill should be dismissed without further motion* (*i*). No further pro-

(*a*) *Attorney-General* v. *Sands*, Freem. 131; *Barthrop* v. *West*, 2 Ch. Rep. 33; *Duke of Norfolk's case*, 3 Ch. Ca. 10. See *post*, p. 941.
(*b*) 1 Ch. Ca. 13.
(*c*) *Pratt* v. *Colt*, 1 Ch. Ca. 128; *S. C.* Freem. 139.
(*d*) *Trevor* v. *Peryor*, 1 Ch. Ca. 148.
(*e*) Hard. 490; *S. C.* Freem. 131; *S. C.* Nels. 134.
(*f*) 2 Ch. Rep. 143.
(*g*) 1 Vern. 172.
(*h*) R. L. 1683, A. fol. 166.
(*i*) R. L. 1684, A. fol. 210.

ceedings appear in the case; and, therefore, it must be concluded that the bill was dismissed. There can be no doubt, however, that Lord Nottingham's decision was correct, and in *Goffe* v. *Whalley* (*a*) the question was renewed, but the result does not appear, unless the overruling of the heir at law's demurrer to the creditor's bill was on the ground that the Court held the trust to be assets.

Statute of Frauds.

7. Thus stood the law before the Statute of Frauds (*b*). By the 10th section of that Act a trust in fee-simple was declared to be assets by descent. But the enactment was taken to embrace *simple* trusts only, and not *complicated* trusts (*c*), or equities of redemption (*d*), so that the question still remained whether such interests as were not within the statute might not still, upon the *general principles* of equity, be treated as assets by analogy to law. This was expressly so decided as to equities of redemption in *Plucknet* v. *Kirk* (*e*) and other cases (*f*); and upon principle, the rule governing equities of redemption ought equally to be applied to every other equitable interest.

3 & 4 W. 4. c. 104.

8. The question is now of little importance, as it was enacted by 3 & 4 W. 4. c. 104 (*g*), that all a person's "*estate or interest*" (which must include any trust) in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, should be assets for the payment of debts as well on simple contract as on specialty.

Whether a trust is legal or equitable assets.

9. There remains to be considered the question, whether a trust shall, as to persons who died *before* 1*st January*, 1870 (*h*), be administered as *legal* or *equitable* assets.

Trust of a chattel.

10. It has in some cases been considered that the mere circumstance that property was *equitable* at the testator's death, was sufficient to make it *equitable assets* (*i*), but this is clearly erroneous, the question being, not whether the assets can be recovered at law or in equity, but whether the *creditor* can obtain payment thereout only from a Court of equity (*j*). Now

(*a*) 1 Vern. 282, Raithby's edit.

(*b*) 29 Car. 2. c. 3.

(*c*) The former part of the clause, which enables the sheriff to take a trust in execution, was construed not to include a *complicated* trust, and therefore it is presumed the latter part of the clause could not be differently interpreted.

(*d*) *Plunket* v. *Penson*, 2 Atk. 293, *per* Lord Hardwicke; *Solley* v. *Gower*, 2 Vern. 61, *per* Lord Jeffries.

(*e*) 1 Vern. 411; Reg. Lib. 1686, B. fol. 181, 844; and see Lord Jeffries' opinion in *Solley* v. *Gower*, 2 Vern. 61.

(*f*) *Anon.* Freem. 115; *Acton* v. *Peirce*, 2 Vern. 480; *Plunket* v. *Penson*, 2 Atk. 290.

[(*g*) See *post*, p. 943.]

(*h*) See *post*, p. 945.

(*i*) *Cox's case*, 3 P. W. 341, and note Ib.; *Hartwell* v. *Chitters*, Amb. 308; *Clay* v. *Willis*, 1 B. & C. 372.

(*j*) *Cook* v. *Gregson*, 3 Drew. 549.

if an executor recover money in that character under a trust or other equitable right, the proceeds, *when actually come to his hands*, will be legal assets, even in a Court of law (*a*); and it would be an inconsistency to say, that if the property has been reduced into possession, a Court of equity shall administer it as legal assets, but if it be outstanding at the time when the creditor institutes proceedings in equity, it shall be administered as equitable assets. Upon this principle it has at length been established, after much fluctuation (*b*), that equitable interests in personal estate are to be distributed as legal assets (*c*). "Whether," observed Sir R. Kindersley, "the assets are such that the executor can recover them in a Court of law or in a Court of equity only is immaterial. The true test is, whether he recovers them "*virtute officii*." If the assets come to his hands *as executor*, a Court of law would treat them as assets and they are to be administered (in equity) as legal assets" (*d*).

Trust in fee in the hands of the *heir*.

11. A trust in *fee* stands in a very different light from the trust of a *chattel* in the hands of the executor. As regards the inheritance, until modern Acts (*e*), it was only in respect of creditors by specialty in which the heirs were bound, that the question of legal or equitable assets could in fact have arisen, for specialties in which the heirs were not bound, and simple-contract debts, were not payable out of real estate, and statutes and judgments though *liens*, to a partial extent, upon the equitable fee, were not payable as debts, but as incumbrances. In respect then of specialties in which the heirs were bound, a plain and simple trust was made assets in a Court of law in the hands of the *heir* by the Statute of Frauds, and therefore was *legal assets* in equity (*f*); but complicated trusts, and equities of redemption, were not touched by the statute; and it would seem, upon principle, that as equity subjected the trust to specialty creditors by analogy only to law, the Court ought, by observing the analogy throughout, to adopt the *legal course of administration*.

(*a*) *Hawkins* v. *Lawse*, 1 Leon. 155, *per* Periam, J.; *Anon. case*, 1 Roll. Rep. 56; *Harwood* v. *Wrayman*, cited Ib.; *S. C.* reported Mo. 858.

(*b*) See cases cited in note (*i*) p. 941; *and Morgan* v. *Sherrard*, 1 Vern. 293; *Wilson* v. *Fielding*, 10 Mod. 426; *S. C.* 2 Vern. 763; *Sharpe* v. *Earl of Scarborough*, 4 Ves. 541.

(*c*) *Cook* v. *Gregson*, 3 Drew. 547; *Shee* v. *French*, Ib. 716; *Christy* v. *Courtenay*, 26 Beav. 140; and see *Lovegrove* v. *Cooper*, 2 Sm. & G. 271; *Mutlow* v. *Mutlow*, 4 De G. & J. 539.

(*d*) *Cook* v. *Gregson*, 3 Drew. 547.

(*e*) 47 G. 3. c. 74, Sess. 2, as to traders *only*; and 3 & 4 Will. 4. c. 104, *post*, p. 943.

(*f*) *Plunket* v. *Penson*, 2 Atk. 293, *per* Lord Hardwicke; *King* v. *Ballett*, 2 Vern. 248.

In the case of *Grey* v. *Colvile*, before referred to, in which bond-creditors, had, *after* the debtor's decease, entered up judgments against the *heir* who took by descent; it appears to have been assumed by the litigants, and was decreed by Lord Nottingham, than whom no Chancellor had a more just conception of the true nature of trusts, that the creditors should be paid *according to the priority of their judgments* out of a trust in fee (*a*). Grey v. Colvile.

12. In the case of the *devise* of a *trust* in fee, the analogy presented by the case of the devise of a *legal fee* ought, it is conceived, to be pursued. By 3 & 4 W. & M. c. 14, the power of the owner of the land to devise it away in fraud of his creditors (*b*) was first restrained, and a remedy was given against the heir and devisee jointly, in respect of the property so devised. The statute, however, expressly excepted from its operation, as do also the subsequent Acts enlarging the creditors' remedies (*c*), devises clothed with a trust or charge for payment of debts. It is conceived, that the true test whether an equitable estate in fee devised shall be legal or equitable assets, is, whether the estate *if legal* and *devised in similar terms* would have constituted legal or equitable assets (*d*). Whether trust in fee *devised* is legal or equitable assets.

13. By 3 & 4 W. 4. c. 104, it was enacted that when any person should die seised of or entitled to any *estate or interest* in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, *which he should not by his last will have charged with, or devised subject to the payment of his debts*, the same should be assets, *to be administered in Courts of equity* for the payment of the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, should be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons, who died seised of freehold estates, was or were before the passing of that Act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs 3 & 4 W. 4. c. 104.

(*a*) *Grey* v. *Colvile*, 2 Ch. Rep, 143; and see *Morrice* v. *Bank of England*, 2 Sw. 585; *Dollond* v. *Johnson*, 2 Sm. & G. 301.

(*b*) See p. 216, *supra*.

(*c*) 47 G. 3. c. 74, Sess. 3; 11 G. 4, & 1 W. 4. c. 47; 3 & 4 W. 4. c. 104.

(*d*) See *Plunket* v. *Penson*, 2 Atk. 51, 290; *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538; and the observations on those cases in 3rd ed. p. 690.

were bound: provided always that in the administration of assets *under and by virtue of that Act* all creditors by specialty in which the heirs were bound should be paid the full amount of the debts due to them before any of the creditors, by simple contract, or by specialty in which the heirs were not bound, should be paid any of their demands.

Construction of the Act.

Upon the construction of this statute the following observations occur:—

a. The Act creates a *general* charge on the estate for the benefit of creditors (*a*), subject only to the right of alienation in the heir or devisee (*b*).

β. The words "assets to be administered in equity" mean only that the creditor's *remedy* shall be in equity, and not that the estate shall be administered as *equitable assets*, and [it would seem,] therefore, that the estate is to be administered as legal assets (*c*).

[γ. No right of retainer is given to the heir or devisee for a debt due to him on a simple contract. But it would seem that such a right of retainer in respect of a debt by specialty in which the heirs are bound is not taken away (*d*).]

δ. The express terms of the Act giving priority to creditors by specialty in which the heirs are bound over creditors by specialty in which the heirs are not bound, have, as a matter of course, had full effect given to them (*e*).

(*a*) *Kinderley* v. *Jervis*, 22 Beav. 1.

(*b*) See cases, p. 264, note (*c*).

(*c*) See *Foster* v. *Handley*, 1 Sim. N. S. 200; more fully reported, 15 Jur. 73; *Re Burrell*, 9 L. R. Eq. 443, where it was held that creditors by specialty in which the heirs were bound were entitled to priority as against an equity of redemption in *copyholds*. In *Re Illidge*, 24 Ch. D. 654, in which however the earlier cases were not cited, it seems to have been assumed by Chitty, J., that the assets were to be administered as equitable assets; and see *S. C.* on appeal, 27 Ch. Div. 478, 484.

[(*d*) *Re Illidge*, 24 Ch. D. 654; 27 Ch. Div. 478; explaining *Ferguson* v. *Gibson*, 14 L. R. Eq. 379. The foundation of the rule, allowing the right of retainer out of the real estate to an heir at law or devisee being a creditor by specialty in which the heirs were bound, was, that he might not be under a disadvantage by not being able to sue himself; since, if he could not retain, other like creditors might have obtained priority over him by suing him. But a simple contract creditor or creditor by specialty in which the heirs were not bound, could not get a judgment giving him priority, and so the rule had no application in his case. There appears to be nothing in 3 & 4 W. 4. c. 104, or in 32 & 33 Vict. c. 46 to take away from a creditor by specialty in which the heir is bound the old right of action against the heir or devisee, and it seems to follow that although the former statute makes real estate liable to be administered by Courts of equity, the right of the heir or devisee to retain is no more taken away, than the power of Courts of equity to administer personal estate takes away an executor's right of retainer; *Re Illidge*, *ubi supra*.]

(*e*) *Richardson* v. *Jenkins*, 1 Drew. 477.

ε. The Act makes no mention of debts by *judgment* or by *decree of a Court of equity*, so that the remedies for the recovery of these out of the real estate may perhaps be viewed as still depending upon the general law (*a*).

14. As regards the administration of estates of persons who may have died *on or after the* 1*st January*, 1870, the legislature has now abolished the distinction between *specialty* and *simple contract* debts, and has directed all specialty and simple contract debts to be paid *pari passu* (*b*). [But this does not interfere with or enlarge the right of the executor to retain his own debt, as against creditors in equal degree with himself, except in so far as it increases the fund available for payment of simple contract creditors (*c*); nor does it affect his right of preferring one creditor to another (*d*). 32 & 33 Vict. c. 46.

(*a*) *Judgments* against the *testator* or *intestate* and decrees in equity against the *testator* or *intestate* are paid out of the personal estate *pari passu*. *Decrees* (if for payment of money or costs) were by 1 & 2 Vict. c. 110, s. 18 (though they were not formerly; *Bligh* v. *Darnley*, 2 P. W. 619; *Mildred* v. *Robinson*, 19 Ves. 585,) *liens* upon the real estate; and they always ranked as of equal degree with judgments in the administration of *personal* estate, and therefore above specialty or simple contract debts; *Searle* v. *Lane*, 2 Vern. 37, *Foly's case*, 2 Eq. Ca. Ab. 459; *Stasby* v. *Powell*, 1 Freem. 333; *Peploe* v. *Swinburn*, Bunb. 48. Judgments and decrees against the *personal representative* are paid out of legal assets in the order of their dates; *Dollond* v. *Johnson*, 2 Sm. & G. 301, and cases cited, Ib. When dockets were in use, a judgment against a person had no priority in the administration of his assets over other debts unless it was docketed; *Hickey* v. *Hayter*, 6 T. R. 384; *Landon* v. *Ferguson*, 3 Russ. 349. But when the docket was closed the judgment had priority *per se*, and the executor or administrator was bound by that priority though he had no notice, and no means of obtaining notice of the judgments; *Fuller* v. *Redman*, 26 Beav. 600. To remedy this inconvenience it was in effect enacted by Lord St. Leonard's Law of Property Amendment Act, 23 & 24 Vict. c. 38, ss. 3, 4, that judgments should have no priority in the administration of assets unless they were registered; *Van Gheluive* v. *Nerinckx*, 21 Ch. D. 189. But the Act does not apply where the judgment is recovered against the executor or administrator, as in that case the personal representative has full notice necessarily, and no remedy is required; *Jennings* v. *Rigby*, 33 Beav. 198; *Gaunt* v. *Taylor*, 3 Man. & G. 886, and 3 Scott (N. S.) 700; *Re Williams' Estate*, 15 L. R. Eq. 270; *Re Maggi*, 20 Ch. D. 545. And the Act is retrospective, so that an unregistered judgment, though entered up against a debtor living at the date of the Act has no preference; *Kemp* v. *Waddingham*, 1 L. R. Q. B. 355. But otherwise, where the debtor was dead at the date of the Act, so that the creditor had acquired a vested right; *Evans* v. *Williams*, 2 Dr. & Sm. 324. [And the priority of judgment creditors in the administration of assets is not affected by s. 10 of the Judicature Act, 1875; *Smith* v. *Morgan*, 5 C. P. D. 337; *Re Maggi*, *ubi sup.*]

(*b*) 32 & 33 Vict. c. 46.

[(*c*) *Re Williams' Estate*, 15 L. R. Eq. 270; *Crowder* v. *Stewart*, 16 Ch. D. 368; *Wilson* v. *Coxwell*, 23 Ch. D. 764; *Re Jones*, 31 Ch. D. 440. It is the duty of an executor or administrator to exercise his right of retainer for the benefit of his *cestuis que trust*; *Fox* v. *Garrett*, 28 Beav. 16; *Re Owen*, 23 L. R. Ir. 328.]

[(*d*) *Re Orsmond*, 58 L. T. N.S. 24. An order in an administration action under O. xv. r. 1, merely for an account by an executrix and reserving further consideration does not affect the right

[Retainer by executor.]

15. Where there are specialty debts and simple contract debts, and the right of retainer of the executor is in respect of a simple contract debt, the assets should be apportioned on the footing of giving all the creditors an equal dividend. The dividend in respect of the specialty debts is payable to them in full, and out of the residue of the assets the executor will retain his debt, and the surplus, if any is divisible rateably among the other simple contract creditors (*a*).

[Administration in bankruptcy of estate of deceased debtor.]

16. By the Bankruptcy Act, 1883 (*b*), sect. 125, and the Bankruptcy Act, 1890 (*c*), sect. 21, an order may be made in bankruptcy for the administration according to the law of bankruptcy of the estate of a deceased debtor. And where proceedings for administration of the debtor's estate have been instituted in another Court, such Court may, on proof that the estate is insufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon that Court can make an order for the administration of the estate according to the law of bankruptcy. It is, however, in the discretion of the Court in which the estate is being administered to retain the administration (*d*), and where the estate was small, the number of creditors small, and considerable expense had been incurred in the administration before the application for transfer was made, an order for transfer was refused; and a doubt was expressed whether a creditor who had not proved his debt had any *locus standi* to apply for the transfer (*e*). And the circumstances that the executor has a right of retainer, and that he is not bound to plead the Statute of Limitations, are not grounds for directing a transfer (*f*). By sub-sect. (5) of sect. 125, upon an order being made for administration, the property of the debtor vests in the official receiver as trustee, and he is to realize and distribute it in accordance with the provisions of the Act. The provisions here referred to are those relating to the property of the debtor, not those relating to the property of other persons; thus, for instance, sect. 47, avoiding certain voluntary settlements executed by a bankrupt, has no application (*g*). By sub-sect. (7) the official receiver is to have regard to any claim by the legal personal

of creditors to sue her, or her right to prefer creditors; *Re Barrett*, 43 Ch. D. 70.]

[(*a*) *Wilson* v. *Coxwell*, 23 Ch. D. 764; *Re Jones*, 31 Ch. D. 440.]

[(*b*) 46 & 47 Vict. c. 52.]

[(*c*) 53 & 54 Vict. c. 71.]

[(*d*) *Re Baker*, 44 Ch. Div. 262.]

[(*e*) *Re Weaver*, 29 Ch. D. 236; and as to the effect of the section generally, see *Re Williams*, 36 Ch. D. 573.]

[(*f*) *Re Baker*, 44 Ch. Div. 262.]

[(*g*) *Re Gould*, 19 Q. B. Div. 92, 99.]

representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him, and such claims are to be deemed a preferential debt, and paid in full out of the debtor's estate, in priority to all other debts. By sub-sect. (8) any surplus assets, after payment in full of all debts, costs of administration, and interest, are to be paid over to the legal personal representative of the debtor, or dealt with in such other manner as may be prescribed. By sub-sect. (9) notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under the section, if an order for administration is made thereon, is to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative is to operate as a discharge as between himself and the official receiver, but save as aforesaid nothing in the section is to invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration.

If an order for administration be made under this section, it is conceived that the executor's right of retainer will, as from the time of his receiving notice of the petition, cease so far as regards any assets not actually retained at the date of the notice (*a*).]

[(*a*) But see *Re Baker*, 44 Ch. Div. 262, 271.]

CHAPTER XXVIII.

RELIEF OF THE CESTUI QUE TRUST AGAINST THE FAILURE OF THE TRUSTEE.

We have now pointed out in what the estate of the *cestui que trust* primarily consists. We have also examined what are the incidents and properties of it by analogy to estates at law or by statute. It follows next that we speak of certain *collateral or subsidiary rights*, by which the *cestui que trust* is supported in the enjoyment of his equitable interest against the various accidents to which an estate, not direct, but transmitted through the instrumentality of another, must necessarily be exposed. In the present chapter we shall consider the force of the maxim, "A trust shall not fail for want of a trustee."

Trust follows the estate.

1. It is a general rule that, whenever the intention of the settlor can be clearly collected, and there is no want of consideration, the Court will follow the estate into the hands of the *legal* owner, not being a purchaser for value without notice, and compel him to give effect to the trust by the execution of the proper assurance.

Trustee dying in testator's lifetime, or otherwise failing.

Thus, if a devisor or settlor appoints a trustee, who either dies in the testator's lifetime (*a*), or disclaims (*b*), or is incapable of taking the estate (*c*), or if the trustee otherwise fail (*d*), the trust is not thereby defeated, but fastens on the conscience of the person upon whom the legal estate has devolved. "I take it," said Lord Chief Justice Wilmot, "to be a first and fundamental principle in equity, that *the trust follows the legal estate wheresoever it goes, except it comes into the hands of a purchaser for*

(*a*) *Moggridge* v. *Thackwell*, 3 B. C. C. 528; *S. C.* 1 Ves. jun. 475, *per* Lord Thurlow; *Attorney-General* v. *Downing*, Amb. 552, admitted; *Tempest* v. *Lord Camoys*, 35 Beav. 201.

(*b*) *Backhouse* v. *Backhouse*, V. C. of Eng. 20 Dec. 1844.

(*c*) *Sonley* v. *Clockmakers' Company*, 1 B. C. C. 81; *Anon. case*, 2 Vent. 349; *White* v. *Baylor*, 10 Ir. Eq. Rep. 53, 54.

(*d*) *Attorney-General* v. *Stephens*, 3 M. & K. 347.

valuable consideration without notice. A Court of equity considers devises of trusts as distinct substantive devises, standing on their own basis, independent of the legal estate: and the *legal estate* is nothing but the *shadow which always follows the trust estate* in the eye of a Court of equity" (*a*).

Direction to sell, and no person to sell named.

2. If a testator direct a sale of his lands for certain purposes, but *omits to name a person* to sell, the trust attaches upon the conscience of the heir, and he is strictly bound in equity to give effect to the intention (*b*).

Direction for separate use and no trustee appointed.

3. So, if [before the Married Women's Property Act, 1882,] the lands were devised (*c*), or a sum of money was bequeathed (*d*) to a *feme covert* for her sole and separate use, but without the interposition of a trustee, the property vested at *law* in the husband, in her right, but in *equity* he held upon trust for the separate use of the wife.

Failure of trustee of a power imperative.

4. We have seen, in a former chapter, that powers are distributable into powers *arbitrary* and powers *imperative*, and that powers *imperative* do in reality partake of the nature of trusts. Upon this ground the Court protects a *cestui que trust* from the failure of the donee of a power imperative, as it would do from the failure of any other trustee. "If," said Lord Eldon, "the power be one which it is the duty of the party to execute —made his duty by the requisition of the will—put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a *trustee for the exercise of the power,* and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it" (*e*). "As to the objection," said Lord Chief Justice Wilmot, "that these powers are personal to the trustees, and by their deaths become unexecutable, they are not *powers,* but *trusts,* and there is a very essential difference between them. *Powers* are never imperative—they leave the act to be done at the will of the party to whom they

(*a*) *Attorney-General* v. *Lady Downing*, Wilm. 21, 22.

(*b*) First clearly settled in *Pitt* v. *Pelham*, Freem. 134.

(*c*) *Bennet* v. *Davis*, 2 P. W. 316; *Major* v. *Lansley*, 2 R. & M. 355.

(*d*) *Rollfe* v. *Budder*, Bunb. 187; *Tappenden* v. *Walsh*, 1 Phillim. 352; *Prichard* v. *Ames*, T. & R. 222; *Parker* v. *Brooke*, 9 Ves. 583; and see *Roberts* v. *Spicer*, 5 Mad. 491; *Wills* v. *Sayers*, 4 Mad. 409; *Rich* v. *Cockell*, 9 Ves. 375. At first there was some doubt: *Harvey* v. *Harvey*, 1 P. W. 125; *Burton* v. *Pierpoint*, 2 P. W. 78.

(*e*) *Brown* v. *Higgs*, 8 Ves. 574.

are given. *Trusts* are always imperative, and are obligatory upon the conscience of the party intrusted. This Court supplies the *defective execution* of powers, but never the *non-execution* of them, for the powers are meant to be *optional*. But the person who creates a trust means it should *at all events* be executed. The individuals named as trustees are only the nominal instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the constitution has provided a trustee. Where no trustees are appointed at all, this Court assumes the office. There is some personality in every choice of trustees; but this personality is *res unius ætatis*, and, if the trust cannot be executed through the *medium* which was in the primary view of the testator, it must be executed through the *medium* which the constitution has substituted in its place. A college was to be founded under the eye of five trustees: that cannot be: the death of the trustees frustrates that *medium*. What then? Must the end be lost because the means are by the act of God become impossible? Suppose the question had been asked the testator, 'If the trustees die or refuse to act, do you mean no college at all, and the heirs to take the estate?' 'No: I trust them to execute my intention: I do not put it into their power whether my intention shall ever take place at all'" (*a*).

Trustee of a discretion dying in testator's lifetime, declining office, &c.

5. If trustees, then, have an *imperative power* committed to them, and they either die in the testator's lifetime (*b*), or decline the office (*c*), or disagree among themselves as to the mode of execution (*d*), or do not declare themselves before their death (*e*), or if from any other circumstance (*f*), the exercise of the power by the party intrusted with it becomes impossible, the Court will substitute itself in the place of the trustees, and will exercise the power by the most reasonable rule. And the Court assumes the jurisdiction of exercising the power *retrospectively* (*g*), and

(*a*) *Attorney-General* v. *Lady Downing*, Wilm. 23.

(*b*) *Attorney-General* v. *Lady Downing*, Wilm. 7; *S. C.* Amb. 550; *Attorney-General* v. *Hickman*, 2 Eq. Ca. Ab. 193; *Maberly* v. *Turton*, 14 Ves. 499.

(*c*) *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 194; *Gude* v. *Worthington*, 3 De G. & Sm. 389; *Izod* v. *Izod*, 32 Beav. 242; [and see *Re Stanger*, 39 W. R. 455; 64 L. T. N.S. 693.]

(*d*) *Moseley* v. *Moseley*, Rep. *t.* Finch, 53; and see *Wainwright* v. *Waterman*, 1 Ves. jun. 311.

(*e*) *Hewett* v. *Hewett*, 2 Eden, 332; *Flanders* v. *Clark*, 1 Ves. 10, *per* Lord Hardwicke; *Harding* v. *Glyn*, 1 Atk. 469; *Ray* v. *Adams*, 3 M. & K. 243, *per* Sir J. Leach; *Grieveson* v. *Kirsopp*, 2 Keen, 653; *Croft* v. *Adam*, 12 Sim. 639; *Re Hargrove's Trusts*, 8 Ir. R. Eq. 256.

(*f*) *Attorney-General* v. *Stephens*, 3 M. & K. 347; *Re Richards*, 8 L. R. Eq. 119.

(*g*) *Edwards* v. *Grove*, 2 De G. F.

will take up the trust, whatever difficulties or impracticabilities may stand in the way (*a*); for, as Lord Kenyon laid down the rule strongly, if the trust can *by any possibility* be executed by the Court, the non-execution by the trustee shall not prejudice the *cestuis que trust* (*b*).

Mode of execution.

6. In what *mode* the Court will execute the power will vary according to the circumstances of the case.

Where the settlor has prescribed a rule, the Court will adopt it.

Where the discretion of the trustee is to be *governed by some rule*, or to be *measured by a state of facts, which the Court can enquire into as effectually as a private person*, then the Court *can* "look with the eyes of trustees," and will substitute its own judgment for that of the individual (*c*).

Gower *v.* Mainwaring.

Thus in *Gower* v. *Mainwaring* (*d*), John Mainwaring executed a trust deed, by which the trustees were to give the residue of the real and personal estate among the settlor's relations *where they should see most necessity, and as they should think most equitable and just.* Two of the trustees died, and, the third refusing to act, it was discussed, how far the discretion of the trustees could be vicariously exercised by the Court. Lord Hardwicke said, "What differs it from the cases mentioned is this, that *here is a rule laid down for the trust.* Wherever there is a trust or power—for this is a mixture of both—I do not know that the Court can put itself in the place of those trustees, and exercise that discretion. Where trustees have power to distribute *generally* according to their discretion *without any object pointed out or rule laid down*, the Court interposes not; unless in case of a charity, which is different, the Court exercising a discretion as having the general government and regulation of charity. But *here is a rule laid down: the trustees are to judge of such necessity and occasions of the family: the Court can* (*e*) *judge of the necessity: that is a judgment to be made of facts existing, so that the Court can make the judgment as well as the trustees, and, when informed by evidence of the necessity, can judge what is equitable and just on this necessity,*" and his Lordship decreed a division among the relations (such relations to be restricted to those within the Statute of Distributions) according to their necessities and circumstances, which the

& J. 222, *per* L. J. Turner; *Maberly* v. *Turton*, 14 Ves. 499.

(*a*) *Pierson* v. *Garnet*, 2 B. C. C. 46, *per* Lord Kenyon.

(*b*) *Brown* v. *Higgs*, 5 Ves. 505.

(*c*) *Hewett* v. *Hewett*, 2 Eden, 332; *Maberly* v. *Turton*, 14 Ves. 499.

(*d*) 2 Ves. 87.

(*e*) In Mr. Belt's edition of Vesey there is the strange misprint of "*cannot* judge."

Master should enquire into, and consider how it might be most equitably and justly divided (*a*) (1).

How the Court will exercise the power where the settlor has laid down no rule.

7. Where the settlor has given *no rule* or *measure* by which the discretion is to be governed, the Court cannot in that case act upon mere caprice, but will execute the power by the most reasonable and intelligible rule that the circumstances of the case will admit.

Equality is equity.

And upon ordinary occasions the Court proceeds upon the maxim, that *equality* is *equity* (*b*). Thus in *Doyley* v. *Attorney-General* (*c*),

(*a*) 2 Ves. 110; and see *Liley* v. *Hey*, 1 Hare, 580.

(*b*) *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 195; *Fordyce* v. *Bridges*, 2 Ph. 497; *Longmore* v. *Broom*, 7 Ves. 124; *Salusbury* v. *Denton*, 3 K. & J. 536; *Penny* v. *Turner*, 2 Ph. 493; *Izod* v. *Izod*, 32 Beav. 242; *Gray* v. *Gray*, 13 Ir. Ch. Rep. 404; [*Re Douglas*, 35 Ch. Div. 473, 485. As to the mode of distribution of money received by way of compensation under Lord Campbell's Act (9 & 10 Vict. c. 93), see *Bulmer* v. *Bulmer*, 25 Ch. D. 409.]

(*c*) 2 Eq. Ca. Ab. 195. See *Down* v. *Worrall*, 1 M. & K. 561; but there the two sets of objects were connected not by "*and*," but by "*or*;" and *Doyley* v. *Attorney-General* was not cited; see V. C. Wood's observations, 3 K. & J. 538.

Construction of bequest to "poor relations."

(1) The execution of the power in this case in favour of the settlor's relations within the Statute of Distributions, according to their necessities, leads us to observe upon the construction of a *direct bequest* to a person's "poor or necessitous relations." It is commonly thought that the epithet "poor," "necessitous," or the like, is merely nugatory; but on examination there will appear to be considerable authority in favour of the contrary doctrine. It is perfectly settled, notwithstanding a case in which Lord Hardwicke is said to have held otherwise, (*Attorney-General* v. *Buckland*, cited 1 Ves. 231, Amb. 71,) that "relations," though accompanied with the words "poor," "necessitous," or the like, will be restricted to those within the Statute of Distributions. The only question, therefore, is whether *as among those within the statute* expressions of this kind will not be allowed their effect. In a case reported by Peere Williams (*Anon. case*, 1 P. W. 327), the bequest was to "*poor* relations," and the Countess of Winchelsea, one of the next of kin, was allowed a share, in regard the word "poor" was frequently used as a term of endearment and compassion rather than to signify indigence. It is evident that this case can have no application where the word "poor" is not of *doubtful* meaning, but is *clearly* to be taken in the sense of poverty and necessity. In *Widmore* v. *Woodroffe*, Amb. 636, the testator had given a third of the residue to be distributed "amongst the most *necessitous* of his relations." There was *only one relation within the Statute of Distributions*, and it was held that such relation was exclusively entitled. The only point decided, therefore, was, that the addition of the term "necessitous" would not extend the construction of the word "relations" to those *out* of the statute. Thus there appears to be no authority for holding the words to be nugatory *as among the relations within the statute*, while on the contrary side of the question there are, as we shall see, direct decisions. In *Brunsden* v. *Woolredge*, Amb. 507, a testator gave 500*l.* to be distributed amongst his mother's *poor* relations, and Sir T. Sewell directed the fund to be distributed amongst the poor relations of the mother within the statute *who were objects of charity*. In *Mahon* v. *Savage*, 1 Sch. & Lef. 111, a testator gave 1000*l.* to be distributed amongst his *poor* relations, or such other objects of charity as should be mentioned in his private instructions to his executors. No instructions were left, and Lord Redesdale held, that Lynam, *one of the next of kin within the statute*, was not entitled to a share, unless he was a poor person at the time of the payment of the legacy. We may also add the *dictum* of Lord Thurlow in *Green* v. *Howard*, 1 B. C. C. 33:—"The word 'relations,'" he said, "must be confined

a testator gave his real and personal estate to trustees upon trust to dispose thereof to such of his relations of his mother's side who were most deserving, and in such manner as they should think fit, *and* for such charitable uses and purposes as they should also think most proper and convenient: and the power having devolved upon the Court, Sir J. Jekyll directed that *one moiety* of the personal estate should go to the relations of the testator on the mother's side, and the *other moiety* to charitable uses, the known rule that *Equality is equity* being, he said, the best rule to go by. He had no rule of judging of the merits of the testator's *relations*, and could not enter into spirits, and therefore could not prefer the one to the other, but all should come in without distinction.

Words of gift and words of power distinguished.

8. With respect to the subject under consideration, the cases in which the donor's intention is expressed in the form of a *gift*, may admit of distinction from those in which it is expressed in the form of a *power*.

Upon trust for the children of A. as B. shall appoint.

If a fund be limited "upon trust for the children of A. as B. shall appoint," the construction is, that the children of A. take a vested interest by the *gift*, subject to be divested by the exercise of the *power*. Therefore, on failure of the power, the children, who were the objects of the power, become absolutely entitled, just as if the discretion had never been annexed (*a*). But the gift is subject to the exercise of the power, and, therefore, if the power be testamentary, the donee of the power may well appoint in favour of those who may be living at his death, to the exclusion of those who may have predeceased him (*b*). [And where the will creating the power of appointment contained a recital that the testator had already provided for his children (who were the objects of the power), and did *not intend thereby to make any further provision* for them, it was held that the

[Implication of gift over negatived by recital.]

(*a*) *Davy* v. *Hooper*, 2 Vern. 665; *Fenwick* v. *Greenwell*, 10 Beav. 412; *Madoc* v. *Jackson*, 2 B. C. C. 588; *Hockley* v. *Mawbey*, 1 Ves. jun. 143, see 149, 150; *Jones* v. *Torin*, 6 Sim. 255; *Falkner* v. *Lord Wynford*, 9 Jur. 1006.

(*b*) *Woodcock* v. *Renneck*, 4 Beav. 196; 1 Ph. 72; and see *Lambert* v. *Thwaites*, 2 L. R. Eq. 151.

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to the statute, but not always in the proportions of the statute: where the testator has said, to relations *according to their greater need*, the Court has shown particular favour to one." The argument that the Court cannot distinguish between the degrees of poverty as amongst the relations within the statute is also answered by the case of *Gower* v. *Mainwaring*, cited in the text, in which a direction for such a distinction was actually made.

power was not a power coupled with a trust, and that the children were not entitled in default of appointment (*a*).]

Upon trust to dispose amongst the children of A.

Where an estate is vested in trustees "upon trust to *dispose* thereof among the children of A.," in this case the children take nothing by way of *gift*, but the transmission of their interest must be through the *medium* of the *power*. If the trust be to distribute *equally* among the objects, the bequest, though in the form of a power, must be tantamount to a simple gift (*b*); and if the trustees be at liberty to distribute *unequally*, and make no distribution, the Court itself executes the power, and divides the fund equally amongst the objects of it (*c*).

Discretion as to objects of the power.

9. But, further, a discretion may be given to the trustee, not only in respect of the *proportions* to be appointed, but also in respect of the *objects* to whom the appointment is to be made; as where a fund is bequeathed to trustees with a discretionary power of distribution to *such* of a class as the trustees shall think fit.

Whether to be regarded as a trust or power.

In the last case the question first to be resolved is, Did the settlor intend to communicate a *mere power* or to create a *trust?*

Harding v. Glyn.

In *Harding* v. *Glyn* (*d*), a testator gave to Elizabeth his wife a house and certain goods and chattels, "but *desired* her at or before her death to give the same unto and among *such* of the testator's relations as she should think most deserving and approve of." The wife died without having made any appointment, and the Court considered a *trust* was created, and divided the estate equally amongst the testator's relations living at the time of the wife's death.

Marlborough v. Godolphin.

In *The Duke of Marlborough* v. *Lord Godolphin* (*e*), Lord Hardwicke held, in a similar case, that there was merely a *power* and no trust.

Brown v. Higgs.

In *Brown* v. *Higgs* (*f*), on the contrary, where the introductory words used were, "*I authorize and empower*," Lord Alvanley decided that there was a *trust*. The cause was reheard before his Lordship, and, after grave consideration on the subject, he

[(*a*) *Carberry* v. *M'Carthy*, 7 L. R. Ir. 328.]

(*b*) *Phillips* v. *Garth*, 3 B. C. C. 64; *Rayner* v. *Mowbray*, Ib. 234.

(*c*) *Hands* v. *Hands*, cited *Swift* v. *Greyson*, 1 T. R. 437, note; *Pope* v. *Whitcombe*, 3 Mer. 689, corrected from Reg. Lib. 2 Sugd. Powers, 650, 6th ed.; *Walsh* v. *Wallinger*, 2 R. & M. 78; *S. C.* Taml. 425; *Grieveson* v. *Kirsopp*, 2 Keen, 653; *Brown* v. *Pocock*, 6 Sim. 257; *Finch* v. *Hollingsworth*, 21 Beav. 112; *Re White's Trusts*, Johns. 656; [and see *Re Douglas*, 35 Ch. Div. 473, 485.]

(*d*) 1 Atk. 469, *S. C.* stated from Reg. Lib. in *Brown* v. *Higgs*, 5 Ves. 501.

(*e*) 2 Ves. sen. 61.

(*f*) 4 Ves. 708.

decreed as before (*a*). The decree was afterwards affirmed on appeal by Lord Eldon (*b*), and again affirmed in the House of Lords (*c*).

The doctrine of *Harding* v. *Glyn* has since been affirmed by other authorities (*d*), and may be now viewed as established. The rule has been thus laid down by Lord Cottenham: "When there appears a general intention in favour of *individuals* of a class to be *selected by another person*, and the *particular* intention fails from that selection not being made, the Court will carry into effect the *general* intention in favour of the class" (*e*).

The doctrine of Harding *v.* Glyn now established.

10. The question in favour of *what objects* a power *imperative*, whether of *distribution* merely, or of *selection*, will be executed by the Court, viz., whether in favour of those *living at the death of the testator*, or those *living at the death of the donee of the power*, remains to be considered; and it is conceived that, in reference to this question, the following results may be deduced from the authorities:—

In favour of what objects the Court will exercise a power imperative.

First. Where a testator bequeaths property with a power *imperative* in favour of a class, whether of children, relations, or others, and it appears to be the intention that the distribution or selection should take place *as soon as conveniently may be* after the testator's death, then the Court will execute the power in favour of the class as existing at the date of the *testator's death* (*f*).

Case where an immediate exercise of the power is contemplated.

Secondly. Where the *frame* of the will does not of *necessity* point to an immediate exercise of the power, as where the donee of the power takes a *life estate* expressly, or by implication, the *nature of the power* given to the donee has to be taken into consideration:

Where an immediate exercise not contemplated.

a. If the devise or bequest be in the form not of a gift, but of a power to be exercised by *will* only, then, inasmuch as the objects of the power are necessarily those only living at the death of the donee, the Court executes the power in favour of

Where power testamentary.

(*a*) 5 Ves. 495.

(*b*) 8 Ves. 561, see p. 576.

(*c*) 18 Ves. 192.

(*d*) *Birch* v. *Wade*, 3 V. & B. 198; *Burrough* v. *Philcox*, 5 M. & Cr. 72; *Penny* v. *Turner*, 2 Ph. 493; *Walsh* v. *Wallinger*, 2 R. & M. 78; *Re Caplin*, 11 Jur. N. S. 383, 2 Dr. & Sm. 527; and see *Salusbury* v. *Denton*, 3 K. & J. 535; *Re White's Trusts*, Johns. 656; *Re Eddowes*, 1 Dr. & Sm. 395; [*Pocock* v. *Attorney-General*, 3 Ch. Div. 342; *Wilson* v. *Duguid*, 24 Ch. D. 244.]

(*e*) *Burrough* v. *Philcox*, 5 M. & Cr. 92.

(*f*) *Brown* v. *Higgs*, 4 Ves. 708, &c.; *Longmore* v. *Broom*, 7 Ves. 124. The result will, of course, be the same where a life estate being given to the donee of the power, the donee dies in the testator's lifetime; see *Penny* v. *Turner*, 2 Ph. 493; *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. Rep. 332.

those members of the class only who are *in esse* at the *death of the donee* (*a*). But the rule applies only where the class takes *through the medium of a power*, for if there be a *gift* to them in the first instance, in such shares, &c., as the donee of the power shall appoint by will, then, in default of exercise of the power, the whole class take, whether they survive the donee of the power or not (*b*).

Where power not merely testamentary.

β. Where the power given to the tenant for life is not merely testamentary, but may be exercised either by *deed or will*, the question, whether the class to take is to be ascertained at the death of the testator or of the donee of the power, is involved in still further difficulty. The decisions which support an execution of the power in favour of the class of objects as existing at the *death of the donee* (*c*), and those which support an execution in favour of the class as existing at the *death of the original testator* (*d*), are almost evenly balanced; but the apparent absence of any full consideration of the question, and the circumstance that in some of the cases the power, though not expressly limited to an exercise by will, did not in terms authorize an execution by deed or writing, and may perhaps have been viewed by the Court as testamentary, detract from their value as authorities upon this point.

Upon principle, too, as well as upon authority, the question is attended with difficulty. On the one hand, the power may be properly exercised by the donee at any time before his death, and there is no obligation to exercise it earlier, and if any members of the class die before the power is exercised, they, according to the ordinary rule, cease to be objects of it. The donee of the power has an undoubted right to postpone the execution of it until the last moment of his life, and the only default which the Court has to supply, is the non-exercise *just before the death*, and that default must, therefore, be supplied in favour of those who were objects at the date of the death of the

(*a*) *Cruwys* v. *Colman*, 9 Ves. 319; *Birch* v. *Wade*, 3 V. & B. 198; *Walsh* v. *Wallinger*, 2 R. & M. 78; *Brown* v. *Pocock*, 6 Sim. 257; *Burrough* v. *Philcox*, 5 M. & Cr. 72; *Bonser* v. *Kinnear*, 2 Giff. 195; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Freeland* v. *Pearson*, 3 L. R. Eq. 658; *Re Saville*, 14 W. R. 603; [*Sinnott* v. *Walsh*, 5 L. R. Ir. 27;] and see the analogous case of *Woodcock* v. *Renneck*, 4 Beav. 190; 1 Ph. 72; *Finch* v. *Hollingsworth*, 21 Beav. 112.

(*b*) *Lambert* v. *Thwaites*, 2 L. R. Eq. 151.

(*c*) *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 195; *Harding* v. *Glyn*, 1 Atk. 469; *Pope* v. *Whitcombe*, 3 Mer. 689, corrected from Reg. Lib. 2 Sugd. Pow. 650, 6th ed.

(*d*) *Hands* v. *Hands*, cited 1 T. R. 437, note; *Grieveson* v. *Kirsopp*, 2 Keen, 653; [*Wilson* v. *Duguid*, 24 Ch. D. 244.]

donee (*a*). On the other hand, the donee of the power may exercise it in favour of the class existing at the time of exercise, to the exclusion of those who have died before, and, also, where the power is one of selection, to the exclusion of those who may come into *esse* subsequently, but the *Court* cannot act arbitrarily, and cannot show any favour, but must observe equality towards all. Who, then, are the objects of the power? As it was not the duty of the donee of the power to exercise it at one time more than another, the only objects of the power must be all those who might by possibility have taken a benefit under it, that is, those living at the death of the testator, and those who come into being during the continuance of the life estate (*b*); otherwise, should all the class predecease the tenant for life (an event not improbable, where *children* or some limited class of relations are the objects), there would be a power imperative which is construed as a trust, and no *cestui que trust*, a result which, it is conceived, the Court would be somewhat unwilling to adopt.

[In a recent case where there was a residuary bequest to A. with a direction that "the whole principal at her death was to be divided amongst her children, if she had any, in such proportions as she should think fit," the late M. R. held, (1), that A. had a power of appointment, either by instrument *inter vivos*, or by will; and (2), that, as she did not exercise the power, her surviving child and the representatives of her children who had died in her lifetime were entitled to participate in the property (*c*). It is observable that the power in this case was only one of distribution; but in a still later case (*d*), where the power was one of selection and distribution, the objects who had died in the lifetime of the donee of the power were held entitled to participate; but the decision in the latter case was also based upon other grounds. The cases in which an intention appears that there should be a *personal enjoyment* by the objects of the power stand on a different footing, and in these cases there is good ground for holding that the object must survive the donee of the power in order to participate (*e*); but apart from

(*a*) See also observation by V. C. Wood in *Re White's Trusts*, Johns. 659, 660, a case different, however, from any of those discussed in the text, the donees of the power being trustees, who both died before the tenant for life.

[(*b*) See *Wilson* v. *Duguid*, 24 Ch. D. 244.]

[(*c*) *Re Jackson's Will*, 13 Ch. D. 189.]

[(*d*) *Wilson* v *Duguid*, 24 Ch. D. 244.]

[(*e*) *Re White's Trusts*, Johns. 656; *Re Phene's Trust*, 5 L. R. Eq. 346.]

any such indication it is conceived that the governing principle should be that all persons in whose favour the power could at any time have been exercised are objects, and that they all are equally entitled to participate.]

Whole purview of instrument must be regarded.

γ. It is clear that where the donee tenant for life may exercise the power by *deed or will*, the members of the class in existence at the date of the death of the donee will alone take, if, upon the purview of the original instrument, they alone appear to be the objects of the power (*a*).

Construction of the word "relations."

Power of selection and power of distribution.

11. Where there is a power of appointment in favour of "relations," the *donee* of the discretion, if he have a power of *selection*, may appoint to relations in any degree (*b*), and it is only in those cases where he has a mere power of *distribution* that he must confine himself to the relations within the Statute of Distribution of Intestate's Estates (*c*). But the Court, except where the bequest is for the benefit of *poor relations* by way of founding a charity (*d*), or the testator has furnished some intelligible rule by which the relations out of the statute may be easily ascertained (*e*), must in all cases appoint to the relations within the statute; for as on the one hand the Court cannot act arbitrarily by selecting particular objects, so on the other it cannot execute the power in favour of relations in general, for this would lead *ad infinitum* (*f*).

(*a*) *Winn* v. *Fenwick*, 11 Beav. 438; and see *Tiffin* v. *Longman*, 15 Beav. 275.

(*b*) *Supple* v. *Lowson*, Amb. 729; *Grant* v. *Lynam*, 4 Russ. 292; *Harding* v. *Glyn*, 1 Atk. 469; *S. C.* stated from Reg. Lib., *Brown* v. *Higgs*, 5 Ves. 501; *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Cruwys* v. *Colman*, 9 Ves. 324, *per* Sir W. Grant; *Spring* v. *Biles*, cited *Swift* v. *Gregson*, 1 T. R. 435, note (*f*); *Salusbury* v. *Denton*, 3 K. & J. 536; *Snow* v. *Teed*, 9 L. R. Eq. 622. In *Brunsden* v. *Woolredge*, Amb. 507, Sir T. Sewell seems (contrary to his opinion in *Supple* v. *Lowson*, *ubi supra*) to have confined the trustees to relations within the statute.

(*c*) *Isaac* v. *Defriez*, Amb. 595; but see the case stated from Reg. Lib., *Attorney-General* v. *Price*, 17 Ves. 373, note (*a*); *Carr* v. *Bedford*, 2 Ch. Rep. 146; *Lawlor* v. *Henderson*, 10 Ir. R. Eq. 150; *Pope* v. *Whitcombe*, 3 Mer. 689. The last case, and *Forbes* v. *Ball*, 3 Mer. 437, were both decided by Sir W. Grant, but appear to be contradictory; however, in the latter case the question raised was, not whether the donee had exceeded her power, but whether the discretion was a *power* or a *trust*; for if a power, and it had not been executed by the will, the fund would have sunk into the residue, and the plaintiff have been entitled as residuary legatee. Note, a power of selection will be implied in a case of "relations," where it would not have been implied in the case of "children;" *Spring* v. *Biles*, cited 1 T. R. 435, note (*f*); *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Salusbury* v. *Denton*, 3 K. & J. 536. In the last two cases the words were "*amongst* the relations," but see *Pope* v. *Whitcombe*, 3 Mer. 689, where the expression was similar.

(*d*) See *White* v. *White*, 7 Ves. 423; *Attorney-General* v. *Price*, 17 Ves. 371; *Isaac* v. *De Friez*, Ib. 373, note (*a*); and see *Mahon* v. *Savage*, 1 Sch. & Lef. 111.

(*e*) *Bennett* v. *Honywood*, Amb. 708.

(*f*) Thus in *Bennett* v. *Honywood*,

Whether relations shall take *per stirpes* or *per capita*.

12. A further point open to discussion is, in what *shares* such relations shall take,—whether those who in case of intestacy would have claimed by representation shall under the execution of the power by the Court take *per stirpes* or *per capita*.

Now, the rule that those are deemed relations who would take a distributive share under the statute was adopted on the ground, that, unless some line were drawn for restricting the meaning of the word, a bequest to relations would be void for uncertainty. As this was the sole foundation for appealing to the statute at all, it is evident the single enquiry for the Court is, *who* would take a distributive share: *in what proportions* they would take is wholly beside the question, and in fact beside the Court's jurisdiction; for, when the class has been ascertained, the testator himself has determined the proportions by devising to the objects in words creating a joint tenancy (*a*). No distinction can be taken between real and personal estate; yet it could scarcely be held, that if *lands* were devised to the testator's "relations," the kindred within the statute would take in unequal proportions.

Principle to be extracted from the cases.

The result of the authorities would seem to accord with what is correct upon principle, viz., that *in a gift to "relations" (whether the testator has added the words "equally to be divided" or not), the distribution among the relations within the statute must be made* per capita, *and not* per stirpes (*b*). The question can no longer arise where the gift is to "*next of kin:*" for by the decision of *Elmsley* v. *Young*, upon appeal from Sir J. Leach to the Lords Commissioners (*c*), the words "next of kin" must be construed to mean "nearest of kin," to the exclusion of those who would take under the statute by representation.

Subject of the gift incapable of division.

13. We have stated that, as a general principle, the Court will execute the power among the objects *equally;* but it sometimes happens that the subject of the gift is *incapable of division*, or the settlor has expressly directed the whole to be bestowed on *one* object to be selected by the trustee. In such cases the Court

ubi supra, 456 persons applied as relations within two years.

(*a*) See *Walker* v. *Maunde*, 19 Ves. 427, 428.

(*b*) See *Thomas* v. *Hole*, Cas. *t.* Talb. 251; *Stamp* v. *Cooke*, 1 Cox, 236; *Phillips* v. *Garth*, 3 B. C. C. 64; *Green* v. *Howard*, 1 B. C. C. 33; *Rayner* v. *Mowbray*, 3 B. C. C. 234, Reg. Lib. B. 1791, fol. 183; *Pope* v. *Whitcombe*, 3 Mer. 689, Reg. Lib. B. 1809, fol. 1535; *Hinckley* v. *Maclarens*, 1 M. & K. 27; *Withy* v. *Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215; *Fielden* v. *Ashworth*, 20 L. R. Eq. 410. The above cases are discussed in Append No. IX. to 3rd edit.

(*c*) 2 M. & K. 780; and see *Withy* v. *Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215.

still acts upon the maxim, that, if *by any possibility* the power can be executed the Court will do it.

Moseley v. Moseley.

In *Moseley* v. *Moseley* (*a*), a very early case, an estate was devised to trustees upon trust to settle on *such* (*i.e.* on such *one*) of the sons of N. as the trustees should think fit. The trustees having neglected to comply with the direction, the sons of N. filed a bill to have the benefit of the trust, and the Court decreed the trustees, within a fortnight next after the entry of the order, to nominate such one of the plaintiffs as they should think fit, upon whom to settle the lands of the testator; and if the trustees should fail to nominate within that time, or there should be any difference between them concerning such nomination, then the Court would nominate one of the plaintiffs, it being the testator's intent that his estate should not be divided, but settled upon one person.

Richardson v. Chapman.

In *Richardson* v. *Chapman* (*b*), Dr. Potter, Archbishop of Canterbury, gave all his options to trustees upon trust, that in disposing thereof "regard should be had according to their discretion to his eldest son, his sons in law, his present and former chaplains, and others his domestics, particularly Dr. T., his chaplain, and Dr. H., his librarian; also to his worthy friends and acquaintance, particularly to Dr. Richardson." The trustee tried first to give the option in question to himself. He then fixed upon a person, with whom he appeared to have made an underhand bargain. When this failed, he, in breach of his duty, presented a Mr. Venner. On a bill filed to set aside the presentation, Lord Northington considered the trust to be of a kind that the Court could not execute, and dismissed the bill. Dr. Richardson appealed against this decision to the House of Lords, and the other person, who stood prior to him, not appearing, the House reversed the decree, and ordered the presentation to be made to the appellant. "This case," says Lord Alvanley "shows, that however difficult it may be to select the persons intended, and though it must depend from the nature of the trust upon the opinion of the trustees as to the merit of the persons who are the objects, yet the Court will execute even a trust of that nature, if the trustee shall either neglect to execute, or be disabled from executing, or shows by his conduct any intention not to execute it as the testator intended he should. When one reads the nature of this trust, how difficult it was to

(*a*) Rep. *t.* Finch, 53; *S. C.* cited *Clarke* v. *Turner*, Freem. 199.

(*b*) 7 B. P. C. 318; *S. C.* cited *Brown* v. *Higgs*, 5 Ves. 504, 505.

make the selection, it is decisive to show the Court must do it, though the trust is in its nature so discretionary" (*a*).

(*a*) *Brown* v. *Higgs*, 5 Ves. 504. In this case (see 4 Ves. 718, 719; 5 Ves. 508), an estate was devised "to *one* of the sons of Samuel Brown as John Brown should direct by a conveyance in his lifetime, or by his last will and testament;" and John Brown not having executed the power, Lord Alvanley was inclined to think, though he would not decide the point, that the children of Samuel Brown could not establish a claim; but the ground of this opinion was not that a *trust* had been created which the Court could not execute, but that the intention of the testator as collected from the will was to communicate a *mere power*.

CHAPTER XXIX.

THE RIGHTS OF A CESTUI QUE TRUST IN PREVENTION OF BREACH OF TRUST.

As the estate of the *cestui que trust* depends for its continuance upon the faith and integrity of the trustee, it is reasonable that the *cestui que trust*, whose interest is thus materially concerned, should be allowed by all practicable means to secure himself against the occurrence of any act of misconduct. We shall, therefore, next consider the rights of the *cestui que trust* that are calculated to arm him with this protection.

Cestui que trust entitled to appointment of proper trustees.

First.—The *cestui que trust* is entitled to have the custody and administration of the estate confided to the care both of *proper persons* and of a *proper number* of such persons.

Trustee dying in testator's lifetime.

1. Thus, if the trustee originally appointed by a will happen to die in the testator's lifetime, the *cestui que trust*, where such a course would be for his interest, may have the property better secured by a conveyance to an express trustee for himself; and where a testator did not appoint a trustee at all, but only appointed executors, the Court asserted an inherent jurisdiction of its own to appoint trustees to take charge of the fund (*a*).

Death of trustees after having acted.

2. So, where the original number of trustees has become reduced by deaths, the *cestui que trust* may restore the property to its original security by calling for the appointment of new trustees in the place of the trustees deceased (*b*); and even a *cestui que trust* in remainder may take proceedings to have the proper number of trustees filled up (*c*), and under the new practice the Court has appointed new trustees upon an action by infant *cestuis que trust* without any statement of claim upon an admis-

(*a*) *Dodkin* v. *Brunt*, 6 L. R. Eq. 580; [and see Appendix, *post*, sect. 9 of the Trustee Extension Act, and the cases cited in the note thereto.]

(*b*) *Buchanan* v. *Hamilton*, 5 Ves. 722; *Hibbard* v. *Lamb*, Amb. 309.

(*c*) *Finlay* v. *Howard*, 2 Dru. & War. 490.

sion in the statement of defence by the sole trustee that she was willing to retire (*a*).

Trustee refusing to act, becoming incapable, or misconducting himself, &c.

3. If a trustee refuse to act (*b*), or become so circumstanced that he cannot effectually execute the office (as where a trustee goes *abroad* to reside permanently (*c*), or the trustees of a chapel entertain opinions *contrary to the founder's intention* (*d*)), or if a trustee of money become *bankrupt* (*e*), or if a trustee *misconduct* himself in any manner (*f*) (as by dealing with the trust property for his own *personal advancement* (*g*), by suffering a co-trustee to commit a *breach of trust* (*h*), or by *absconding* on a charge of forgery (*i*)); in these and the like cases the *cestui que trust* may have the old trustee removed, and a new trustee appointed in his room. And in such a suit it will not be scandalous or impertinent to challenge a trustee for misconduct, or to impute to him any corrupt or improper motive in the execution of the trust, or to allege that his behaviour is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation; but it will be impertinent, and may be scandalous, to state circumstances of *general* malice or personal hostility (*j*). And if the old trustee be removed on the

(*a*) *Mooney* v. *Summerlin*, W. N. 1876, p. 90.

(*b*) *Maggeridge* v. *Grey*, Nels. 42; *Travell* v. *Danvers*, Rep. *t.* Finch, 380; *Wood* v. *Stane*, 8 Price, 613; *Anon.* 4 Ir. Eq. Rep. 700.

(*c*) *O'Reilly* v. *Alderson*, 8 Hare, 101; *Re Ledwich*, 6 Ir. Eq. Rep. 561; *Commissioners of Charitable Donations* v. *Archbold*, 11 Ir. Eq. Rep. 187.

(*d*) *Attorney-General* v. *Pearson*, 7 Sim. 290, see 309; *Attorney-General* v. *Shore*, Ib. 309, see 317.

(*e*) *Bainbrigge* v. *Blair*, 1 Beav. 495; *Re Roche*, 1 Conn. & Laws. 306; *Commissioners of Charitable Donations* v. *Archbold*, 11 Ir. Eq. Rep. 107; *Harris* v. *Harris* (No. 1), 29 Beav. 107; *Re Barker's Trusts*, 1 Ch. D. 43, in which case M.R. observed: "It is the duty of the Court to remove a bankrupt who has trust money to receive or deal with, so that he can misappropriate it. There may be exceptions under special circumstances to that general rule. And it may also be, that where a trustee has no money to receive, he ought not to be removed merely because he has become bankrupt, but I consider the general rule to be as I have stated. The reason is obvious. A necessitous man is more likely to be tempted to misappropriate than one who is wealthy; and, besides, a man who has not shown prudence in managing his own affairs, is not likely to be successful in managing those of other people." An exception to the general rule was made in *Re Bridgman*, 1 Dr. & Sm. 164, where a trustee became bankrupt, but without any imputation on his moral character, and had been honorably unfortunate, and but for an accident would have been solvent, and had been treated by all parties since his bankruptcy as a proper person to manage the trust. If the trustee compound with his creditors, the same rule applies as in bankruptcy, for the *cestuis que trust* have equally a right to have the administration of the trust estate committed to responsible persons; [*Re Adam's Trust*, 12 Ch. D. 634; and see *Re Hopkins*, 19 Ch. Div. 61; *Re Foster's Trusts*, 55 L. T. N.S. 479.]

(*f*) *Mayor of Coventry* v. *Attorney-General*, 7 B. P. C. 235; *Buckeridge* v. *Glasse*, Cr. & Ph. 126, see 131.

(*g*) *Ex parte Phelps*, 9 Mod. 357.

(*h*) *Ex parte Reynolds*, 5 Ves. 707.

(*i*) *Millard* v. *Eyre*, 2 Ves. jun. 94.

(*j*) *Earl of Portsmouth* v. *Fellows*, 5 Mad. 450.

ground of *misconduct*, he must bear the expense of the appointment of a new trustee, as an act necessitated by himself (*a*).

[But where the instrument creating the trust contemplates the possibility of a single trustee being appointed to act alone, and the power of appointing new trustees is given to the trustees or trustee for the time being, it is not a breach of trust in the last surviving trustee to refuse to appoint another trustee to act with himself, and an action to compel him to do so, if not sustainable on other grounds, will be dismissed with costs (*b*).

[Trustee removed where it is to the advantage of the trust.]

4. The jurisdiction of a Court of equity to remove a trustee is ancillary to its principal duty, to see that the trusts are properly executed. And therefore, though charges of misconduct are not made out, or are greatly exaggerated, the Court may, if satisfied that the continuance of the trustee would prevent the trusts being properly executed, remove the trustee, as trustees exist for the benefit of those to whom the creator of the trust has given the trust estate (*c*).]

Trust property under administration by the Court.

5. If the trust property be under administration by the Court, and the surviving trustee dies, the appointment of other trustees is not matter of course, but rests in the discretion of the Court, having regard to the state of the trust at the time (*d*); and if liberty has been given by a former order to apply at chambers, and the parties present a petition instead of applying at chambers for the appointment of new trustees, the petitioners will be disallowed their costs (*e*).

Trustees required to be "inhabitants."

6. If the settlement require the trustees of a charity to be *inhabitants of a particular place*, it is irregular to appoint persons trustees who do not answer that description, provided at the time of the election there be any inhabitants proper to be trustees (*f*). But where it has been the custom to appoint trustees not being inhabitants, the Court will not *remove* the existing trustees, though it will take care that the founder's directions shall be better observed for the future (*g*); and

(*a*) *Ex parte Greenhouse*, 1 Mad. 92.

[(*b*) *Peacock* v. *Colling*, 54 L. J. N.S. Ch. 742; 33 W. R. 528; 53 L. T. N.S. 620.]

[(*c*) *Letterstedt* v. *Broers*, 9 App. Cas. 371, 386.]

(*d*) *Ryan* v. *Stockdale*, W. N. 1875, p. 106.

(*e*) *Bund* v. *Green*, W. N. 1875, p. 213. [By Rules of Court, 1883, O. lv. r. 11, when an originating summons has been taken out under rules 3 and 4, every subsequent summons relating to the same matter is to be marked with the name of the judge to whom the matter is assigned.]

(*f*) *Attorney-General* v. *Cowper*, 1 B. C. C. 439. As to the force of the word "residence," see *Blackwell* v. *England*, 3 Jur. N. S. 1302; *Attenborough* v. *Thompson*, 2 H. & N. 559.

(*g*) *Attorney-General* v. *Stamford*, 1

generally, though trustees may have been appointed irregularly in the first instance, their removal cannot be demanded after acquiescence for a great number of years (*a*). And in the selection of trustees of charities the Court inquires whether the parties proposed are *proper persons*, not whether they are the *most proper* that could be found (*b*).

[7. Where the administration of a charity had been committed by the settlor to the lord provost and town council of Edinburgh and the ministers of the burgh, but for a long period the administration had been solely in the hands of the provost and council, it was held that, notwithstanding the length of time during which a contrary practice had prevailed, the ministers must in future be admitted as joint administrators of the charity (*c*).] [Proper mode of administration of charity restored.]

8. The Court will not dismiss a trustee for the mere *caprice* of the *cestui que trust* without any reasonable cause shown (*d*), or because the trustee has *refused* from *honest motives* to exercise a *power* at the request of a tenant for life (*e*), or because a *dissension* has arisen between the trustee and one of the *cestuis que trust* (*f*), or because a *cestui que trust* puts forward a claim, which may be unfounded, that property of the trustee ought to be brought into the settlement (*g*), or because the trustee has transgressed the *strict line* of his duty, provided there was *no wilful default*, but merely a *misunderstanding* (*h*). Where, however, a trustee pertinaciously insisted on being continued in the office, though his co-trustees were unwilling to act with him, Lord Nottingham said, "He liked not that a man should be ambitious of a trust when he could get nothing but trouble by it," and without any reflection on the conduct of the trustee, declared he should meddle no further in the trust (*i*). Trustee not to be dismissed from caprice.

9. As the substitution of a trustee by the Court proceeds upon a full consideration of the case, and is never made unless the Court is satisfied as to the fitness of the person proposed, it In appointing new trustees the Court will not give them a power of appointing other trustees.

Ph. 737; *Attorney-General* v. *Clifton*, 32 Beav. 596; *Attorney-General* v. *Daugars*, 33 Beav. 621.

(*a*) *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 139, see 150.

(*b*) *Re Lancaster Charities*, 7 Jur. N.S. 96.

[(*c*) *The Lord Provost, &c., of Edinburgh* v. *The Lord Advocate*, 4 App. Cas. 823.]

(*d*) *O'Keeffe* v. *Calthorpe*, 1 Atk. 18; and see *Pepper* v. *Tuckey*, 2 Jon. & Lat. 95.

(*e*) *Lee* v. *Young*, 2 Y. & C. C. C. 532.

(*f*) *Forster* v. *Davies*, 4 De G. F. & J. 133.

(*g*) *S. C.*

(*h*) See *Attorney-General* v. *Coopers' Company*, 19 Ves. 192; *Attorney-General* v. *Caius College*, 2 Keen, 150.

(*i*) *Uvedale* v. *Ettrick*, 2 Ch. Ca. 130.

cannot be expected that the Court should, when appointing new trustees and directing the trust property to be conveyed to them, authorize the insertion of a *power* in the conveyance, enabling the new trustees to *nominate other trustees* in their stead as often as occasion may require: this would plainly be an abandonment by the Court of its own jurisdiction—a delegation of it to the care and judgment of individuals. Accordingly, notwithstanding some previous fluctuation in the practice (*a*), it is now settled that, except in charity cases (*b*), the Court will not authorize the insertion of such a power in the deed of conveyance (*c*).

Rules for selecting new trustees.

10. In appointing new trustees the Court does not act arbitrarily, but upon certain general principles. *First*, the Court has regard to the *wishes of the author of the trust*, whether actually expressed in the instrument, or plainly deducible from it; and if he has declared a particular person not fit to be appointed a trustee, the Court will refrain from appointing him. *Secondly*, the Court will not appoint a new trustee with a view to the interest of some of the parties beneficially interested, in opposition to the wishes of others; for a trustee ought to hold an *even hand as between all parties*, and not favour a particular class. And, *thirdly*, the Court has regard to the nature of the trust, and the question by whose instrumentality it can *best be carried into execution* (*d*).

Statutory powers.

11. The exercise by the *cestui que trust* of his right to have the custody of the trust estate confided to a proper number of duly qualified trustees has been greatly facilitated by various statutes enabling him to obtain, in certain cases, the removal of unfit trustees, and the appointment of others in their room, and also the appointment of new trustees where the office is merely vacant; and this by a cheaper and more summary proceeding than by action.

[46 & 47 Vict. c. 147.]

[12. By the Bankruptcy Act, 46 & 47 Vict. c. 52, s. 147, which in substance re-enacted the 117th section of the Bankruptcy Act, 1869, it is enacted, that "where a *bankrupt* is a

(*a*) *Joyce* v. *Joyce*, 2 Moll. 276; *White* v. *White*, 5 Beav. 221.

(*b*) *Attorney-General* v. *Hurst*, M. R. Dec. 2, 1791, Reg. Lib. A. 1791, f. 487; see the decree, stated Seton's Dec. 4th ed. p. 585; *In the matter of* 52 G. 3. c. 101, 12 Sim. 262: *Re Lovett's Exhibition*, *Sidn. Suss. Coll. Camb.* cor. V. C. Knight Bruce, Dec. 20, 1849.

(*c*) *Bayley* v. *Mansell*, 4 Madd. 226; *Brown* v. *Brown*, 3 Y. & C. 395 *Southwell* v. *Ward*, Taml. 314; *Bowles* v. *Weeks*, 14 Sim. 591; *Oglander* v. *Oglander*, 2 De G. & Sm. 381; *Holder* v. *Durbin*, 11 Beav. 594, in which last case Lord Langdale, M. R., in deference to the views of the other judges, declined to follow his own previous decision in *White* v. *White*.

(*d*) *Re Tempest*, 1 L. R. Ch. App. 485; 12 Jur. N.S. 539.

trustee within the Trustee Act, 1850, sect. 32 of that Act shall have effect so as to authorize the appointment of a new trustee in substitution for the bankrupt (whether voluntarily resigning or not) if it appears expedient so to do" (*a*). Under this section the Court will, as a general rule, remove a trustee where the bankruptcy is recent, and it is not shown that the bankrupt is of good character, and has since his bankruptcy acquired means (*b*).]

13. By 2 Wm. 4. c. 57, s. 3, it was enacted that in case of the death of the trustee in whom any real property might have been vested in trust for any *charity*, the Court of Chancery might upon *petition* appoint new trustees, and direct the estate to be vested in them upon the charitable trusts. 2 W. 4. c. 57, s. 3.

14. By 5 & 6 Wm. 4. c. 76, s. 71 (the Municipal Corporations Act), it was enacted that in every borough in which the body corporate, or any one or more of the members of such body corporate in *his or their corporate capacity* then stood solely or together with any person or persons elected solely by such body corporate, or by any members thereof, *seised or possessed for any estate or interest whatsoever* of any hereditaments or personal estate whatsoever, in whole or in part, in trust for any charitable trusts, all the estate and interest, and all the powers of such body corporate or of such members thereof, should, from and after the 1st day of August, 1836, utterly cease; with a proviso that if Parliament should not otherwise direct, on or before the said 1st day of August, 1836 (*which was not done*), the Lord Chancellor should make such orders as he should see fit for the administration of such trust estates. 5 & 6 W. 4 c. 76, s. 71.

Under the authority "to make orders," the Court of Chancery from time to time appointed trustees for the due management of the charity property in the place of the corporation. The jurisdiction of the Court, however, was held not to apply to a case where no *estate* was vested in the *old corporation*, but the charity property was vested in trustees, and the *corporation* was merely the visitor with powers of nomination (*c*). Where there was a Jurisdiction of the Court of Chancery under 5 & 6 W. 4. c. 76, s. 71.

(*a*) For the law under the previous Bankruptcy Act, 12 & 13 Vict. c. 106, repealed by 32 & 33 Vict. c. 83, s. 20, see the 5th edition of the Law of Trusts, p. 607.

[(*b*) *Re Adams' Trust*, 12 Ch. D. 634; a case under the Bankruptcy Act, 1869, of a compounding creditor; and see *Coombes* v. *Brookes*, 12 L. R. Eq. 61; *Re Foster's Trusts*, 55 L. T. N.S. 479, where a new trustee was appointed in the place of a bankrupt who had obtained his discharge.]

(*c*) *Attorney-General* v. *Newbury Corporation*, C. P. Coop. Rep. 1837-38, 72; *Christ's Hospital* v. *Grainger*, 16 Sim. 102.

charity corporation *substantially*, though not *identically*, the same in its component parts as the municipal corporation, the case was held to be within the spirit if not the letter of the section above referred to (*a*).

Legal estate.

The appointment of trustees by the Court under this Act, though it made them custodians of the property, could not of course transfer to them the legal estate, which, it was decided, notwithstanding the strong negative words used in the statute, remained in the corporation (*b*).

16 & 17 Vict. c. 137, s. 65.

15. But by 16 & 17 Vict. c. 137, s. 65, the legal estate was vested, without any actual conveyance, in the trustees appointed by the Court, and upon the death, resignation or removal, of any of the trustees, and the appointment of any new trustee or trustees, the legal estate transferred itself to the trustees for the time being without any conveyance.

Petitions for appointment of new trustees of charities.

16. [It was held that] petitions for filling up vacancies in the number of trustees of charities, in substitution for a corporation, ought to be presented under Sir S. Romilly's Act (52 Geo. 3. c. 101), as well as the Municipal Corporations Act (*c*), and that the Attorney-General's fiat should be obtained to such a petition (*d*); though this rule does not appear to have been uniformly adhered to (*e*).

[45 & 46 Vict. c. 50, s. 133.]

[17. By the Municipal Corporations Act, 1882 (*f*), which repealed the previous Municipal Corporations Act, and 16 & 17 Vict. c. 137, s. 65, without prejudice to anything done under those Acts respectively, the provision for the transfer of the legal estate without conveyance on the appointment of new trustees is, by sect. 133, re-enacted. It is to be observed that the section does not continue the power to make orders for the administration of trust estates, but the appointment of trustees can still be made under Sir S. Romilly's Act, though it will seldom be necessary to resort to it for the purpose.]

Appointment of trustees of charities under the Charitable Trusts Act.

18. By the Charitable Trusts Act (16 & 17 Vict. c. 137, s. 28), new trustees of any charity the gross annual income whereof exceeds 30*l.* (*g*) may be appointed by one of the *equity judges in*

(*a*) *Attorney-General* v. *Mayor, &c., of Exeter*, 2 De G. M. & G. 507.

(*b*) *Doe* v. *Norton*, 11 M. & W. 913.

(*c*) *Re Warwick Charities*, 1 Ph. 559.

(*d*) *Re Rolle's Charity*, 3 De G. M. & G. 153; *Re London, Brighton and South Coast Railway Company*, 18 Beav. 608.

(*e*) *Re Nightingale's Charity*, 3 Hare, 336; *Re Belke's Charity*, 13 Jur. 317.

[(*f*) 45 & 46 Vict. c. 50.]

(*g*) By s. 32, where the income is below 30*l.* (since extended by 23 & 24 Vict. c. 136, s. 11, to an income not

chambers, and the Court has power at the same time to make an order under the Trustee Act, *without petition*, vesting the estates in the new trustees (*a*). But the sanction of the Charity Commissioners, under the 17th section, must first be obtained. And by a more recent Act (23 & 24 Vict. c. 136, s. 2), the *Charity Commissioners* are empowered upon the application of the *trustees* or a *majority* of them, under their hands or common seal, to make the *like orders for the appointment of new trustees of charities as could have been made by a judge at chambers;* and this power extends even to contentious cases (*b*).

Peto's Act.

19. By 13 & 14 Vict. c. 28, "Wherever freehold, leasehold, copyhold, or customary property in England or Wales, has been or shall be acquired by any congregation, or society, or body of persons associated for *religious purposes* or for the promotion of *education*, as a chapel, meeting-house," &c., "and wherever the conveyance, assignment, or other assurance of such property has been or may be taken" to trustees duly appointed, such conveyance, assignment, or other assurance shall not only vest the property in the parties named, but also in their successors from time to time, and where there is *no power to appoint new trustees*, the *society* may, for the purpose of vesting the estate, appoint new *trustees;* [but every] such appointment [whether under a power in the trust deed or by virtue of the Act] must be evidenced by deed under the hand and seal of the chairman and attested by two witnesses. The primary, if not the only object of this enactment obviously was to make the trust estate devolve upon the trustees of the society from time to time without conveyance, and it is doubtful whether the new trustees to be thus appointed by the society [in the absence of any special direction in the trust deed] succeed generally to all the powers of the old trustees, or take the legal estate only (*c*).

[32 & 33 Vict. c. 26.]

[Trustees Appointment Act, 1890.]

By 32 & 33 Vict. c. 26 the provisions of Peto's Act were extended to burial-grounds, and by the Trustees' Appointment Act, 1890 (*d*) are made to "apply to and include any land acquired by trustees in connection with any society or body of persons comprising several congregations or other sections or divisions

exceeding 50*l.*), the District Courts of Bankruptcy and County Courts have jurisdiction.

(*a*) *Re Davenport's Charity*, 4 De G. M. & G. 839. In *Re Lincoln Primitive Methodist Chapel*, 1 Jur. N. S. 1011, V. C. Stuart does not appear to have had his attention drawn to the previous decision of Lord Cranworth in *Davenport's Charity*.

(*b*) *Re Burnham National Schools*, 17 L. R. Eq. 241.

(*c*) See as to the construction of the Act, *Re Houghton's Chapel*, 2 W. R. 631.

[(*d*) 53 & 54 Vict. c. 19, s. 2.]

or component parts associated together for any religious purpose, when such land is held in trust for any of the following purposes: (1) a place for religious worship: (2) an endowment or provision for the maintenance of a place of religious worship, or the minister thereof, or provision for expenses connected therewith: (3) a burial-ground: (4) a place for education and training of students, whether for the ministry or for any other purpose: (5) a school house for a Sunday school, day school, or other school: (6) a residence for a minister or schoolmaster, or for the care-taker of a place of religious worship, or of a school house, or a meeting house, or offices, or other buildings for or in connection with religious or educational purposes." The power of appointing new trustees conferred by the Conveyancing and Law of Property Act, 1881, or any other statutory power for the same purpose for the time being in force, is to apply to all land acquired and held on trust for any purpose to which Peto's Act or the Act of 1869 (32 & 33 Vict. c. 26) applies, and any such statutory power may be exercised either by the persons and in manner therein provided, or by the persons and in the mode in which, under the instrument creating the trust, or any other instrument, the appointment of a new trustee in place of a deceased trustee can be effected (*a*). The vesting clause in Peto's Act is extended to the case of trustees appointed under any power conferred by the Act of 1890, or under any other statutory power (*b*), and where an appointment of a trustee can be made under a power in an instrument as well as under a statutory power, the latter power is not to be exercised until twelve months from the date of the vacancy to be filled up has expired (*c*); and provision is made whereby purchasers and mortgagees from trustees invalidly appointed are protected, if no proceedings are taken or effectively prosecuted to set aside the appointment within six months from its date (*d*). It is further provided that where trustees, or the major part of them, or other persons present at a meeting duly constituted, are empowered to appoint trustees by resolution, a memorandum of the appointment of any trustee which states that the meeting was duly constituted and is otherwise in the form indicated by Peto's Act, shall be sufficient and conclusive evidence that the appointment appearing by the memorandum was duly made (*e*).

[(*a*) Sect. 3.]
[(*b*) Sect. 4.]
[(*c*) Sect. 5.]
[(*d*) Sect. 6.]
[(*e*) Sect. 7.]

[Mortmain and Charitable Uses Act, 1891.]

21. By the Mortmain and Charitable Uses Act, 1891 (*a*), already referred to (*b*), it is provided that if land assured by will to or for the benefit of any charitable use is not sold within one year from the death of the testator, or such extended period as may be determined by the Court or the Charity Commissioners, the land shall, at the expiration of the time limited for sale, vest forthwith in the official trustee of charity lands, and the Charity Commissioners shall take all necessary steps for the sale or completion of the sale of such land to be effected with all reasonable speed by the administering trustees for the time being thereof, and for this purpose the Commissioners may make any order under their seal, directing such trustees to proceed with the sale or the completion of the sale of the said land, or *removing such trustees and appointing others*, and may provide by such order for the payment of the proceeds of sale to the official trustees of charitable funds in trust for the charity, and for the payment of the costs and expenses incurred by the administering trustees in or connected with the sale.]

13 & 14 Vict. c. 60.

22. Amongst the various provisions of the Trustee Act, 1850 (13 & 14 Vict. c. 60), it is enacted (by s. 32) that whenever it shall be *expedient* to appoint a new trustee or trustees, and it shall be found *inexpedient, difficult, or impracticable*, so to do without the assistance of the Court, the Court may *appoint a new trustee* or trustees, either in substitution for or in addition to any existing trustee or trustees (*c*). The effect of this section will be considered more particularly in the Appendix, in treating of the provisions of the Act generally.

Trustee may be compelled to any act of duty.

Secondly, The *cestui que trust* is entitled to bring an action against his trustee, and *compel him to the execution of any particular act of duty.*

Maintenance of right at law.

1. Thus, if the legal estate in the hands of the trustee be disturbed by a stranger, the *cestui que trust*, though he may not institute legal proceedings in the name of a trustee without his authority (*d*), may oblige the trustee, on giving him a proper

[(*a*) 54 & 55 Vict. c. 73, sects. 5, 6.]

[(*b*) See *ante*, p. 604.]

(*c*) Notwithstanding the very large terms of this enactment, it does not authorize the Court to *remove* a trustee who is willing to act; *Re Hodson's Settlement*, 9 Hare, 118; *Re Hadley*, 5 De G. & Sm. 67; *Re Blanchard*, 3 De G. F. & J. 131; 7 Jur. N. S. 505; *Re Mais*, 16 Jur. 608; *Re Garty's Settlement*, 4 N. R. 636; [*Re Combs*, 51 L. T. N.S. 45.] See the Act with notes in the Appendix.

(*d*) See *Crossley* v. *Crowther*, 9 Hare, 386; [and the name of the trustee as co-plaintiff cannot be added without

indemnity, to lend his name for asserting the legal right (*a*). If the trustee of a covenant, even a voluntary one, will not sue upon it, the *cestui que trust* may compel the trustee on a proper indemnity to lend his name to the *cestui que trust*, to enable him to sue (*b*). Otherwise, should the trust property be lost, and the trustee himself become insolvent, the *cestui que trust's* equitable interest would be absolutely destroyed. [But the *mere refusal* by the trustee to sue will not entitle the *cestui que trust* to sue in his own name (*c*): to justify such a course special circumstances must be shown tending to disable the trustee from suing (as where his acts and conduct with reference to the estate are impeached), or rendering it inconvenient that he should do so (*d*).]

Tenant for life of renewable leaseholds neglecting to renew.

2. If a tenant for life of leaseholds be bound to renew, and by his threats or acts manifest an intention not to renew, the remainderman may institute proceedings and have a receiver appointed for the purpose of providing the renewal fine out of the rents and profits of the estate; and if the period of renewal has already expired, a receiver may be appointed on proof of the tenant for life's default (*e*).

Trustee giving security.

3. In one case, where a suspicion was entertained that the trustee would not fairly execute his trust, the Court required of him, if he continued in the office, to enter into securities for his good faith (*f*).

Cestui que trust may have a contingent interest secured.

4. And generally a *cestui que trust*, who can allege an existing interest, however minute or remote, may, upon reasonable cause shown, apply to the Court to have his interest properly secured.

Possibility upon a possibility.

5. But a distinction must be taken between an existing

his consent in writing pursuant to Rules of Court, 1883, O. xvi. r. 11; *Besley* v. *Besley*, 37 Ch. D. 648.]

(*a*) *Foley* v. *Burnell*, 1 B. C. C. 277, *per* Lord Thurlow; Cary, 14; [*Ex parte Kearsley*, 17 Q. B. D. 1;] and see *Kirby* v. *Mash*, 3 Y. & C. 295; *Malone* v. *Geraghty*, 2 Conn. & Laws. 251.

(*b*) See *Fletcher* v. *Fletcher*, 4 Hare, 78; *Jerdein* v. *Bright*, 2 J. & H. 325.

[(*c*) *Sharpe* v. *San Paulo Railway Company*, 8 L. R. Ch. 587, 609; *Yeatman* v. *Yeatman*, 7 Ch. D. 210; *Travis* v. *Milne*, 9 Ha. 14; and, *semble*, "if the Court upon the materials before it came to the conclusion that it was a proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful, then it would be a proper case to allow a party to sue in his own name;" *Yeatman* v. *Yeatman*, 7 Ch. D. 216, *per* Hall, V.C.; *Meldrum* v. *Scorer*, 54 L. T. N.S. 474. In the latter case, on objection taken by the defendant, and in order to guard against multiplicity of actions, all the *cestuis que trust* were made parties.]

[(*d*) *Beningfield* v. *Baxter*, 12 App. Cas. 167; *Meldrum* v. *Scorer*, 56 L. T. N.S. 471, 474.]

(*e*) *Bennett* v. *Colley*, 5 Sim. 192; *S. C.* 2 M. & K. 233.

(*f*) *Kneeling* v. *Child*, Rep. *t.* Finch, 360.

interest, whether vested or contingent, and the *mere possibility of a future event, which, if it occurs, may give birth to an interest.* Thus where a one-fifteenth share of a residue was bequeathed to Isaac for life, if he married Esther, and after his death for Isaac's eldest or only child living at his decease, and who should attain twenty-one, with a gift over in case Isaac should not marry Esther, and Isaac married Isabella while Esther was still living, it was held by M. R. (*a*), and affirmed by Lord Westbury (*b*), that the eldest child of Isaac, an infant, as his interest was preceded by the condition that Isaac should survive his present wife, and then marry Esther, a possibility upon a possibility, could not sustain a suit for having his interest secured. Had Isaac survived his wife and then married Esther, the interest of the child would still have been contingent, and in that case M. R. appears to have thought that the child would have had no *locus standi* in Court, but L. C. was of a different opinion. And in another case, where a house was devised to trustees in trust for tenants for life, and after their respective deceases for their children then living, and the issue of such of them as should be dead, and failing such children and issue in trust for a class, and, there being issue of one of the tenants for life but not of the others, some of the class presented a petition for the appointment of new trustees, on the footing that they were "persons beneficially interested" under the 37th section of the Trustee Act, 1850, M. R. dismissed the petition with costs (*c*), but on appeal the order below was reversed, and the L. JJ. held that the petitioners were persons beneficially interested (*d*).

Trustee may be restrained from violating his duty.

Thirdly. As the *cestui que trust* may compel the trustee to the observance of his duty, so, on the other hand, if the *cestui que trust* have reason to suppose, and can satisfy the Court, that the trustee is about to proceed to an act not authorized by the true scope of the trust, he may obtain *an injunction from the Court to restrain the trustee from such a wanton exercise of his legal power* (*e*).

(*a*) *Davis* v. *Angel*, 31 Beav. 223; [and see *Re Parsons*, 45 Ch. D. 51, 60.]

(*b*) 10 W. R. 723.

(*c*) *Re Sheppard's Trusts*, 10 W. R. 704.

(*d*) 1 N. R. 76; 4 De G. F. & J. 423.

(*e*) *Balls* v. *Strutt*, 1 Hare, 146. So a mortgagee with a power of sale will proceed at his peril to sell the mortgaged estate after tender of principal and interest, though costs be not included, if the security be sufficient; and a purchaser with notice cannot shelter himself under a clause in the mortgage deed exempting the purchaser from the necessity of seeing to

Though the damage would not be irreparable.

1. It is clear that the *cestui que trust* would be entitled to an injunction where the act in contemplation would, if done, be irremediable (*a*); but in *Pechel* v. *Fowler* (*b*), a case in the Exchequer while it was a Court of equity, it is said to have been held, that a *cestui que trust* could not restrain an improvident *sale* by the trustee, because the *cestui que trust* might proceed against the trustee for the consequential damage to the trust estate, and so the injury was not irreparable; but Sir J. Leach, under similar circumstances, granted an injunction (*c*); and other authorities are not wanting in support of so just and reasonable a right which may now be considered as established (*d*).

Partial owner may obtain injunction.

2. And not only a person exclusively interested in a trust fund, and therefore the absolute owner, may obtain an injunction against the disposition of it, which is almost matter of course; but one who has only a common interest with others in the trust estate, is entitled on behalf of himself and those others to have the property secured (*e*).

Injunction against bankrupt or insolvent trustee.

3. An injunction against the disposition of the fund may be obtained against an insolvent trustee (*f*) and *à fortiori* against one who is actually a bankrupt (*g*), and the Court will grant an injunction against the administration of the assets by an executor who is proved to be of bad character, drunken habits, and great poverty (*h*). [But the Court will not thus interfere in favour of a creditor, unless it is shewn that the assets are being wasted, and in a creditor's action for administration a receiver will not be appointed merely because the executor will probably exercise his legal right of retaining his own debt or of preferring a particular creditor (*i*)], nor will the Court interfere merely because an executor is poor (*j*).

the validity of the sale; *Jenkins* v. *Jones*, 2 Giff. 99; [and see *Selwyn* v. *Garfit*, 38 Ch. Div. 273.]

(*a*) See *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh. N. S. 57; *Re Chertsey Market*, 6 Price, 279, 281; *Attorney-General* v. *Foundling Hospital*, 2 Ves. jun. 42.

(*b*) 2 Anst. 549.

(*c*) *Anon. case*, 6 Mad. 10.

(*d*) See *Webb* v. *Earl of Shaftesbury*, 7 Ves. 487, 488; *Reeve* v. *Parkins*, 2 J. & W. 390; *Milligan* v. *Mitchell*, 1 M. & K. 446; *Attorney-General* v. *Mayor of Liverpool*, 1 M. & Cr. 210; *Vann* v. *Barnett*, 2 B. C. C. 157; *Dance* v. *Goldingham*, 8 L. R. Ch. App. 902; *Marshall* v. *Sladden*, 4 De G. & Sm. 468, and *ante*, p. 474.

(*e*) *Scott* v. *Becher*, 4 Price, 346; *Dance* v. *Goldingham*, 8 L. R. Ch. App. 902.

(*f*) *Mansfield* v. *Shaw*, 3 Mad. 100; *Scott* v. *Becher*, 4 Price, 346; *Taylor* v. *Allen*, 2 Atk. 213.

(*g*) *Gladdon* v. *Stoneman*, 1 Mad. 143, note.

(*h*) *Howard* v. *Papera*, 1 Mad. 143; *Hathornthwaite* v. *Russel*, 2 Atk. 126; *S. C.* Barn. 334.

[(*i*) *Re Wells*, 45 Ch. D. 569; *Harris* v. *Harris*, 57 L. J. Ch. 754; 35 W. R. 710; *Philips* v. *Jones* (C. A. 1884, 28 S. J. 360), disapproving dictum of Jessel, M.R., in *Re Radcliffe*, 7 Ch. D. 733.]

(*j*) *Everett* v. *Pryterch*, 12 Sim. 365.

4. If a solicitor buy up mortgages created by his client in order to relieve the client from embarrassment, and afterwards refuses to give information as to the securities and threatens to sell the property, he will be restrained from selling upon the terms of the client paying into Court such a sum as the Court considers sufficient to cover the amount actually paid by the solicitor (*a*).] [Solicitor buying up mortgages by his client.]

[(*a*) *Macleod* v. *Jones*, 24 Ch. Div. 289.]

CHAPTER XXX.

THE REMEDIES OF THE CESTUI QUE TRUST IN THE EVENT OF A BREACH OF TRUST.

Upon the subject of the *cestui que trust's* remedies for a breach of trust, we shall consider, *First.* The right of the *cestui que trust* to follow the *specific* estate into the hands of a stranger, to whom it has been tortiously conveyed; *Secondly.* The right of attaching the property into which the trust estate has been *wrongfully converted; Thirdly.* The remedy against the trustee *personally*, by way of compensation for the mischievous consequences of the act; and *Fourthly.* The *mode* and *extent* of redress in breaches of trust committed by trustees of charities.

SECTION I.

OF FOLLOWING THE ESTATE INTO THE HANDS OF A STRANGER.

The questions that suggest themselves upon this subject are, *First.* Into whose hands the estate may be followed; *Secondly.* Within what limits of time; *Thirdly.* What account the Court will direct of the mesne rents and profits.

First. Into whose hands the estate may be followed.

Where alienee is a volunteer estate may be followed.

1. If the alienee be a *volunteer*, then (subject to any bar arising out of the Statute of Limitations) the estate may be followed into his hands, whether he had notice of the trust (*a*), or not (*b*); for though he had no actual notice, yet the Court will imply it

(*a*) *Mansell* v. *Mansell*, 2 P. W. 678; and see *Saunders* v. *Dehew*, 2 Vern. 271; *S. C.* 2 Freem. 123; *Langton* v. *Astrey*, 2 Ch. Rep. 30; *S. C.* Nels. 126.

(*b*) *Mansell* v. *Mansell*, 2 P. W. 681, *per Cur.*; *Bell* v. *Bell*, Ll. & G. *t.* Plunket, 58, *per Cur.*; *Pye* v. *George*, 2 Salk. 680, *per* Lord Harcourt; and see 1 Rep. 122 b; *Burgess* v. *Wheate*, 1 Eden, 219; *Spurgeon* v. *Collier*, 1 Eden, 55; *Cole* v. *Moore*, Mo. 806.

against him where he paid no consideration. But if the alienee be a *purchaser* of the estate at its full value, then (subject as aforesaid) if he take with *notice* of the trust, whether the notice be actual or constructive (*a*), he is bound to the same extent and in the same manner as the person of whom he purchased (*b*), even though the conveyance was made to him by fine with non-claim (*c*); for, knowing another's right to the property, he throws away his money voluntarily, and of his own free will (*d*). And the rule applies not only to the case of a trust, properly so called, but to purchasers with notice of any equitable incumbrance, as of a covenant or agreement affecting the estate (*e*), or a *lien* for purchase-money (*f*). But, if a *bonâ fide* purchaser have *not notice*, either expressly or constructively, he then merits the full protection of the Court, and his title, even in equity, cannot be impeached (*g*).

Purchaser without notice cannot protect himself by getting in legal estate from an express trustee.

2. If the purchaser have no notice of the trust at the time of the purchase, but afterwards *discovers the trust and obtains a conveyance from the trustee,* he cannot protect himself by taking

(*a*) *Boursot* v. *Savage*, 2 L. R. Eq. 134. And see *Hartford* v. *Power*, 2 Ir. Rep. Eq. 204.

(*b*) *Dunbar* v. *Tredennick*, 2 B. & B. 319, *per* Lord Manners; *Pawlett* v. *Attorney-General*, Hard. 469, *per* Lord Hale; *Burgess* v. *Wheate*, 1 Eden, 195; *per* Sir T. Clarke; *Bovey* v. *Smith*, 1 Vern. 149; *Phayre* v. *Peree*, 3 Dow, 129, *Adair* v. *Shaw*, 1 Sch. & Lef. 262, *per* Lord Redesdale; *Wigg* v. *Wigg*, 1 Atk. 382; *Mead* v. *Lord Orrery*, 3 Atk. 238, *per* Lord Hardwicke; *Mackreth* v. *Symmons*, 15 Ves. 350, *per* Lord Eldon; *Mansell* v. *Mansell*, 2 P. W. 681, *per Cur.*; *Willoughby* v. *Willoughby*, 1 T. R. 771, *per* Lord Hardwicke; *Verney* v. *Carding*, cited *Joy* v. *Campbell*, 1 Sch. & Lef. 345; *Flemming* v. *Page*, Rep. *t.* Finch. 320; *Powell* v. *Price*, 2 P. W. 539, admitted; *Backhouse* v. *Middleton*, 1 Ch. Ca. 173; *S. C.* Id. 208; *Walley* v. *Walley*, 1 Vern. 484; *Pearce* v. *Newlyn*, 3 Mad. 186; *Slattery* v. *Axton*, W. N. 1866, p. 113; *Macbryde* v. *Eykyn*, W. N. 1867, p. 306; *Heath* v. *Crealock*, 18 L. R. Eq. 215, 10 L. R. Ch. App. 22.

(*c*) *Kennedy* v. *Daly*, 1 Sch. & Lef. 355; and see *Bell* v. *Bell*, Ll. & G. *t.* Plunket, 44.

(*d*) *Mead* v. *Lord Orrery*, 3 Atk. 238, *per* Lord Hardwicke.

(*e*) *Daniels* v. *Davison*, 16 Ves. 249; *Earl Brook* v. *Bulkeley*, 2 Ves. 498; *Taylor* v. *Stibbert*, 2 Ves. jun. 437; *Winged* v. *Lefebury*, 2 Eq. Ca. Ab. 32; *Ferrars* v. *Cherry*, 2 Vern. 384; *Jackson's case*, Lane, 60; *Crofton* v. *Ormsby*, 2 Sch. & Lef. 583; *Kennedy* v. *Daly*, 1 Sch. & Lef. 355.

(*f*) *Mackreth* v. *Symmons*, 15 Ves. 329; *Walker* v. *Preswick*, 2 Ves. 622, *per* Lord Hardwicke; *Cator* v. *Pembroke*, 1 B. C. C. 302, *per* Lord Loughborough; *Gibbons* v. *Baddall*, 2 Eq. Ca. Ab. 682, note (*b*); *Elliott* v. *Edwards*, 3 B. & P. 181; and see *Grant* v. *Mills*, 2 V. & B. 306; *Dunbar* v. *Tredennick*, 2 B. & B. 320.

(*g*) *Burgess* v. *Wheate*, 1 Eden, 195, *per* Sir T. Clarke; Id. 246, *per* Lord Henley; *Millard's case*, 2 Freem. 43; *Mansell* v. *Mansell*, 2 P. W. 681, *per Cur.*; *Willoughby* v. *Willoughby*, 1 T. R. 771, *per* Lord Hardwicke; *Dunbar* v. *Tredennick*, 2 B. & B. 318, *per* Lord Manners; *Trevor* v. *Trevor*, 1 P. W. 633; *Harding* v. *Hardrett*, Rep. *t.* Finch, 9; *Cole* v. *Moore*, Mo. 806, *per Cur.*; *Jones* v. *Powles*, 3 M. & K. 581; *Payne* v. *Compton*, 2 Y. & C. 457; *Thorndike* v. *Hunt*, 3 De G. & J. 563; *Heath* v. *Crealock*, 18 L. R. Eq. 215, 10 L. R. Ch. App. 22; *Waldy* v. *Gray*, 20 L. R. Eq. 238; *Taylor* v. *Blakelock*, 32 Ch. Div. 560.]

shelter under the legal estate; for this is not like getting in a first mortgage, which the first mortgagee has a right to transfer to whomsoever he will (*a*); but here notice of the trust converts the purchaser into a trustee, and he must not, to get a plank to save himself, be guilty of a breach of trust (*b*). [But the plaintiff who seeks to deprive another of the benefit of the legal estate must rely on an equity of his own, not on that of a stranger (*c*).]

Purchaser without notice from purchaser with notice.

3. A purchaser *without notice from a purchaser with notice* is not liable, for his own *bona fides* is a good defence in itself, and the *mala fides* of the vendor ought not to invalidate it (*d*); and a purchaser taking the legal estate without actual notice of the trust, but taking it from a person in whom it vested by an instrument which disclosed the trust, but *of which instrument the purchaser was ignorant at the time of purchase,* can still protect himself as a purchaser without notice (*e*).

But the rule does not apply to the case of a *charitable use,* for it has been ruled that a purchaser without notice from a purchaser with notice shall be bound by the claim of charity (*f*). In other respects the principles of equity as to the doctrine of notice are applicable to charities in the same manner as between private persons (*g*).

Shares in a company.

Where a trustee of shares of a company within the Companies' Clauses Consolidation Act transferred them to a *stranger without notice,* but who had notice before the transfer was *registered,* the purchaser was protected; for he had no notice when he paid his money, and it was like a conveyance where the legal estate was to become vested on the performance of some condition, such as making a demand or the like, and the registration involved no breach of trust by the trustee (*h*).

(*a*) *Bates* v. *Johnson*, Johns. 304; *Baillie* v. *M'Kewan*, 35 Beav. 177; *Joyce* v. *Rawlins*, 11 L. R. Eq. 53; *Mumford* v. *Stohwasser*, 18 L. R. Eq. 556; [*Garnham* v. *Skipper*, 55 L. J. N.S. Ch. 263; 53 L. T. N.S. 940; 34 W. R. 135.]

(*b*) *Saunders* v. *Dehew*, 2 Vern. 271; *S. C.* 2 Freem. 123; *Langton* v. *Astrey*, 2 Ch. Rep. 30; *S. C.* Nels. 126; *Carter* v. *Carter*, 3 K. & J. 617; *Sharples* v. *Adams*, 32 Beav. 213; *Collier* v. *M'Bean*, 34 Beav. 426; *Justice* v. *Wynne*, 10 Ir. Ch. Rep. 489; 12 Ir. Ch. Rep. 289; *Prosser* v. *Rice*, 28 Beav. 68; *Heath* v. *Crealock*, 10 L. R. Ch. App. 22 [*Harpham* v. *Shacklock*, 19 Ch. Div. 207, 214; and see *Taylor* v. *Russell*, (1891) 1 Ch. 8, 20, 29.]

[(*c*) *Taylor* v. *Russell*, (1891) 1 Ch. 8, 28.]

(*d*) *Mertins* v. *Jolliffe*, Amb. 313, *per* Lord Hardwicke; *Ferrars* v. *Cherry*, 2 Vern. 384; see *Pitts* v. *Edelph*, Tothill, 164; *Salsbury* v. *Bagott*, 2 Sw. 608.

(*e*) *Pilcher* v. *Rawlins*, 7 L. R. Ch. App. 259, overruling *Carter* v. *Carter*, 3 K. & J. 617.

(*f*) *East Greenstead's case*, Duke, 65; *Sutton Colefield case*, Id. 68; and see Id. 94, 173; see *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jon. & Lat. 194.

(*g*) See Sugd. Vend. & Pur. 722, 14th ed.

(*h*) *Dodds* v. *Hills*, 2 H. & M. 424;

[A trustee who has the legal estate and takes from his *cestui que trust* an assignment of the equitable interest by way of security for money advanced to the *cestui que trust*, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice (*a*).] [Trustee can avail himself of legal estate.]

4. A purchaser *with notice from a purchaser without notice* is exempt from the trust, not from the merits of the second purchaser, but of the first; for if an innocent purchaser were prevented from disposing of the beneficial interest, the necessary result would be a stagnation of property (*b*). But if the trustee sell the lands to a *bonâ fide* purchaser without notice, and afterwards *himself* become the owner of the lands, though for a good and valuable consideration, the trust as to him revives again, and he shall restore the land to the trust (*c*); and in this respect equity follows the law; for, if a trespasser of goods sell them in the market overt, the owner's title is barred; but if they come to the trespasser again, the owner may seize them (*d*). ["The only exception to the rule which protects a purchaser with notice taking from a purchaser without notice is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a *bonâ fide* purchaser without notice, and has got it back again" (*e*).] Purchaser with notice from purchaser without notice.

5. Upon the question, how far a purchaser will be bound by notice of a *doubtful equity*, Lord Northington said, in *Cordwell* v. *Mackrill* (*f*), "A man must take notice of a deed on which *an equity, supported by precedents the justice of which every one acknowledges, arises, but not the mere construction of words,* How far purchaser bound by notice of a doubtful equity.

[and see *France* v. *Clark*, 22 Ch. D. 830; 26 Ch. Div. 257; and *Roots* v. *Williamson*, 38 Ch. D. 485; and see *ante*, p. 789.]

[(*a*) *Newman* v. *Newman*, 28 Ch. D. 674.]

(*b*) *Harrison* v. *Forth*, Pr. Ch. 51; *Bradwell* v. *Catchpole*, stated *Walker* v. *Symonds*, 3 Sw. 78, note (*a*); *Mertins* v. *Jolliffe*, Amb. 313, *per* Lord Hardwicke; *Brandlyn* v. *Ord*, 1 Atk. 571, *per eundem*; *Sweet* v. *Southcote*, 2 B. C. C. 66; *M'Queen* v. *Farquhar*, 11 Ves. 478, *per* Lord Eldon; *Lowther* v. *Carlton*, 2 Atk. 242; *S. C.* 3 Barn. 358; *S. C.* For. 187; *Andrew* v. *Wrigley*, 4 B. C. C. 136, *per Cur.*; *Salsbury* v. *Bagott*, 2 Sw. 608, *per Cur.*; [*Re Barrow's case*, 14 Ch. Div. 432.]

(*c*) *Bovy* v. *Smith*, 2 Ch. Ca. 124; *S. C.* 1 Vern, 60, 84, 144; *Kennedy* v. *Daly*, 1 Sch. & Lef. 379, *per* Lord Redesdale, [and see *Ledbrook* v. *Passman*, 59 L. T. N.S. 306; 57 L. J. Ch. 855, as to the incapacity of a trustee for payment of mortgages to tack third mortgage to first, having taken transfers of both.]

(*d*) See *Bovy* v. *Smith*, 2 Ch. Ca. 126.

[(*e*) *Per* Jessel, M. R., *Re Barrow's case*, 14 Ch. Div. 445; and see *West London Commercial Bank* v. *Reliance Building Society*, 19 Ch. Div. 954, 963.]

(*f*) 2 Eden, 347; *S. C.* Amb. 516.

which are uncertain in themselves, and the meaning of which often depends on their locality." And Sir W. Grant observed, "There may be such a *doubtful equity* that a purchaser is *not to be taken to know what will be the decision*, and that is all Lord Camden (*a*) means; but in this case the equity is *clear*" (*b*).

Notice of "heirs of the body."

6. The rule, that "heirs of the body" in articles shall be construed "first and other sons," does not appear to have been fully established till about the year 1720 (*c*): Lord Hardwicke therefore said, that notice of *ancient* articles, that is, of articles before the doctrine was well settled, should not bind a *bonâ fide* purchaser (*d*). And afterwards, in a case of both articles and settlement before marriage, the settlement reciting the articles, Lord Hardwicke thought that, as the equity in this instance rested upon a single authority (*e*), and *that* one in which the question arose between the parties and their representatives and mere volunteers, the purchaser ought not to be bound by the claim of the issue (*f*). But notice of *modern* articles, that is, of articles entered into since the clear establishment of the rule, will affect a purchaser (*g*); but, even then, the articles themselves must be produced, that the Court may judge from the whole instrument; for the true construction depends upon the words, and other parts of the deed may be material to find out their meaning (*h*).

Lord St. Leonards' observations on Cordwell v. Mackrill.

Lord St. Leonards observed, that *Cordwell* v. *Mackrill* was of no great authority, though decided by a great Judge; and conceived the true rule to be that, where upon the whole articles it is plain what construction the Court would have put upon them, had it been called upon to execute them at the time they were made, they should be enforced *however difficult the construction might be*, even as against a *purchaser* with notice, but not after a lapse of time where there was anything so equivocal or ambiguous in them as to render it doubtful how they ought to be effectuated (*i*).

Title long neglected.

7. In a case where a residuary legatee had enjoyed for nineteen years a copyhold estate, which had been mortgaged to the testator

(*a*) Sir W. Grant appears to have supposed that the decision was by Lord Camden.

(*b*) *Parker* v. *Brooke*, 9 Ves. 588.

(*c*) By *Trevor* v. *Trevor*, 1 P. W. 622.

(*d*) *Senhouse* v. *Earle*, Amb. 288; and accordingly relief not asked against purchasers in *West* v. *Errissey*, 2 P. W. 349.

(*e*) *West* v. *Errissey*, 2 P. W. 349.

(*f*) *Warrick* v. *Warrick*, 3 Atk. 291.

(*g*) *Senhouse* v. *Earle*, Amb. 288, *per* Lord Hardwicke; *Davies* v. *Davies*, 4 Beav. 54; and see *Parker* v. *Brooke*, 9 Ves. 587.

(*h*) *Cordwell* v. *Mackrill*, Amb. 515; *S. C.* 2 Eden, 344.

(*i*) *Thompson* v. *Simpson*, 1 Dru. & War. 491.

in fee, and then the heir of the testator recovered the land by ejectment and mortgaged it, and the residuary legatee, having neglected to assert his title to the possession for nine years, at the end of that period filed a bill in Chancery, and established his claim, it was determined that the mortgagee of the heir after the ejectment was not called upon to notice the right of the residuary legatee; for it was not that "*clear, broad, plain, equity*" which should affect a purchaser (*a*).

Separate use.

8. A testator had given a leasehold estate to his daughter to her sole and separate use, but *without the interposition of a trustee* (*b*), and the husband, supposing himself absolutely entitled, entered into possession, and afterwards mortgaged the premises; and it was held that the mortgagee was bound to notice the equitable construction of the will, as a doctrine well understood (*c*); and, the husband having obtained a reversionary lease and mortgaged it, the mortgagee was of course held cognizant of the rule, that leases obtained under cover of the tenant right would be subject to the equity of the original term (*d*).

[Conveyancing Act, 1882.]

[9. By the Conveyancing Act, 1882 (*e*), sect. 3, it is provided that "a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless (i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." The section is not to exempt a purchaser from any liability under any covenant or provision contained in the instrument under which his title is derived mediately or immediately, but it applies to purchases made either before or after the commencement of the Act.

The section does not affect the ordinary rule that a purchaser cannot avoid constructive notice by omitting to investigate the title to the property (*f*), or set up the legal estate as against the

(*a*) *Hardy* v. *Reeves*, 4 Ves. 466; *S. C.* 5 Ves. 426.

(*b*) See *supra*, p. 851.

(*c*) *Parker* v. *Brooke*, 9 Ves. 583.

(*d*) And see *Coppin* v. *Fernyhough*, 2 B. C. C. 291.

(*e*) 45 & 46 Vict. c. 39, s. 3.

[(*f*) *Patman* v. *Harland*, 17 Ch. D. 353 (showing that even an express representation by the vendor, that a particular deed contains no restrictive covenants nor anything affecting the

title of a third person when he himself "did not take the usual ordinary precaution to make inquiry about it, but was content to accept the title, to take a conveyance, and to advance his money without inquiry of any sort or kind" (*a*), but it was intended to remedy the evil consequences of such a doctrine as was well illustrated by *Hargreaves* v. *Rothwell* (*b*), whereby where a solicitor had acted in a former transaction with reference to the estate "notice was imputed to the client if there was such a distance only between the former transaction and the present transaction in which he was engaged as left the Court under the impression—it could not be more than an impression—that the solicitor had actually remembered the former transaction; and in that way knowledge was imputed to the solicitor, and through the solicitor notice was imputed to the client" (*c*).]

Choses en action.

10. As regards *choses en action*, and other personal estate not transferable at law, which may have been purchased from a trustee, the purchaser, whatever amount may have been paid by him, cannot stand on a better footing than the person of whom he purchases, but must (in conformity with the established rule governing assignments of *choses en action*) hold them subject to the same equities to which the trustee held them (*d*).

Equitable mortgage by trustee.

11. So a trustee who has the legal estate cannot without a transfer of the legal estate create an equity, in breach of his duty; as if a trustee holding a mortgage were wrongfully to deposit the deeds by way of security, the depositee could not hold the deeds as against the *cestuis que trust*, for the transaction being inequitable in itself could not give birth to an equity (*e*).

[Equity of *cestui que trust* prevails over subsequent equities however arising.]

[12. So, where trust money was improperly laid out in the purchase of an estate, which was conveyed to A. and mortgaged by him to several persons in succession without notice of the breach of trust, of whom the first only had the legal estate, it was held that the claim of the *cestuis que trust* against the

title, will not relieve the purchaser from the obligation of investigation), and cases there cited.]

[(*a*) *Gainsborough* v. *Watcombe Terra Cotta Co.*, 54 L. J. N.S. Ch. 994, *per* North, J.]

[(*b*) 1 Keen, 154, 160.]

[(*c*) *In re Cousins*, 31 Ch. D. 671, 676, *per* Chitty, J.]

(*d*) *Ord* v. *White*, 3 Beav. 357; *Cockell* v. *Taylor*, 15 Beav. 103; *Clack* v. *Holland*, 19 Beav. 262; *Barnard* v. *Hunter*, 2 Jur. N.S. 1213; *Mangles* v. *Dixon*, 1 Mac. & G. 437, 3 H. L. Ca. 702; *Athenæum, &c., Society* v. *Pooley*, 3 De G. & J. 294; and see *ante*, pp. 781, *et seq.*

(*e*) *Newton* v. *Newton*, 6 L. R. Eq. 135, 4 L. R. Ch. App. 143; see *Joyce* v. *De Moleyns*, 2 Jon. & Lat. 374; [*Carritt* v. *Real and Personal Advance Company*, 42 Ch. D. 263; see *ante*, p. 808.]

property was an equitable estate of the same quality as the estates of the equitable mortgagees, and had priority over them as being prior in time (*a*). And where a lease was surrendered by an executor, and a new lease including additional property was taken by him in his own name and at an increased rent, and was deposited by him as a security for an advance made to him, it was held that the *cestuis que trust* had priority over the equitable mortgagee (*b*).]

Improper loans of trust money.

13. And if a trustee in breach of his duty lend trust money, and the borrower, *with notice of the trust*, applies it to his own use, the conscience of the latter is affected, and he cannot separate the loan from the trust, and insist that, when the loan would as a loan have been barred, the trust is barred (*c*).

General rule.

14. And it may be laid down generally that the rules of the Court are the rules of honesty and fair dealing, that no party to an illegal or fraudulent contract can derive any benefit from it, and that all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust, will be compelled to restore such trust funds (*d*).

15. By 37 and 38 Vict. c. 78, s. 7, no priority or protection by reason of the legal estate was allowed even to a purchaser for value without notice; but any priority or protection so acquired before the commencement of the Act was not to be taken away; and the Act was not to apply to Scotland. But the 7th section of the Act has since been repealed by 38 and 39 Vict. c. 87, s. 129. [A similar provision has, however, been since re-enacted as to the lands in Yorkshire by the 16th section of the Yorkshire Registries Act, 1884 (*e*).]

Secondly. Within what limits of time the suit must be instituted.

Time no bar in a direct trust, otherwise in a constructive trust.

1. It is a well-known rule, that, as between *cestuis que trust* and trustee in the case of a *direct trust*, no length of time is a bar; for, from the privity existing between them, the possession

[(*a*) *Cave* v. *Cave*, 15 Ch. D. 639; and see *Rice* v. *Rice*, 2 Drew. 73. The decision in *Cave* v. *Cave* has been questioned by the Court of Appeal in Ireland on the ground that the right of a *cestui que trust* to follow trust money into land is an inferior equity to that of an innocent purchaser for value of an equitable estate in the land; *In re Ffrench's Estate*, 21 L. R. Ir. 283; see, however, *Carritt* v. *Real and Personal Advance Company*, 42 Ch. D. 263; *Re Richards*, 45 Ch. D. 589.]

[(*b*) *Re Morgan*, 18 Ch. Div. 93.]

(*c*) *Ernest* v. *Croysdill*, 2 De G. F. & J. 198, *per* L. J. Turner; and see *Wilson* v. *Moore*, 1 My. and K. 337; *Child* v. *Thorley*, 16 Ch. D. 151, 155.

(*d*) *Gray* v. *Lewis*, 8 L. R. Eq. 526; see p. 543.

[(*e*) 47 & 48 Vict. c. 54.]

of the one is the possession of the other, and there is no adverse title (*a*). It has hence been argued, that as the person into whose hands the estate is followed is also by construction of law a trustee, the *cestui que trust* is entitled to the benefit of the rule, and is not precluded by mere lapse of time from establishing his claim. But the authorities show that this doctrine cannot be maintained (*b*).

"It is certainly true," said Sir W. Grant, "that no time bars a *direct trust;* but if it is meant to be asserted that a Court of equity allows a man to make out a case of *constructive trust* at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be: so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but, *where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a Court of equity to seek that relief*" (*c*). And Lord Redesdale observed, "The position that *trust* and *fraud* are not within the statute must be thus qualified: that if a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust;* and if the only circumstance is, that he does not perform his trust, his possession operates nothing as a bar, because *his possession is according to his title.* But the question of *fraud* is of a very

(*a*) See *Chalmer* v. *Bradley*, 1 J. & W. 67; *Bennett* v. *Colley*, 2 M. & K. 232; *Llevellyn* v. *Mackworth*, Barn. 449; *Wilson* v. *Moore*, 1 M. & K. 146; *Townshend* v. *Townshend*, 1 B. C. C. 554; *Hamond* v. *Hicks*, 1 Vern. 432; *Norton* v. *Turvill*, 2 P. W. 144; *Bell* v. *Bell*, Ll. & G. *t.* Plunket, 66; *Attorney-General* v. *Mayor of Exeter*, Jac. 448; *Heath* v. *Henly*, 1 Ch. Ca. 26; *Wedderburn* v. *Wedderburn*, 2 Keen, 749; 2 M. & Cr. 41; 22 Beav. 84; *Smith* v. *Acton*, 26 Beav. 210; *Lord Hollis's case*, 2 Vent. 345; *Earl of Pomfret* v. *Windsor*, 2 Ves. 484; *Hargreaves* v. *Michell*, 6 Mad. 326; *Nevarre* v. *Rutton*, 1 Vin. Ab. 185; *Shields* v. *Atkins*, 3 Atk. 563; *Phillipo* v. *Munnings*, 2 M. & Cr. 309; *Ward* v. *Arch*, 12 Sim. 472; *Young* v. *Waterpark*, 13 Sim. 204; *Gough* v. *Bult*, 16 Sim. 323; *Massy* v. *O'Dell*, 10 Ir. Ch. Rep. 22; *Crawford* v. *Crawford*, 1 Ir. Rep. Eq. 436; [*Foxton* v. *Manchester, &c., Banking Company*, 44 L. T. N.S. 406.] See *post*, p. 1003.

(*b*) *Townshend* v. *Townshend*, 1 B. C. C. 550, see 554; *Bonney* v. *Ridgard*, 1 Cox, 145; *Andrews* v. *Wrigley*, 4 B. C. C. 125; *Collard* v. *Hare*, 2 R. & M. 675; and see *Cholmondeley* v. *Clinton*, 2 J. & W. 190; *S. C.* affirmed, 4 Bligh, 4; *Bell* v. *Bell*, Rep. *t.* Plunket, 66; *Portlock* v. *Gardner*, 1 Hare, 594; *Ex parte Hasell*, 3 Y. & C. 622; *Wedderburn* v. *Wedderburn*, 4 M. & Cr. 53; but see *Attorney-General* v. *Christ's Hospital*, 3 M. & K. 344 (the case of a charity); *Rolfe* v. *Gregory*, 11 Jur. N. S. 98; 4 De G. J. & S. 576; *Sturgis* v. *Morse*, 3 De G. & J. 1.

(*c*) *Beckford* v. *Wade*, 17 Ves. 97.

different description; *that is a case where a person who is in possession by virtue of the fraud is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a Court of equity, founded on the fraud; and his possession in the meantime is adverse to the title of the person who impeaches a transaction on the ground of fraud*" (*a*).

General operation of lapse of time.

2. For more clearly understanding how lapse of time operates in reference to the remedy of the *cestui que trust* in the event of a wrongful alienation of the trust estate by the trustee, it may be useful to consider *the effect of lapse of time upon suits for equitable relief generally.*

Three bars to equitable relief.

To claims in equity there appear to be three bars arising from lapse of time:—I. *A statute of limitation;* II. The *presumption* of something done which, if done, is subversive of the plaintiff's right; III. The ground of *public policy* or *inconvenience* of the relief.

Bar by analogy to a statute.

I. Where there is a statutable bar at *law*, the same period was always, either by analogy or in obedience to the statute, adopted as a bar in *equity* in reference to equitable claims (*b*).

Lord Camden's views.

(1) The language of Lord Camden upon this subject has been admired as peculiarly energetic. "As a Court of equity," he said, "has no legislative authority, it cannot properly define the time of bar by a *positive rule* to an hour, a minute, or a year: it is governed by circumstances. But *as often as Parliament has limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery has adopted that rule, and applied it to similar cases in equity;* for when the legislature has fixed a time at *law*, it would be preposterous for *equity*, which by its own proper authority always maintained a limitation, to countenance *laches* beyond the period that *law* is confined to by Parliament; and therefore in all cases, *where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar*" (*c*).

(*a*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 633.

(*b*) See *Ex parte Dewdney*, 15 Ves. 496; *Bonney* v. *Ridgard*, 1 Cox. 149; *Beckford* v. *Wade*, 17 Ves. 97; *Townshend* v. *Townshend*, 1 B. C. C. 554; *Aggas* v. *Pickerell*, 3 Atk. 225; *Belch* v. *Harvey*, Appendix to Sugd. Vend. and Purch. No. xiv. 13th ed.; *White* v. *Ewer*, 2 Vent. 340; *Knowles* v. *Spence*, 1 Eq. Ca. Ab. 315; *Pearson* v. *Pulley*, 1 Ch. Ca. 102; *Johnson* v. *Smith*, 2 Burr. 961; *Attorney-General* v. *Mayor of Exeter*, Jac. 448; *Salter* v. *Cavanagh*, 1 Dru. & Walsh, 668; *Kingston* v. *Lorton*, 2 Hog. 166; *Foley* v. *Hill*, 1 Ph. 399; *Hamilton* v. *Grant*, 3 Dow, 44; *Marquis of Clanricarde* v. *Henning*, 30 Beav. 175.

(*c*) *Smith* v. *Clay*, cited in note to *Deloraine* v. *Browne*, 3 B. C. C. 639.

Lord Redesdale's views.

Lord Redesdale, in a case before him, observed, "It is said that Courts of equity are not within the statutes of limitations. This is true in one respect; they are not within the *words* of the statutes, because the words apply to particular legal remedies; but they are within the *spirit* and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language to say that Courts of equity act merely by *analogy* to the statutes; they act in *obedience* to them" (*a*). And again, "I think the statute must be taken *virtually* to include Courts of equity; for when the legislature has by statute limited the proceedings at law in certain cases, and provided no express limitation for proceedings in equity, it must be taken to have contemplated that equity followed law; and therefore it must be taken to have virtually enacted in the same cases a limitation for Courts of equity also" (*b*). And the same doctrines have been repeatedly recognized by the highest authorities, amongst whom may be mentioned Lord Manners (*c*), Sir T. Plumer (*d*), Lord Lyndhurst (*e*), and Lord Westbury (*f*).

Limitation of twenty years.

(2) Upon these principles, then, an *equitable* claim to *lands* could never have been enforced after a lapse of twenty years; for though to *writs of right* and to *formedons* much longer periods were allowed at law, yet equity always looked upon these as peculiar and excepted cases, and guided itself rather by analogy to the statute of James, which fixed the limitation to the prosecution of *rights of entry* (*g*).

Bills to redeem.

(3) At *law* the remainderman's right always ran only from the determination of the particular estate, but in the case of a *bill to redeem* filed by the person entitled in remainder to the equity of redemption, twenty years' possession by the mortgagee without account or admission of title, though partly or wholly during the lifetime of the tenant for life, barred the remainderman; the ground for the distinction apparently being, that the remainderman might have filed a bill to redeem during a continuance of the life estate (*h*). But where the mortgagee is also

(*a*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 630.

(*b*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 631; and see *Marquis of Cholmondeley* v. *Lord Clinton*, 2 J. & W. 192; *Bond* v. *Hopkins*, 1 Sch. & Lef. 429; [*Re Baker*, 20 Ch. Div. 230; *Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. Div. 59.]

(*c*) *Medlicott* v. *O'Donel*, 1 B. & B. 166.

(*d*) *Marquis of Cholmondeley* v. *Lord Clinton*, 2 J. & W. 151.

(*e*) *Foley* v. *Hill*, 1 Ph. 405.

(*f*) See *Knox* v. *Gye*, 5 L. R. H. L. 674.

(*g*) *Marquis of Cholmondeley* v. *Lord Clinton*, 2 J. & W. 192.

(*h*) See *Giffard* v. *Hort*, 1 Sch. & Lef. 407 note; *Blake* v. *Foster*, 4 Bligh,

tenant for life of the equity of redemption, [so that the same person is entitled to the rents and the interest,] the time does not run against the remainderman until the death of the tenant for life (*a*); [and the fact that the rents are payable to one set of trustees and the interest to another does not alter the case where the *cestui que trust* is the same (*b*),] and the same rule applies where the mortgagee is tenant in common with others of the equity of redemption (*c*).

Fine.

(4) Where a fine, with proclamations, was levied by a person claiming adversely, though a volunteer, without actual notice or other imputation of fraud, a constructive trust was held to be barred after a lapse of *five* years (*d*).

Statutory bar not avoided by ignorance, poverty, &c.

(5) In the case of a *statutory bar* the limited period affords a substantial insuperable obstacle to the plaintiff's claim, and no plea of poverty, ignorance, or mistake, can be of any avail. However clear and indisputable the title, could the merits be enquired into, the limited time has elapsed, and the door of justice is closed (*e*). If the Court could relieve after twenty years on the ground of distress, or any similar plea, so might it after thirty, forty, or fifty; there would be no limitation, and property would be thrown into confusion (*f*).

Effect of forbearance of the trustee to sue.

(6) Sir Joseph Jekyll is reported on one occasion to have laid down the rule that, "the *forbearance* of the trustees in not doing what it was their office to have done should in no sort prejudice the *cestuis que trust*" (*g*); and hence it has been inferred that a right gained by a stranger through the neglect of the trustee shall be no bar in equity to the claim of the *cestui que trust;* but this is not the case generally as regards the operation of the Statutes of Limitations. "The rule, that the Statute of Limitations does not bar a trust estate," said Lord Hardwicke, "holds only as between *cestui que trust* and trustee, not as between *cestui que trust* and trustee on the one side, and strangers on the other, for that would make the statute of no force at all, because there is hardly any estate of consequence without such

N.S. 140; *Corbett* v. *Barker*, 1 Anstr. 138, 3 Anstr. 755; *Harrison* v. *Hollins*, 1 S. & S. 471; but see 2 Ph. 121.

(*a*) *Raffety* v. *King*, 1 Keen, 601, and cases there cited; *Burrell* v. *Lord Egremont*, 7 Beav. 205.

[(*b*) *Topham* v. *Booth*, 35 Ch. D. 607.]

(*c*) *Wynne* v. *Styan*, 2 Ph. 303.

(*d*) *Bell* v. *Bell*, El. & G. *t.* Plunket, 44; and see 3 P. W. 310, note (G.)

(*e*) *Marquis of Cholmondeley* v. *Lord Clinton*, 2 J. & W. 139, *per* Sir T. Plumer; *Byrne* v. *Frere*, 2 Moll, 171, 178, *per* Sir A. Hart; *Astley* v. *Earl of Essex*, 18 I. R. Eq. 290. But as to mistake, see *Brooksbank* v. *Smith*, 2 Y. & C. 58.

(*f*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 640.

(*g*) *Lechmere* v. *Earl of Carlisle*, 3 P. W. 215.

trust, and so the Act would never take place. Therefore, where a *cestui que trust and his trustee are both out of possession* for the time limited, the party in possession has a good bar against them both" (*a*). "A *cestui que trust,*" said Lord Redesdale, "is always barred by length of time operating against the *trustee.* If the trustee does not enter, and the *cestui que trust* does not compel him to enter, as to the person claiming paramount the *cestui que trust* is barred" (*b*). And Lord Manners observed, "The opinion of Sir J. Jekyll, if intended to apply to *third persons,* which I do not conceive it was, has often been denied, and is contrary to many decisions. If trustees neglect their duty, and suffer an adverse possession of twenty years to be held, I apprehend the Statute of Limitations is a bar to the *cestui que trust*" (*c*).

Case where *cestui que trust* is under disability, or is entitled in remainder.

(7) It results from the foregoing statements of the doctrine of the Court, that, as a general rule, where both *cestui que trust* and trustee are out of possession for the time prescribed by the Statutes of Limitations, the former suffers for the neglect of the latter and is barred. But the question still remains, whether in cases where the *cestui que trust* would, if his title were legal, have more than the ordinary time to sue (as where he is under *disability* or *entitled in remainder* only), he will be allowed the same extended period for suing in *equity,* notwithstanding that the *trustee* may be barred.

Where subject matter of trust is a debt.

(8) Where the subject matter of the trust is a debt, arising under a *covenant* or *contract,* it seems difficult to avoid the conclusion, that when the trustee is barred, the *cestui que trust* is barred also (*d*). But if the debtor borrowed the money as trust money, or knowing it to be such, he cannot set up the statute (*e*).

Where subject matter is land and possession is adverse.

(9) The same result would seem to follow where the subject matter of the trust is *land,* and the possession has been held adversely to both trustee and *cestui que trust,* without any species of privity, as when the trustee is disseised. Here there is generally no remedy in equity. The proper course for the *cestui que trust* is to bring ejectment in the name of the

(*a*) *Lewellin* v. *Mackworth,* 2 Eq. Ca. Ab. 579; *S. C.* Barn. 445.

(*b*) *Hovenden* v. *Lord Annesley,* 2 Sch. & Lef. 629.

(*c*) *Pentland* v. *Stokes,* 2 B. & B. 75; and see *Cooper* v. *Ware,* 18 Ir. Jur. 24.

(*d*) See *Wych* v. *East India Company,* 3 P. W. 309; *Stone* v. *Stone,* 5 L. R. Ch. App. 74; *Hammond* v. *Messenger,* 9 Sim. 327; *Bolton* v. *Powell,* 14 Beav. 275.

(*e*) *Spickernell* v. *Hotham,* Kay, 669; *Bridgman* v. *Gill,* 24 Beav. 302; *Ernest* v. *Croysdill,* 2 De G. F. & J. 175; 6 Jur. N.S. 740; and see *Stone* v. *Stone,* 5 L. R. Ch. App. 74.

trustee. The rare instance of a person entering without privity or authority upon lands belonging in equity to an infant may perhaps constitute an exception, the rule being that he who so enters must, whether the infant is legally or equitably entitled, be regarded as a bailiff or receiver for the infant (*a*). But no such exception can be maintained where the infant has *never* been in possession by himself, his guardian, or agent, but the title was adverse to those through whom he claims (*b*). And even the existence of the objection itself cannot be viewed as free from doubt (*c*).

Where trust is of *land* and party in possession claims by conveyance from trustees.

(10) Where the subject matter of the trust is *land*, and the person in possession claims by *conveyance* from the trustee, here, unless the facts warrant the defence of *purchase for value without notice*, the right of the *cestui que trust* to fix the person in possession with the liability to perform the trust falls under an ordinary head of equitable jurisdiction. The *cestui que trust* is clearly entitled to proceed in equity against the legal owner, and the only question is within what time he must do so. In these cases, it is conceived, the *cestui que trust* (although the trustee may be barred from his action of ejectment) must, in the absence of any express statutory enactment applicable to the case (*d*), be entitled to sue in equity within the same extended period in reference to disability and accruer of right, as if his title were legal (*e*).

Fraud.

(11) No time will cover a *fraud so long as it remains concealed;* for, until discovery (or at all events until the fraud might with reasonable diligence have been discovered), the title to avoid the transaction does not properly arise (*f*). But, *after*

(*a*) See cases cited p. 1013, *infra*, note (*e*).

(*b*) *Crowther* v. *Crowther*, 23 Beav. 305. But see *Quinton* v. *Frith*, 2 Ir. R. Eq. 414.

(*c*) See *Allen* v. *Sayer*, 2 Vern. 368, corrected from R. L., Treat. on Trusts, 3rd edit. App. X., and the author's remarks at p. 720 of the same edition; *Wych* v. *East India Company*, 3 P. W. 309; *The Earl* v. *Countess of Huntingdon*, cited Ib. 310, note (G.); *Thomas* v. *Thomas*, 2 K. & J. 79.

(*d*) See p. 998, *infra*.

(*e*) See *Scott* v. *Scott*, 18 Jur. 755; 4 H. L. Cas. 1065.

(*f*) *Blair* v. *Bromley*, 2 Ph. 354; *Rolfe* v. *Gregory*, 11 Jur. N. S. 97; *S. C.* 3 De G. J. & S. 576; *Cotterell* v. *Purchase*, Cas. *t.* Talbot, 63, *per* Lord Talbot; *Medlicott* v. *O'Donel*, 1 B. & B. 166, *per* Lord Manners; *Arran* v. *Tyrawly*, cited Ib. 170; *Alden* v. *Gregory*, 2 Eden, 280; *Morse* v. *Royal*, 12 Ves. 374, *per* Lord Erskine; *Bicknell* v. *Gough*, 3 Atk. 558; *South Sea Company* v. *Wymondsell*, 3 P. W. 143; *Booth* v. *Warrington*, 4 B. P. C. 163; *Pickering* v. *Lord Stamford*, 2 Ves. jun. 280, *per* Lord Alvanley; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 634; *Roche* v. *O'Brien*, 1 B. & B. 330; *Blennerhassett* v. *Day*, 2 B. & B. 118, *per* Lord Manners; *Robinson* v. *Norris*, 1 Giff. 421; *Whatton* v. *Toone*, 5 Mad. 54; [*Metropolitan Bank* v. *Heiron*, 5 Ex. Div. 319; *Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. Div. 59; *Moore* v.

discovery, the defendant may avail himself of the statute, for he has a right to say, "You shall not bring this matter under discussion at this distance of time; it is entirely your own neglect that you did not do so within the period limited by the statute" (*a*).

How defendant may take advantage of the statute.

(12) [The defendant may avail himself of the Statute of Limitations, by *pleading it himself* (*b*); but, if he neglect to do so,] he cannot shelter himself under the statute at the time of the hearing (*c*); though it seems the Court itself may still, in its own discretion, refuse to grant relief after the limited period (*d*).

In cases of fraud.

(13) Even when the plaintiff charges *fraud*, the defendant may plead [the statute] (*e*). If the plaintiff allege that he only discovered the fraud within the period limited by the statute, the defendant must either deny the fraud, or insist that the plaintiff had knowledge of it (*f*).

Bar from presumption.

II. The Court, after great length of time, will *presume* some act to have been done, which, if done, is a bar to the demand (*g*).

At what time presumption is raised.

(1) The period at which the Court raises the *presumption* depends upon the circumstances of the case. As a general rule, the Court presumes after a lapse of twenty years (1), but where there is a statutable bar at *law*, and of a different period, the

Knight, (1891) 1 Ch. 547;] and see *Whalley* v. *Whalley*, 1 Mer. 436; *Western* v. *Cartwright*, Sel. Cas. Ch. 34; *Re Agriculturists' Cattle Insurance Company*, 3 L. R. Eq. 769; [*Barber* v. *Houston*, 14 L. R. Ir. 273; *S. C.* 18 L. R. Ir. 475.] But Sir A. Hart thought time would run against fraud from the date of it, though undiscovered, provided the person entitled had knowledge of the fraud a reasonable time before the expiration of the period; *Byrne* v. *Frere*, 2 Moll, 157.

(*a*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 634, *per* Lord Redesdale; *Western* v. *Cartwright*, Sel. Ch. Ca. 34; [*Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319;] and see *Mulcahy* v. *Kennedy*, 1 Ridg. 337.

[(*b*) Rules of the Supreme Court, 1883, Ord. 19, R. 15. As to the right under the old practice to raise the question by demurrer see the 7th Edition, p. 739, and cases there cited; and as to the present practice in lieu of demurrer see Ord. 25.]

(*c*) *Prince* v. *Heylin*, 1 Atk. 494; *Harrison* v. *Borwell*, 10 Sim. 382; *Roch* v. *Callen*, 6 Hare, 535; *Sleight* v. *Lawson*, 3 K. & J. 296.

(*d*) *Prince* v. *Heylin*, *ubi supra*.

(*e*) *South Sea Company* v. *Wymondsell*, 3 P. W. 143. [*Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. Div. 59.]

(*f*) See Mitford on Pleading, 269, 4th ed. *Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q B. Div. 59.]

(*g*) *Pattison* v. *Hawksworth*, 10 Beav. 375; and see *Attorney-General* v. *Moor*, 20 Beav. 119; [but see *Thomson* v. *Eastwood*, 2 App. Cas. 215, 256.]

(1) In *Harmood* v. *Oglander*, 6 Ves. 199, 8 Ves. 106, the bill was filed after a lapse of *thirty-two years*, yet neither Lord Alvanley nor Lord Eldon considered the length of time to bar the plaintiff's demand; but in this case the parties were *equitable tenants in common*, and as between them the presumption of *ouster* did not arise.

Court will not entertain a *presumption* within a *less time* than the period fixed by the statute (*a*).

Ground of the presumption.

(2) Presumptions are made, not necessarily because the Court really believes what is presumed, but in the absence of evidence, for the purpose of quieting the possession (*b*). Lord Erskine observed, "It is said you cannot *presume* unless you *believe*. It is because there are no means of creating belief or disbelief, that such general presumptions are raised" (*c*). Where *positive* evidence can be presented to the Court, the fact may be presumed after a period much shorter than the usual one. And, on the other hand, though the distance of time may be far greater than the ordinary limit of presumption, yet if there appear any positive evidence to negative the fact, the legal inference cannot be sustained, for the rule is *stabit præsumptio donec probetur in contrarium*. But the Court has judged it better, for the ends of justice, that presumptions should be *favoured* in law, and should not be rebutted by slight evidence in contradiction (*d*).

Ignorance, mistake, and distress.

(3) The Court cannot *presume* a person to have abandoned his right so long as he remains in *ignorance* of it, or labours under a *mistake* (*e*); and the *distress* of a person, so far as it accounts for his *laches*, will *pro tanto* weaken the foundation of the presumption (*f*). So a release of right cannot with the same force be presumed against a *class of persons*, as against an individual; for it is not likely that a person having only an aliquot share in the property, should pursue his remedy with the same spirit as if he were the exclusive proprietor (*g*).

Bar from public or private inconvenience.

III. Though the plaintiff's demand cannot be met by an *absolute bar*, and no release of right can be *presumed*; yet,

(*a*) *Eldridge* v. *Knott*, Cowp. 214.

(*b*) *Eldridge* v. *Knott*, Cowp. 215, *per* Lord Mansfield; and see *Grenfell* v. *Girdlestone*, 2 Y. & C. 682; *Magdalen College* v. *Attorney-General*, 3 Jur. N. S. 675.

(*c*) *Hillary* v. *Waller*, 12 Ves. 266.

(*d*) *Jones* v. *Turberville*, 2 Ves. jun. 13, *per* Lord Commissioner Eyre; and see *Grenfell* v. *Girdlestone*, 2 Y. & C. 662.

(*e*) See *Marquis Cholmondeley* v. *Lord Clinton*, 2 Mer. 362; *Randall* v. *Errington*, 10 Ves. 427; *Roche* v. *O'Brien*, 1 B. & B. 330, see 342; *Pickering* v. *Stamford*, 2 Ves. jun. 280, and following pages; *S. C.* Ib. 585; *Chalmer* v. *Bradley*, 1 J. & W. 65, and following pages; *Bennet* v. *Colley*, 2 M. & K. 232; *Stone* v. *Godfrey*, 5 De G. M. & G. 76.

(*f*) See *Roche* v. *O'Brien*, 1 B. & B. 342; *Hillary* v. *Waller*, 12 Ves. 266; *Gowland* v. *De Faria*, 17 Ves. 25; *Byrne* v. *Frere*, 2 Moll. 171, 178.

(*g*) See *Whichcote* v. *Lawrence*, 3 Ves. 752; *Anon. case*, cited *Lister* v. *Lister*, 6 Ves. 632; *Kidney* v. *Coussmaker*, 12 Ves. 158; *Hardwick* v. *Mynd*, 1 Anst. 109; *Attorney-General* v. *Lord Dudley*, G. Coop. 146; [*Boswell* v. *Coaks*, 27 Ch. Div. 425, 457;] but see *Elliot* v. *Merriman*, 2 Atk. 42; *Hercy* v. *Dinwoody*, 2 Ves. jun. 87.

thirdly, relief will not be granted where, if administered, *it would lead to great public or private inconvenience* (*a*).

In action for account a settlement may be presumed.

(1) Thus in an action for an account against an executor or administrator, who is in equity a *trustee*, and was formerly not protected by any statute of limitations (*b*), though the *presumption* of a final settlement may be rebutted by positive evidence, the Court will not open the account at any distance of time, when it is probable that most of the parties are dead, and the vouchers and receipts are lost (*c*).

Instances of great delay.

(2) Where a suit was prosecuted after a delay of threescore and two years, Lord Keeper Wright said, that "the cause being now within one year of the grand climacteric, it was fit it should be at rest" (*d*). But bills have been dismissed at the end of twenty-seven years (*e*), and a much shorter period would be a sufficient bar, should the Court see a difficulty in granting the relief: every case must be determined with reference to its own particular circumstances (*f*).

Pickering v. Stamford.

(3) In *Pickering* v. *Lord Stamford* (*g*) a testator gave the residue of his personal estate to a charity, and *thirty-five years* after his decease, the next of kin filed their bill for an account, and prayed that such part as consisted of money upon mortgage or other real securities, might be declared a void bequest, and distributable, subject to debts, &c., among the testator's next of kin. Lord Alvanley said: "*I know no rule that has established that mere length of time will bar.* Therefore, that being the case, I am to say whether under the circumstances a bar can be *presumed*" (*h*). And for facilitating the question of presumption, his Lordship directed certain previous enquiries by the Master; and it appearing from the report, that no release or assignment of their interest by the next of kin for the purposes of the charity could, under the circumstances, be presumed, his Lordship then had recourse to the ground of *Inconvenience*. The question, he observed, in all these cases is, whether there are motives of public policy or private inconvenience, to induce the Court to say, the suit ought not to be entertained. "If," said his Lordship, "from

(*a*) See *Attorney-General* v. *Mayor of Exeter*, Jac. 448.

(*b*) See now 3 & 4 W. 4. c. 27, s. 40; 23 & 24 Vict. c. 38, s. 13; 51 & 52 Vict. c. 59, s. 8.

(*c*) *Hunton* v. *Davies*, 2 Ch. Rep. 44; *Huet* v. *Fletcher*, 1 Atk. 467; *Pearson* v. *Belchier*, 4 Ves. 627; *Hercy* v. *Dinwoody*, 2 Ves. jun. 87.

(*d*) *St. John* v. *Turner*, 2 Vern. 418.

(*e*) *Campbell* v. *Graham*, 1 R. & M. 453.

(*f*) See *Hercy* v. *Dinwoody*, 2 Ves. jun. 93; *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. 483.

(*g*) 2 Ves. jun. 272.

(*h*) 2 Ves. jun. 283.

the plaintiff's lying by, it is impossible for the defendants to render the accounts he calls for, or it will subject them to great inconvenience, he must suffer; or the Court will oppose, what I think the best ground, *Public convenience.* The plaintiffs are so conscious of this, that they do not call on the trustees to account for what has been disbursed before any demand made. It appears that the trustees, who by their conduct have done themselves great credit, have kept such accounts that there is no difficulty in finding the personal estate at the death of the testator. Therefore, desiring to be understood by no means to give any countenance to these stale demands, but upon the circumstances that there is nothing inducing great public or private inconvenience, that the accounts are found, and that the trustees are not called on to account for what has been disbursed, I am bound to decide in favour of the plaintiffs" (*a*).

Bar from length of time.

(4) The doctrine laid down by Lord Alvanley in the case referred to, that *mere length of time* will not bar, requires some qualification. Lapse of time or delay in suing, unaccounted for by disability or other circumstances, constitutes *per se* in the eye of a Court of equity, *laches* disentitling the plaintiff, in *certain classes of cases* at least, to relief from the Court. Thus where a plaintiff *cestui que trust* seeks to impeach a purchase by a trustee, a delay of less than twenty years may bar his title to relief (*b*). So where a plaintiff seeks to set aside a purchase from him by his solicitor (*c*), or of a reversionary interest (*d*), or to fix a defendant with a constructive trust (*e*), or to call a person to account for acts of waste (*f*), or comes to a Court of equity alleging a case of fraud as a ground for avoiding the operation of the Statute of Limitations (*g*). So where an account was sought by a surviving partner against the estate of a deceased partner, the Court, even assuming such case to fall within the exception as to merchants' accounts in the Statute of Limitations, refused its aid after a delay of thirteen years (*h*). And where the assistance of the Court is sought in a suit for specific per-

(*a*) 2 Ves. jun. 582, and following pages.

(*b*) See the cases, p. 546, *supra.*]

(*c*) See *Gresley* v. *Mousley,* 4 De G. & J. 78; and the cases there cited; and *Lyddon* v. *Moss,* Ib. 104.

(*d*) *Roberts* v. *Tunstall,* 4 Hare, 257.

(*e*) *Clegg* v. *Edmondson,* 8 De G. M. & G. 787; 3 Jur. N. S. 299; *Isald* v. *Fitzgerald,* cited Amb. 735, 737; and see *Pennell* v. *Home,* 3 Drew, 337; *Norris* v, *Le Neve,* 3 Atk. 38; *Jackson* v. *Welsh,* Li. & G. Rep. *t.* Plunk. 346.

(*f*) *Harcourt* v. *White,* 28 Beav. 303.

(*g*) *Blair* v. *Ormond,* 1 De G. & Sm. 428.

(*h*) *Tatam* v. *Williams,* 3 Hare, 347; and see *Harcourt* v. *White,* 28 Beav. 303.

formance (*a*), or in one partaking of that character (*b*), the rule is extremely strict. It is difficult to refer the refusal of the relief by the Court, in the instances mentioned, to any one general principle. In the cases of purchases by trustees, or of claims founded upon constructive trust, the probability of alteration of circumstances in regard to the property, and the unfairness of the plaintiff in lying by, have weighed with the Court. Perhaps the nearest approach to general principle will be found under the head of "Public Convenience;" *Expedit Reipublicæ ut sit finis litium"* (*c*).

Bar from *laches*, where there is a Statute of Limitations.

(5) It has been pointed out that in *certain special cases* a delay of less than twenty years operates as a bar; and the Court in these instances departs still further from the analogy offered by the Statute of Limitations, by taking into account partly time which may have elapsed while the plaintiff's interest was reversionary (*d*). The question remains whether, *in general*, *laches* can be relied upon as a bar to a mere dry equitable demand falling within the purview of some or one of the Statutes of Limitations; and it seems the legislature itself having prescribed a term of limitation which it deems sufficiently short, the Court ought not further to abridge that term (*e*).

Acquiescence.

(6) Besides the bars which have been enumerated arising from the effect of time, a plaintiff may also be precluded from relief on the ground of *acquiescence*. This is of two kinds:—*First*, direct, where the act complained of was done with the full knowledge and express approbation of another, in which case a Court of equity will not allow that other to seek relief against the very transaction to which he was himself a party (*f*). *Secondly*, indirect, where a person, having a right to set aside a transaction, stands by and sees another dealing with property

(*a*) *Southcomb* v. *Bishop of Exeter*, 6 Hare, 213; *Alloway* v. *Braine*, 26 Beav. 575; *Sharp* v. *Wright*, 28 Beav. 150.

(*b*) *Hope* v. *Corporation of Gloucester*, 1 Jur. N. S. 320.

(*c*) See *Gresley* v. *Mousley*, 4 De G. & J. 95; *Carey* v. *Cuthbert*, 7 Ir. R. Eq. 542; 9 Ir. R. Eq. 330; *Payne* v. *Evens*, 18 L. R. Eq. 356.

(*d*) *Roberts* v. *Tunstall*, 4 Hare, 266; *Browne* v. *Cross*, 14 Beav. 105; but as to the latter case see observations of Turner, L. J., in *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 73.

(*e*) See *Rochdale Canal Company* v. *King*, 2 Sim. N. S. 89; *Penny* v. *Allen*, 7 De G. M. & G. 426; *Mehrtens* v. *Andrews*, 3 Beav. 76; *Duke of Leeds* v. *Earl of Amherst*, 2 Ph. 117; *Clarke* v. *Hart*, 6 H. L. C. 633; *Beaudry* v. *Mayor, &c., of Montreal*, 11 Moore, P. C. C. 339; *Story* v. *Gape*, 2 Jur. N. S. 706; [*Re Baker*, 20 Ch. Div. 230.]

(*f*) See *Kent* v. *Jackson*, 14 Beav. 384; *Styles* v. *Guy*, 1 Mac. & G. 427; 1 Hall & Tw. 523; *Ex parte Morgan*, 1 Hall & Tw. 328; *Graham* v. *Birkenhead, &c., Railway Company*, 2 Mac. & G. 146.

in a manner inconsistent with that right, and makes no objection; when also a Court of equity will not relieve (*a*). But in the latter case, the Court not only looks to the conduct of the person who stands by, but also considers how far the person in possession of the property has any just claims to the protection of the Court. Where, for instance, the possessor lays out his money, with a full knowledge that the property which he improves belongs to another, then it is said he makes the outlay to his own cost. "If," observed L. J. Turner, "a man places his property on the land of another with full knowledge of that person's title, how can the fact that the landowner assented to its being placed there give an equity to have it restored? If it did, the doctrine would come to this, that whenever a man lays out money on another person's land with the consent of the owner, he has an equity to have it repaid" (*b*).

[Where, however, the act complained of has been completed without any knowledge or assent on the part of the person seeking relief, there can be no acquiescence in the strict sense of the word, which has been "defined as quiescence under such circumstances as that assent may be reasonably inferred from it," and is no more than an instance of the law of estoppel by words or conduct. When once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, a right of action has vested in him, which, at all events as a general rule, cannot be divested without accord and satisfaction or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although, under the name of laches, it may afford a ground for refusing relief under some particular circumstances (*c*).]

Limitation Acts.

We may now introduce the Acts for the limitation of actions and suits.

[Personal Property.]

[3. By 21 Jac. 1. c. 16, s. 3, it is enacted that actions upon the case (other than for slander), *actions of account*, and for trespass,

(*a*) *Duke of Leeds* v. *Amherst*, 2 Ph. 123; *Phillipson* v. *Gatty*, 7 Hare, 523; *Stafford* v. *Stafford*, 1 De G. & J. 202; [*Simpson* v. *Simpson*, 3 L. R. Ir. 308; *Blake* v. *Gale*, 31 Ch. D. 196;] and see *Jorden* v. *Money*, 5 H. L. C. 185; [*Mills* v. *Fox*, 37 Ch. D, 153. It must however be borne in mind that where there is a *legal* right to set aside a transaction, as for instance a fraudulent conveyance under 13 Eliz. c. 5, mere delay to enforce it, unless the delay is such as to cause a statutory bar, is no defence; *Re Maddever*, 27 Ch. Div. 523.]

(*b*) *Rennie* v. *Young*, 2 De G. & J. 136, see 142. See *ante*, p. 809.

[(*c*) *Per* L. J. Thesiger in delivering the judgment of the Court of Appeal, *De Bussche* v. *Alt*, 8 Ch. Div. 286, 314; and see *post*, p. 1055.]

debt, detinue and replevin for goods or cattle, and of trespass *quare clausum fregit*, must be brought within six years next after the cause of such actions.]

4. The 3 & 4 Will. 4. c. 27, enacts as follows:—

Lands and rents. Sect. 24: "No person claiming any *land* or *rent* in *equity* shall bring any suit to recover the same, but within the period, during which by virtue of the provisions hereinbefore contained (*a*), he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at *law* to such estate, interest, or right in or to the same as he shall claim therein in equity" (*b*).

Express trusts. Sect. 25: "When any land or rent shall be vested in a trustee upon *any express trust*, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or *any person claiming through him* (*c*), to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act *at, and not before*, the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him" (*d*).

Fraud. Sect. 26: "In every case of a *concealed fraud* the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall or with reasonable diligence might, have been first known or discovered" (*e*).

Acquiescence. Sect. 27: "Nothing in the Act contained shall be deemed to

(*a*) See 37 & 38 Vict. c. 57, s. 9, which from the commencement of the Acts (1st January, 1879), varies the periods within which actions and suits may be brought.

(*b*) See *Scott* v. *Scott*, 18 Jur. 755; 4 H. L. Cas. 1065.

(*c*) As to the meaning of these words, see *Burroughs* v. *McCreight*, 1 Jon. & Lat. 304.

(*d*) Sums of money and legacies charged on land and secured by an *express trust*, are as from 1st January, 1879, made only recoverable within the time allowed for recovery, had there been no express trust; 37 & 38 Vict. c. 57, s. 10; [and as regard actions or other proceedings against a trustee or any person claiming through him, commenced after the 1st of January, 1891, and in which the claim is not founded on fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee, and converted to his use, the effect of this section is modified by sect. 8 of the Trustee Act, 1888, see *post*, p. 1008.]

(*e*) See *Manby* v. *Bewicke*, 3 K. & J. 342; *Petre* v. *Petre*, 1 Drew. 371; *Vane* v. *Vane*, 8 L. R. Ch. App. 383; [*Lawrance* v. *Lord Norreys*, 39 Ch. Div. 213, 224; 15 App. Cas. 210.]

interfere with any rule or jurisdiction of Courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of the Act."

Arrears of rent or interest.

Sect. 42: "No *arrears* of *rent* or of *interest* in respect of any sum of money *charged upon*, or payable out of, any land or rent, shall be recovered by any action or suit, but within *six years* next after the same shall have become due, or after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same is payable or his agent."

37 & 38 Vict. c. 57.

5. And the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57), enacts, that *from and after* 1*st January*, 1879:—

Sect. 1. No action or suit shall be brought to recover any land or rent but within *twelve* years from the time when the right first accrued.

Sect. 2. The right, as to *reversions*, *remainders*, and *future estates* shall be deemed to first accrue when they fall into possession (*a*). But if the person entitled to the particular estate on which the future estate was expectant shall not have been in possession when his interest determined, the action or suit must be brought within twelve years from the time the first right accrued to the owner of the particular estate, or within six years from the time when the estate of the person becoming entitled in possession became vested in possession, whichever of those two periods shall be the longer.

Sect. 3. In cases of disability, *six* years from the cesser of the disability or from the death of the person under disability shall be allowed, notwithstanding the expiration of the twelve years.

Sect. 4. No extension of time shall be allowed for *absence beyond seas*.

Sect. 5. No action or suit to recover any land shall be brought but within *thirty* years from the time when the right first accrued, notwithstanding the existence of any *disability* or succession of disabilities.

Result of the Acts.

6. It results from these Acts that since 1st January, 1879, *twelve* years' possession is made a statutory bar to suits in *equity* in respect of *equitable* interests, as in the case of actions at law

(*a*) Thus in the case of an equitable mortgage or charge of a contingent reversionary interest time does not begin to run until the interest falls into possession: *Hugill* v. *Wilkinson*, 38 Ch. D. 480; and see *Re Hancock*, 57 L. J. Ch. 793; 36 W. R. 710; 59 L. T. N.S. 197.]

upon *legal rights* (*a*), but in case of *disability* a term of *six* years is allowed next after the cesser of the disability, subject to the proviso that no suit is to be brought after the lapse of thirty years from the accruer of the right, whatever disabilities may have existed.

In case of express trust time runs from conveyance for value only.

7. In cases falling within the 25th section of 3 & 4 Will. 4. c. 27 (*b*), the effect of that section is that as between the trustee and any person claiming through him, and the *cestui que trust* and any person claiming through him, time does not run until there has been a conveyance to a purchaser for valuable consideration. The trust estate may, therefore, be followed by the *cestui que trust*, notwithstanding acquiescence by him (*c*), not only as against the trustee, but as against all volunteers claiming under him (*d*); but so soon as the estate is conveyed to a purchaser for valuable consideration (as if it be made the subject of a marriage settlement), the time will begin to run (*e*); and a lease for value is *pro tanto* a conveyance within the meaning of the Act (*f*). No possession, however, by a purchaser for valuable consideration short of the statutory period will be a bar (*g*).

And not even then as against persons under disability, &c.

8. The question whether a lapse of the statutory period from the time of a conveyance for value by a trustee will bar *cestuis que trust*, who, by reason of *disability*, or their rights being *reversionary*, would otherwise be entitled to sue after such period, is not free from difficulty. The 25th section of 3 & 4 W. 4. c. 27, enacts affirmatively that the right is to be deemed to have accrued *at* the time of conveyance, and this, in strict construction, would seem to work an independent bar. But this section is merely a proviso on the 24th section, which is in effect an enactment *restraining* the right to sue in *equity* within the limits allowed for suits at *law;* and the 25th section would appear to be not a further *restraint* of the right to sue, but an

[(*a*) The existence of a trust term, the trusts of which never actively arise, and under which possession is never taken, cannot be set up by the person entitled subject to the term as an answer to a defence founded upon the statute; *Twaddle* v. *Murphy*, 8 L. R. Ir. 123.]

(*b*) See p. 996, note (*d*).

(*c*) *Browne* v. *Radford*, W. N. 1874, p. 124.

(*d*) *Sturgis* v. *Morse*, 24 Beav. 541, 3 De G. & J. 1; *Heenan* v. *Berry*, 2 Jon. & Lat. 303; *Salter* v. *Cavanagh*, 1 Dru. & Walsh, 668; *Blair* v. *Nugent*, 3 Jon. & Lat. 658, 9 Ir. Eq. Rep. 400; *Ravenscroft* v. *Frisby*, 2 Coll. 16; *Massy* v. *O'Dell*, 10 Ir. Ch. Rep. 22; *O'Reilly* v. *Walsh*, 6 Ir. R. Eq. 555; and see *Dixon* v. *Gayfere*, 17 Beav. 421; *Mutlow* v. *Bigg*, 18 L. R. Eq. 246.

(*e*) *Petre* v. *Petre*, 1 Drew. 371.

(*f*) *Attorney-General* v. *Davey*, 4 De G. & J. 136; *Attorney-General* v. *Payne*, 27 Beav. 168.

(*g*) *Attorney-General* v. *Flint*, 4 Hare, 147. But see *Carey* v. *Cuthbert*, 7 Ir. R. Eq. 542; 9 Ir. R. Eq. 330.

enlargement, by way of *modification* of the restriction previously, introduced by the 24th section. The decisions and *dicta* accord with this view and point to the conclusion that a *cestui que trust*, who is a remainderman, or under disability, is entitled to the full statutory period from the accruer of the right in possession, or from the cesser of the disability, as the case may be, notwithstanding the trustee may have conveyed away the estate for value, and the twenty or twelve years, as the case may be, may have elapsed from the date of conveyance, but in no case must the period allowed now exceed thirty years, from the accruer of the right in possession (*a*).

Express trusts.

9. The 25th section applies only to *express trusts;* it is therefore necessary to ascertain with precision what is meant by this phrase. Trusts, *as regards the provisions of the statute*, may be considered as divided into express trusts and constructive trusts; the former arising upon the language of some written instrument (*b*), and the latter such as are elicited by the principles of a Court of equity from the acts of parties.

Word "trust" not necessary to constitute an express trust.

10. It is not necessary to use the word *trust* in order to create an express trust within the meaning of the statute (*c*), but any language that would in equity raise or imply a trust will be deemed an express trust. If, therefore, land be devised to a person upon trust to receive the rents and thereout to pay certain annuities, the surplus rents result to the heir-at-law upon the face of the instrument, and this being an express trust, the heir-at-law, in a case falling within the section, will not be barred by any length of possession by the trustee (*d*).

(*a*) *Thompson* v. *Simpson*, 1 Dru. & War. 489; *Attorney-General* v. *Magdalen College*, 18 Beav. 239, 250; 6 H. L. Cas. 189, see p. 215; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58; *Shaw* v. *Keighron*, 3 Ir. R. Eq. 574; and see *Butler* v. *Carter*, 5 L. R. Eq. 276; *Quinton* v. *Frith*, 2 Ir. R. Eq. 396.

[(*b*) But whether an express trust is necessarily confined to one in *writing, quære*, *Re Sands to Thompson*, 22 Ch. D. 614, 617, *per* Fry, J., observing on *Petre* v. *Petre*, 1 Drew. 371.]

(*c*) *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jon. & Lat. 197.

(*d*) *Salter* v. *Cavanagh*, 1 Dru. & Walsh, 668; [*Patrick* v. *Simpson*, 24 Q. B. D. 128; *Nugent* v. *Nugent*, 15 L. R. Ir. 321;] and see *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jon. & Lat. 196; 7 Ir. Eq. Rep. 580; *Mutlow* v. *Bigg*, 18 L. R. Eq. 246, [reversed on other grounds, 1 Ch. Div. 385; *Churcher* v. *Martin*, 42 Ch. D. 312, 319.] In *Lord St. John* v. *Boughton*, 9 Sim. 223, where there was an express trust to sell and pay debts, the late V. C. E. thought that as *no part of the produce of the sale had been set apart for debts*, the case was not within the exception of the 25th section, but fell under the 40th section (relating to charges, *vide post*, p. 1000), and that if there had been no subsequent acknowledgment of the debt, it could not have been recovered. This, it is conceived, cannot be maintained. However, it was a dictum only, as the bonds were directed to be paid on the ground of acknowledgment; see *Watson* v. *Saul*, 1 Giff. 197.

Constructive trusts not saved.

11. But trusts arising by the construction of a Court of equity from the *acts of parties*, or to be made out by *circumstances*, or to be proved by *evidence*, will not be saved by the clause relating to express trusts, as if the devisee for life of a leasehold estate renew in his own name, the statute will begin to run from the time of the renewal (*a*). So if a trust fund be lent to A., and thereupon B., as surety, with notice of the trust, gives a mortgage of his estate to secure the fund, here B. is not an express trustee; and if no interest be paid for the statutable period, the *cestui que trust* is barred (*b*). [So where the first mortgagee of a ship sold the ship under the power conferred by the Merchant Shipping Act (17 & 18 Vict. c. 104), it was held that he was not an express trustee of the surplus proceeds of sale for the subsequent mortgagee (*c*). And where real estate was conveyed to trustees upon charitable trusts by a deed which was void for non-compliance with 9 Geo. 2. c. 36, s. 3, the trustees were held not to be express trustees for persons claiming under the grantor (*d*).] But if there be an express trustee, and another person with full knowledge of the trust and in collusion with the trustee, and therefore by active fraud, appropriates the property to his own use, he stands in the place of the trustee, and while the fraud remains concealed the statute does not run (*e*). If a person act as the trustee of a settlement containing express trusts, though he assume the character by mistake, he will be deemed, so far as he acts, an express trustee (*f*).

Charges.

12. Mere *charges* might have been held to fall under the description of express trusts, but that they are dealt with under a separate section, viz., the 40th of 3 & 4 W. 4. c. 27 (for which as from 1st January, 1879, is now substituted the 8th section of 37 & 38 Vict. c. 57), a circumstance which shows that they were meant to be distinguished from express trusts. If, therefore, a testator, having two properties, A. and B., *charged* all his real estate with his *debts*, and devised estate A. to trustees upon *trust* to pays his debts, the statute as to estate B. [was] made a bar under 3 & 4 Will. 4. c. 27, after twenty years, (and under

(*a*) *Petre* v. *Petre*, 1 Drew. 371; *Re Scott*, 8 Ir. Ch. Rep. 316; *In the matter of P. Dane*, 5 Ir. R. Eq. 498.

(*b*) *Re Scott*, 8 Ir. Ch. Rep. 316.

[(*c*) *Banner* v. *Berridge*, 18 Ch. D. 254.]

[(*d*) *Churcher* v. *Martin*, 42 Ch. D. 312.]

(*e*) *Rolfe* v. *Gregory*, 4 De G. J. & S. 576.

(*f*) *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58; and see *Smith* v. *Smith*, 10 Ir. R. Eq. 273; 1 L. R. Ir. 206.

37 & 38 Vict. c. 57, [is a bar] after twelve years (*a*), but as to estate A. it [did] not [before 1st January, 1879] begin to run until a conveyance to a purchaser, for valuable consideration (*b*); [but by the 10th section of 37 & 38 Vict. c. 57, the time for recovering any money payable out of land is made the same, whether it is secured by an express trust or not.] So, if an estate be devised to A., *charged* with 1000*l.* in favour of B., or "A. *paying* 1000*l.* to B.," [or "on the condition of A. well and truly paying 1000*l.* to B." (*c*),] although a suit may be sustained in equity to have the sum raised on the footing of a trust, yet it is not an express trust within the meaning of the statute, and [an action by B. in such a case would have been barred at the end of twenty years, and will now under 37 & 38 Vict. c. 57 be barred at the end of twelve years, independently of sect. 10 of that Act (*d*).] And if a testator charge his debts and direct his executors to raise them by mortgage or otherwise, the direction adds nothing to the charge (which *per se* authorized the raising of the debts by mortgage or otherwise), and no express trust, but only a charge, is created (*e*).

Charge coupled with a duty.

13. But a charge in form may be an express trust in fact. Thus where an estate in Ireland was devised to trustees and their heirs, upon trust to *convey* to J. W. for life, charged with annuities to certain corporations for charitable purposes, although the corporations were interposed as trustees, yet, as the devisees were bound to execute a settlement, so as to secure the annuities and retain the legal estate in the meantime, they were, until the settlement had been executed, trustees for the charity (*f*). So, though a simple charge of the testator's debts fell within the 40th section of 3 & 4 W. 4. c. 27, and the creditor was barred after twenty years (*g*), yet, if the will was so worded as to impose on the devisees subject to the charge the *personal obligation* of exerting themselves actively in paying the debts, it became

[(*a*) *Re Stephens*, 43 Ch. D. 39.]

(*b*) *Jacquet* v. *Jacquet*, 27 Beav. 332; *Proud* v. *Proud*, 32 Beav. 235.

[(*c*) *Cunningham* v. *Foot*, 3 App. Cas. 974.]

(*d*) *Knox* v. *Kelly*, 6 Ir. Eq. Rep. 279; *Toft* v. *Stephenson*, 7 Hare, 1; *Hodge* v. *Churchward*, 16 Sim. 71; *Francis* v. *Grover*, 5 Hare, 39; *Hughes* v. *Kelly*, 3 Dru. & War. 482; [*Cunningham* v. *Foot*, 3 App. Cas. 974;] and see *Harrison* v. *Duignan*, 2 Dru. & War. 295.

(*e*) *Dickinson* v. *Teasdale*, 31 Beav. 511; 1 De G. J. & Sm. 52.

(*f*) *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jon. & Lat. 182, 7 Ir. Eq. Rep. 580.

(*g*) *Dundas* v. *Blake*, 12 Ir. Eq. Rep. 138, and cases there cited. The 40th section, as from 1st January, 1879, has been repealed by 37 & 38 Vict. c. 57, s. 9. See the 8th section of the latter Act.

an express trust and fell within the exception of the 25th section (*a*).

Charge and express trust in same matter.

14. A charge upon an estate may under the same instrument be a mere charge as between some parties, while it is an express trust within the 25th section as between other parties. If, for instance, an estate be devised to A. and his heirs, subject to a charge of 500*l.* to B. and C. upon certain trusts, this, as between A. and the two trustees, is a mere charge, and would be barred after twenty or twelve years, as the case may be, but, as between the two trustees and their *cestuis que trust*, the charge when raised will be an express trust, and the time of the bar as between them will be extended accordingly.

Case of charge secured by a term of years.

15. If a *term of years* be limited to the trustees for the purpose of securing the charge, the rights of the *cestuis que trust* will not be barred so long as the term vested in their trustees remains unbarred (*b*).

Mortgage by way of trust.

16. A *mortgage by way of trust for sale* is [for the purpose now under consideration] nothing more than a mortgage with a power of sale, and does not come under the description of an express trust within the meaning of the 25th section (*c*). [A mortgagee, after his mortgage debt has been fully paid, is not an express trustee of the mortgaged property until reconveyance (*d*)].

Charge must be presently raisable.

17. To make the Act operate as a bar to a charge there must be a *hand to receive*, and capable of signing a receipt; as if 400*l.* be *charged* by deed on an estate, and by the same deed it is assigned to trustees upon trust for A. and B. for their lives, and after the death of the survivor for their children, but no power of signing receipts is given to the trustees, and, on the contrary, the Court collects the intention that the trustees are not to raise the money till after the death of the surviving tenant for life, the statute does not begin to run until the latter period (*e*).

Persons claiming through the trustee.

18. It will be observed that, by the 25th section of 3 & 4 Will. 4. c. 27, the *cestui que trust* and any person claiming

(*a*) *Hunt* v. *Bateman*, 10 Ir. Eq. Rep. 360, and cases there cited; *Watson* v. *Saul*, 1 Giff. 188; and see *Burrowes* v. *Gore*, 6 H. L. Cas. 907.

(*b*) *Young* v. *Lord Waterpark*, 13 Sim. 202; on appeal, 15 L. J. N.S. Ch. 63; *Cox* v. *Dolman*, 2 De G. M. & G. 592; and see *Ward* v. *Arch*, 12 Sim. 472.

(*c*) *Locking* v. *Parker*, 8 L. R. Ch. App. 30; [*Re Alison*, 11 Ch. Div. 284.]

[(*d*) *Sands to Thompson*, 22 Ch. D. 614; and see *supra*, p. 200.]

(*e*) *M'Carthy* v. *Daunt*, 11 Ir. Eq. Rep. 29. Assuming that the trustees could not sign a receipt, the decision was right; but it was a bold step to say that the trustees had not such a power. And see *Attorney-General* v. *Persse*, 2 Dru. & War. 67; *Carroll* v. *Hargrave*, 5 Ir. R. Eq. 123; and see *post*, p. 1007.

through him may enforce the trust against the trustee and *any person claiming through him* (*a*), but *both trustee and cestui que trust* may be ousted by the intrusion of a third title, and if so, the statute will begin to run from the dispossession of the trustee and *cestui que trust*. Thus, in 1810, a legal estate was vested in trustees upon trust for five tenants in common, but from 1819 to the filing of the bill in 1842, four of the tenants in common received the rents to the *exclusion of their co-tenant and of the trustees*, who never executed their duty; and it was held that there had been an ouster of both *trustees* and *cestui que trust*, and that the right of such *cestui que trust* was barred by the statute (*b*).

Possession by one of the *cestuis que trust*.

19. A *cestui que trust* in *actual possession* is *tenant at will* to his trustee (*c*), and the 7th section of the Act enacts that "when any person shall be in possession as *tenant at will*, the right of the person entitled subject thereto to make an entry shall be deemed to have first accrued at the determination of such tenancy, or *at the expiration of one year from the commencement of such tenancy*. Provided that no *cestui que trust* shall be deemed to be a tenant at will within the meaning of the clause to his trustee." The exception was introduced in relief of the trustee that he might not be obliged to take active steps lest the tenancy at will should be deemed to have expired, and so the statute should begin to run. In other words, the tenancy should not be determined at the end of one year (*d*). The statute, therefore, does not run against the trustee so long as the *cestui que trust* is in actual possession. [A mortgagor, where the mortgage debt has been fully paid but no reconveyance has been made, is a tenant at will of the mortgagee, but is not a *cestui que trust* of the mortgagee within the meaning of the proviso, and time therefore runs against the mortgagee, and after more than thirteen years his legal estate will be extinguished (*e*).]

And it has been laid down, that if the *cestui que trust* be let into possession as *tenant at will* to the trustee, the tenancy is not determined by the *cestui que trust* sub-letting to an under-tenant, unless the trustee had notice of such underletting, for,

(*a*) See cases, p. 998, note (*f*), *supra*.

(*b*) *Burroughs* v. *M'Creight*, 1 Jon. & Lat. 290, 7 Ir. Eq. Rep. 49; [*Bolling* v. *Hobday*, 31 W. R. 9;] and see *Commissioners of Donations* v. *Wybrants*, 2 Jon. & Lat. 198; *Re Bermingham*, 4 Ir. R. Eq. 187; *Knight* v. *Bowyer*, 2 De G. & J. 440.

(*c*) See *ante*, Chap. xxvi. s. 1.

(*d*) See the observations of Wilde, C. J., in *Garrard* v. *Tuck*, 13 Jur. 873.

[(*e*) *Sands to Thompson*, 22 Ch. D. 614.]

though the general rule is that a tenancy at will is not *assignable*, yet the rule is subject to the qualification that a tenant at will cannot determine his tenancy by transferring his interest to a third party without notice to his landlord (*a*).

But if the *cestui que trust* be not the *actual occupier*, but only in *receipt of the rents and profits*, he is not tenant at will to the trustee, but the possession remains with the trustee, and the *cestui que trust* is the trustee's bailiff or agent for the management of the estate, and therefore if the *cestui que trust* allow any tenant of the trust estate to hold for twelve years, without paying rent or other acknowledgment of title, the statute runs against the trustee through the default of his bailiff or agent (*b*). The trustee, therefore, who puts a *cestui que trust* in receipt of the rents and profits has still a duty to perform, and may be held responsible for a loss accruing through neglect in not looking after his bailiff or agent.

Cestui que trust in possession by mistake.

20. If *actual possession* be held by the trustee of an express trust who has the *legal estate*, but who mistakes his *cestui que trust* and pays the rents to a wrong person, the possession of the trustee is the possession of the rightful *cestui que trust*, and the wrongful recipient of the rents does not acquire a title by adverse possession under the statute (*c*); and this principle is of very extensive application, for, as we have seen, where a *cestui que trust* is put into *receipt of the rents and profits*, the *possession* is still that of the trustee, and the *cestui que trust* is regarded in the light of the bailiff or agent of the trustee. But it is always a question for the jury, or the Court sitting as a jury, to say whether the *cestui que trust* was in receipt of the rents as *bailiff* or *agent* of the trustee, or was in receipt of the rents as claiming the beneficial ownership independently of the trustee. In the former case, the statute of limitations would not run, but in the latter case it would (*d*).

Disseisin by *cestui que trust*.

21. If *cestui que trust* under a will hold adverse possession of an estate supposed to pass, but which did not in fact pass by

(*a*) *Melling* v. *Leak*, 1 Jur. N. S. 760, *per* Cresswell, J. The *alienee* cannot be deemed tenant at will of the trustees without some acknowledgment by them; *Doe d. Stanway* v. *Rock*, 4 Man. & G. 30.

(*b*) *Melling* v. *Leak*, 16 C. B. 652; 1 Jur. N. S. 759.

(*c*) *Lister* v. *Pickford*, 34 Beav. 576.

(*d*) As in *Burroughs* v. *M'Creight*, 1 Jon. & Lat. 290, where the statute was effectually pleaded "not by persons who had placed themselves in the shoes of the trustees, but by persons who, in spite of the trustees, had received the rents for upwards of twenty years for their own benefit," Ib. 305; and see *Cholmondeley* v. *Clinton*, *ante*, p. 817; *Parker* v. *Carter*, *ante*, p. 828.

the will to a trustee, and eventually the true owner is barred, the legal estate gained by the *disseisin* vests in the trustee of the will, under colour of which the possession was taken, and not in the *cestui que trust* (*a*).

22. The 42nd section of the Act of 3 & 4 Will. 4. c. 27, limiting the recovery of arrears of rent or interest to the last six years only, has no application to cases of express trusts within the 25th section, but the *cestui que trust* could, prior to the 1st of January, 1879, have recovered from his trustees the whole arrearages from the commencement of the title (*b*). 42nd section.

23. And where there was a subsisting term not barred, upon which the trustee might obtain *possession*, the whole arrearages [could, prior to the 1st of January, 1879, have been] recovered (*c*). [Subsisting term.]

Thus, in *Cox* v. *Dolman* (*d*), a testator devised his lands to the use of trustees for ninety-nine years upon trust to pay certain annuities, and subject thereto to the use of S. Cox for life, with remainder over; and after the death of S. Cox, one of the annuitants filed a bill to have the arrears of the annuity raised out of the estate. The executors of S. Cox pleaded the statute as a bar to more than six years' arrears, but the Court held that it was the case of an express trust, that the tenant for life had taken possession subject to the trust, and that the term was a subsisting one, upon which the trustees might at any time have recovered, and the plaintiff was declared entitled to the whole arrears, which were to be paid out of the assets of the tenant for life up to the day of his death, and since his death by the remainderman. The direct remedy was, no doubt, to have the whole arrears raised by sale or mortgage of the term, but as the remainderman would be entitled to recover the arrears that accrued in the lifetime of the tenant for life from his estate, the Court, to avoid circuity, decreed payment at once out of the tenant for life's assets. Cox *v.* Dolman.

[24. But by 37 & 38 Vict c. 57, s. 10, after the 31st of December, 1879, "no action, suit, or other proceeding shall be [37 & 38 Vict. c. 57, s. 10.]

(*a*) *Kernaghan* v. *M'Nally*, 12 Ir. Ch. Rep. 89; *Hawksbee* v. *Hawksbee*, 11 Hare, 230; and see *Paine* v. *Jones*, 18 L. R. Eq. 320.

(*b*) *Playfair* v. *Cooper*, 17 Beav. 187; *Gough* v. *Bult*, 16 Sim. 323; *Watson* v. *Saul*, 1 Giff. 200; *Sturgis* v. *Morse*, 3 De G. & J. 1, 24 Beav. 541; *Gyles* v. *Gyles*, 9 Ir. Ch. Rep. 135. And see *Wright* v. *Chard*, 4 Drew. 680.

(*c*) *Cox* v. *Dolman*, 2 De G. M. & G. 592; *Snow* v. *Booth*, 2 K. & J. 132; 8 De G. M. & G. 69; *Lewis* v. *Duncombe* (No. 2), 29 Beav. 175; *Lawton* v. *Ford*, 2 L. R. Eq. 97; *Earl of Mansfield* v. *Ogle*, 1 Jur. N.S. 414; *Re Wyse*, 4 Ir. Ch. Rep. 297; *Re Bermingham*, 4 Ir. Rep. Eq. 187, 9 Ir. R. Eq. 385; *Re Murphy*, 5 Ir. Rep. Eq. 147.

(*d*) 2 De G. M. & G. 592.

brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an *express trust*, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust" (*a*). Thus where an annuity which was secured by an express trust had been unpaid for twenty-five years, and no claim of any sort was made in respect of the annuity during that period, it was held that no *arrears* of the annuity, accrued before a claim for the annuity was made, could be recovered from the property charged; for the remedy for the arrears was the same as if there had been no express trust, in which case they would have been irrecoverable; but the section did not affect the right to future payments of the annuity (*b*).

Charities.

25. It was at first doubted whether charities were not altogether unaffected by the Act of 3 & 4 W. 4. c. 27, inasmuch as, by a special exception in their favour, Courts of equity did not oppose to charitable, as they did to ordinary equitable claims, a bar by analogy to the old Statute of Limitation, and the Act of W. 4. contained no express mention of charities (*c*); but it was afterwards held that they were within the operation

(*a*) See *post*, p. 1008.

[(*b*) *Hughes* v. *Coles*, 27 Ch. D. 231. In the last edition of this work a doubt was expressed whether this case was correctly decided, as the annuity itself was admittedly still subsisting, and by the 42nd section of 3 & 4 W. 4. c. 27, six years' arrears of such an annuity are recoverable without any express trust; while the 10th section of the Act of 1874 contemplates the existence of some period during which the arrears could have been recovered. The intention of the section, it was said, seems to have been to limit the period during which the arrears are to be recoverable, and not to destroy the right to recover any arrears, and it hardly seems to justify the argument that as, in the absence of an express trust, the annuity itself would have been barred by the statute, and therefore no arrears of the annuity could have been recoverable, no arrears are recoverable, though the annuity is still subsisting.

There is great force in these observations, especially in reference to the intention of the section. But it is to be noticed that the section says expressly that no action for the arrears is to be brought except within the time within which they would have been recoverable if there were no express trust. Thus the application of the section to the case of arrears involves the assumption that there is *no* express trust; but it is on the contrary basis, namely, that there *is* an express trust, that the annuity is subsisting and recoverable. If there were no express trust, then if the action were brought within twelve years from the time when the right of action first accrued six years' arrears would be recoverable, but if the action were brought after the twelve years, no arrears would be recoverable. In the case under consideration the action was brought after the twelve years.

(*c*) *Incorporated Society* v. *Richards*, 1 Dru. & War. 287, 288.

of the 24th section, though they might be protected by the 25th section relating to express trusts (*a*); and the law was ultimately so settled in the case of *Attorney-General* v. *Magdalen College* (*b*) on appeal to the House of Lords.

Legacy.

26. A *legacy* cannot be recovered under 37 & 38 Vict. c. 57, after twelve years; [and neither the fact that the executor has assented to the legacy nor that the legacy is coupled with an *implied* trust, will prevent the operation of the statute (*c*). But if an *express* trust of a legacy is declared, and] the executor by setting the legacy apart has assumed the character of a trustee, the statute does not run (*d*); and where the legacy was coupled with a trust for the separate use of a *feme covert*, the executor, after assent to the trust, was held to be converted into a trustee (*e*); [but an executor by merely signing a residuary account, and so assenting to the bequest of residue, does not constitute himself a trustee of the fund (*f*).] Where a legacy was given to A. for life with remainder to his children, and the circumstances were such that during the life of A. there was no hand entitled to receive it, the time was held not to run against the children during the life of A. (*g*).

Residue or share of residue.

27. The 8th section of 37 & 38 Vict. c. 57, is, as from 1st January, 1879, substituted for the 40th section of 3 & 4 W. 4. c. 27, and it is presumed that under the substituted as under the original section the limited period will by a liberal construction of the word *legacy* be held to be a bar to suits also in respect of a *residue* or share of residue (*h*).

Intestacy. 23 & 24 Vict. c. 38, s. 13.

28. The 40th section of 3 & 4 W. 4. c. 27, did not extend to the case of *intestacy*, and by 23 & 24 Vict. c. 38, s. 13, no suit or other proceeding can be brought to recover personal estate or any share thereof from the personal representative of any *intestate* but within twenty years after the accruer of the right, unless there has been part payment or some acknowledgment in writing. The 8th section of 37 & 38 Vict. c. 57, appears not to

(*a*) *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jon. & Lat. 182, 7 Ir. Eq. Rep. 580.

(*b*) 18 Beav. 223; 6 H. L. Cas. 189; *Attorney-General* v. *Davey*, 19 Beav. 521, 4 De G. & J. 136; *Attorney-General* v. *Payne*, 27 Beav. 168.

[(*c*) *Re Davis*, 39 W. R. 627.]

(*d*) *Phillippo* v. *Munnings*, 2 M. & Cr. 309; *O'Reilly* v. *Walsh*, 6 Ir. Eq. 555; [and see *Re Smith*, 42 Ch. D. 302.]

(*e*) *Hartford* v. *Power*, 2 Ir. Rep. Eq. 204.

[(*f*) *Re Rowe*, 58 L. J. Ch. 703; 61 L. T. N.S. 581.]

(*g*) *Carroll* v. *Hargrave*, 5 Ir. R. Eq. 123; see *ante*, p. 1002, note (*e*).

(*h*) *Prior* v. *Horniblow*, 2 Y. & C. 201; *Christian* v. *Devereux*, 12 Sim. 264; [*Sutton* v. *Sutton*, 22 Ch. Div. 511, 517;] and see *Payne* v. *Evens*, 18 L. R. Eq. 356; *Carey* v. *Cuthbert*, 7 Ir. R. Eq. 542.

extend to the case of an *intestacy*, and if so, a legatee will under the latter section be barred after twelve years, while his *next of kin* will not be barred until after twenty years (*a*).

Assets subsequently received.

29. The right of the legatee or next of kin may be barred as to assets received more than the prescribed period before the commencement of the suit, but not barred as to assets received since (*b*).

36 & 37 Vict. c. 66, s. 25.

30. By 36 & 37 Vict. c. 66, s. 25, sub-s. 2, it is enacted that "no claim of a *cestui que trust* against his *trustee* (*c*) for any property held on an *express trust*, or in respect of any *breach of such trust*, shall be held to be barred by any statute of limitations." The 37 & 38 Vict. c. 57, s. 10, enacts that from 1st January, 1879, no money or legacy charged on any land or rent shall, though *secured by an express trust*, be *recoverable*, except within the time within which it might have been recovered had there been no express trust.

37 & 38 Vict. c. 57, s. 10.

The first-mentioned enactment applies as between *trustee* and *cestui que trust*, while the 37 & 38 Vict. c. 57, s. 10 applies as between the *land charged* (though *secured* by way of trust) and the persons entitled to the charge (*d*).

[Trustee Act, 1888.]

[31. The Trustee Act, 1888 (51 & 52 Vict. c. 59) provides by section 8 as follows:—

"(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

"(A) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

(B) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitation applies, the trustee or person claiming through him

[(*a*) See *Sutton* v. *Sutton*, 22 Ch. Div. 511, 517.]

(*b*) See *Adams* v. *Barry*, 2 Coll. 290; *Re Johnson*, 29 Ch. D. 964.

[(*c*) In *Seagram* v. *Tuck*, 18 Ch. D. 296, Kay, J., was of opinion that a receiver appointed by the Court was a trustee of money received by him so as not to be able to avail himself of the statute of limitations.]

[(*d*) *Fearnside* v. *Flint*, 22 Ch. Div. 579; *Hughes* v. *Coles*, 27 Ch. D. 231.]

shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

"(2) No beneficiary as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

"(3) This section shall apply only to actions or other proceedings commenced after the 1st day of January, 1890, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations."

By section 1 "Trustee" is to be deemed to include an executor or administrator, and a trustee whose trust arises by construction or implication of law, as well as an express trustee, but not the official trustee of charitable funds; and the provisions of the Act relating to a trustee are to apply as well to several joint trustees as to a sole trustee.

This enactment is obscurely worded, and it will probably require much judicial interpretation before its full meaning is apprehended, and the exact nature of the protection afforded by it is ascertained; but the general effect of it appears to be that in future whenever an action is brought by a *cestui que trust* against a trustee or any person claiming through him, whether in respect of land or money, and whether the defendant is sought to be charged under an express or a constructive trust, there the defendant will be entitled to the protection which the section gives, unless the plaintiff can prove either (1) fraud or fraudulent breach of trust, or (2) that at the time of action brought the trust property which is the subject matter of the action, or the proceeds thereof are still *retained* by the trustee, or (3) that previously to the bringing of the action, such property or proceeds were received by the trustee and *converted to his use*. If the plaintiff bring his case within one of these three categories, the old law will still apply; if not, the section will take effect.

General effect of section 8.

In view of the established rule that when a trustee is proved to have trust property in his possession he must be considered as continuing in possession for the benefit of the *cestui que trust* until he discharges himself by showing that the property has been duly applied in accordance with the trust (*a*), cases under the second head would seem to present most difficulty. If the rule is regarded merely as a rule of evidence, there appears to be no reason why it should not still be applicable; but so far as the rule is one of law, the applicability of it for the purpose under consideration is open to question; as the wording of the section indicates that a plaintiff, in order to take his case out of it, must show as against the trustee an actual retainer in fact, and not a mere retainer by construction of law.

The expression "converted to his use" may also require some consideration. In a recent case where money was received by a firm of solicitors for the purpose of investment, but was never invested, and the firm paid interest on the money as though it were invested, and credited themselves in their books with the interest so paid, Stirling, J., was of opinion (though he did not decide the point) that the money was converted to the use of the firm within the meaning of the section (*b*).

It may be anticipated, therefore, that while the old law will still, by virtue of the exception contained in the opening clause of the section, govern a large number of cases, the operation of the section will extend principally to cases in which the relief sought against the trustee is in the nature of damages for breach of duty by him in the conduct of the trust, as, for example, where the object of the action is to fix him with the loss arising from an improper investment (*c*), or from neglect to call in trust funds, or otherwise to render him chargeable in respect of property which he has not, but which he ought to have, received.

[Nature of the protection afforded by the statute.]

In considering the character of the protection which the new enactment confers, the construction of sub-sect. 1, clause (A) presents great difficulty; indeed, it is open to doubt whether that clause can have any operation at all. An action by a *cestui que trust* against his trustee is necessarily grounded on the fiduciary relation existing between them, and upon the hypothesis which,

[(*a*) See *Metropolitan Bank* v. *Heiron*, 5 Ex. Div. 319, 325, *per* Cotton, L.J.; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 351, *per* Stirling, J.]

[(*b*) *Moore* v. *Knight*, (1891) 1 Ch. 547.]

[(*c*) *Re Bowden*, 45 Ch. D. 444.]

in applying the Statutes of Limitation, the Court is required to make, viz. that the defendant trustee is not a trustee, such an action could never have been brought at all, and consequently no rights and privileges conferred by any statute of limitations could be enjoyed in it (*a*). Thus where an action was brought to make trustees liable for losses in respect of investments negligently made on insufficient security more than six years previously, Fry, L.J., held that the case did not fall within clause (A), and in reference to that clause he observed that it was obvious that "if a person had not been a trustee, he could not be sued for a breach of trust;" and, further, that there was "no right or privilege, so far as he was aware, conferred by any statute of limitations in respect of a breach of trust," and that he should have great difficulty in applying the clause to the case before him (*b*). If the view thus indicated is correct, it is difficult to conceive of a case to which clause (A) can apply (*c*); and if this be so, it follows that clause (B) must be the operative part of the sub-section. Accordingly, in the case last referred to, Fry, L.J., held that clause (B) applied, seeing that if the action had been for debt for money had and received, and such debt had arisen more than six years previously, and there had been no acknowledgment of it in the meantime, the lapse of time would have afforded a good defence (*d*). In that case the action was brought by a trustee, and not by a beneficiary, and it was therefore held that the proviso at the end of clause (B) did not apply; but it would seem that if a beneficiary, originally interested in reversion, brought a similar action at any time within six years after the determination of the interest preceding

[(*a*) The construction of the section is not much assisted by the observation that the Court is only required to make the hypothesis for the purpose of applying the Statute of Limitations. For if the Court is to divest the defendant of his character of trustee, what character is it to attribute to him? It would be embarrassing if the Court were required to decide the merits of a case according to the actual facts, and then to apply the law to it according to an unreal and imaginary state of facts. The construction of the section which would refer the words "such action or other proceeding" to the form of the action and not to the action itself, does not (even in view of the somewhat loose use of the same expression in sub-section 2) seem admissible, and, if admitted, might lead to perplexity.]

[(*b*) *Re Bowden*, 45 Ch. D. 444.]

[(*c*) No doubt an action might be brought in which the plaintiff, though failing to establish the trusteeship of the defendant, would still be entitled to some relief, but to the extent of that relief such action would not, it is apprehended, be within the section at all.]

[(*d*) Even though the claim against the trustee be in the nature of a specialty debt, it would seem to be the intention of the Act that it should be treated as a simple contract debt capable of being barred under 21 Jac. 1. c. 16, s. 3, subject to the proviso as to disabilities contained in section 7 of that statute.]

his own, it could be maintained; but, by force of sub-sect. 2, the judgment obtained in such action would not enure for the benefit of any other beneficiary, as against whom there would be a good defence by virtue of the section. Thus, for example, though a tenant for life may be barred by the statute, the reversioner may still be in a position to sue to the extent of his interest.

[Liability arising out of law of agency and concealed fraud.]

In a recent case, a sum of money was paid, in or before the year 1874, by a client to one of a firm of solicitors for investment; the money was received by the firm, and representations were from time to time made to the client on behalf of the firm to the effect that the investments had been made, and interest was regularly paid to her until 1886, when it was discovered that the money had in fact never been invested. In an action against the representative of one of the partners, who was innocent of the fraud, it was held by Stirling, J., that the decision in *Blair* v. *Bromley* (*a*), which rested on principles of the law of partnership and not of those of trust, was applicable to the case, and was unaffected by the provisions of the recent Act, and that, in conformity with that decision, the innocent partner was deprived of the benefit of the statute by reason of the representations made, which were binding on him as a partner (*b*).]

Account of mesne rents and profits.

Thirdly. We have to enquire *to what extent a Court of equity, upon recovery of the estate, will direct an account against the defendant* of the *mesne rents and profits.*

The right of the *cestui que trust* to an account of *mesne* rents and profits cannot very well be treated of without entering generally into the principles upon which relief in a Court of equity, in respect of *mesne* rents and profits, is founded.

An account of rents and profits may be sought in equity, either (I.) *Independently* of relief respecting the *corpus* of the land, or (II.) As *incident* or *collateral* to it.

Account may be had against an express trustee without reference to the Statutes of Limitation.

First. Where the account is sought *independently* of other relief.

1. If the account be sought against an *express trustee*, then, as the Statutes of Limitation do not [unless the case falls within the provisions of section 8 of the Trustee Act, 1888, already referred to] run between trustee and *cestui que trust*, it will

[(*a*) 5 Ha. 542; 2 Ph. 354.]
[(*b*) *Moore* v. *Knight*, (1891) 1 Ch. 547; and see the Partnership Act, 1890, ss. 11, 15, &c.]

[independently of that enactment] be directed from the time the rents were withdrawn (*a*).

2. If the claim to the rents rest upon a *legal* title, the plaintiff has then a *legal* remedy, and under the old practice could not have come into a Court of equity at all (*b*); except in cases where, from the complicated nature of the accounts, or other particular circumstances, a Court of law would have afforded very inadequate relief (*c*). But an *infant* might have filed a bill for an account upon a legal title (*d*); as every person entering upon an infant's lands is regarded in the light of a bailiff or receiver for the infant (*e*); the rule, however, did not apply where the infant had never had possession, but it had been held by an adverse party (*f*). The jurisdiction against a person entering during the infant's minority remained, though the bill were not filed until after the infant attained twenty-one (*g*). But after six years the Statute of Limitations would be a bar (*h*). And generally all persons might have an account upon a legal title in respect of *mines*, which are a species of trade (*i*), but not of *timber*, without praying an injunction (*j*).

Account in equity could not be had in respect of a legal title.

Except the account were complicated, &c.

Or the plaintiff was an infant.

Or in the case of mines.

Timber.

3. Although where a remedy lay at law an account could not be had in equity against the *pernor* of the profits himself, yet, after his decease, the party entitled to the profits might have considered himself a *creditor*, and have filed a bill in equity for an *account of the assets* (*k*).

Whether after the death of the pernor an account might be had in equity against his executor.

(*a*) See *Attorney-General* v. *Brewers' Company*, 1 Mer. 498: *Mathew* v. *Brise*, 14 Beav. 341.

(*b*) *Jesus College* v. *Bloome*, 3 Atk. 262; and see *Dinwiddie* v. *Bailey*, 6 Ves. 136; *Taylor* v. *Crompton*, Bunb. 95; *Lansdowne* v. *Lansdowne*, 1 Mad. 137.

(*c*) See *O'Connor* v. *Spaight*, 1 Sch. & Lef. 309; *Corporation of Carlisle* v. *Wilson*, 13 Ves. 276.

(*d*) *Gardiner* v. *Fell*, 1 J. & W. 22; *Roberdeau* v. *Rous*, 1 Atk. 543; *Yallop* v. *Holworthy*, 1 Eq. Ca. Ab. 7; *Newburgh* v. *Bickerstaffe*, 1 Vern. 295; *Curtis* v. *Curtis*, 2 B. C. C. 631, *per Cur.*

(*e*) *Dormer* v. *Fortescue*, 3 Atk. 130, *per* Lord Hardwicke; *Pulteney* v. *Warren*, 6 Ves. 89, *per* Lord Eldon; *Morgan* v. *Morgan*, 1 Atk. 489; *Lord Falkland* v. *Bertie*, 2 Vern. 342, *per Cur.*; *Doe* v. *Keen*, 7 T. R. 390, *per* Lord Kenyon; *Hicks* v. *Sallitt*, 3 De G. M. & G. 782; *Pascoe* v. *Swan*, 27 Beav. 508; [*Wall* v. *Stanwick*, 34 Ch. D. 763; *Re Hobbs*, 36 Ch. D. 553.]

(*f*) *Crowther* v. *Crowther*, 23 Beav. 305. But see the observations of V. C. in *Quinton* v. *Frith*, 2 Ir. R. Eq. 414.

(*g*) *Blomfield* v. *Eyre*, 8 Beav. 250; *Hicks* v. *Sallitt*, *Wall* v. *Stanwick*, *ubi supra*.

(*h*) *Lockey* v. *Lockey*, Pr. Ch. 518, and see *Knox* v. *Gye*, 5 L. R. H. L. 674.

(*i*) *Bishop of Winchester* v. *Knight*, 1 P. W. 406; and see *Pulteney* v. *Warren*, 6 Ves. 89; *Lansdowne* v. *Lansdowne*, 1 Mad. 116; *Parrott* v. *Palmer*, 3 M. & K. 632.

(*j*) *Jesus College* v. *Bloome*, 3 Atk. 262; *Higginbotham* v. *Hawkins*, 7 L. R. Ch. App. 676; and see *Pulteney* v. *Warren*, 6 Ves. 89; *University of Oxford* v. *Richardson*, 1b. 701; *Grierson* v. *Eyre*, 9 Ves. 346; but see *Garth* v. *Cotton*, 1 Dick. 211; *Lee* v. *Alston*, 1 B. C. C. 194.

(*k*) *Monypenny* v. *Bristow*, 2 R. & M. 117 (but the bill also prayed deli-

The account in these cases confined to the legal limit.

4. Where, as in the preceding cases, a Court of equity assumed a concurrent jurisdiction with Courts of law, the account was not extended beyond the legal limit of six years, provided the statute were pleaded: it was otherwise, if the defendant did not avail himself of the statute by demurrer, plea, or answer (*a*).

[Present practice.]

[5. Now, by the recent Judicature Acts the several Divisions of the High Court of Justice have co-ordinate jurisdiction, and matters of account are assigned to the Chancery Division of the Court (*b*), and it is conceived that the same limit of time will apply to the account as formerly prevailed in the Court of Chancery, and the statute of limitations cannot be relied upon unless pleaded by the defendant (*c*).]

Where a legal remedy did exist but has expired, equity will not assist.

6. It often happens that a legal remedy *did* exist, but has since, by the death of a party or the determination of the estate, become extinguished. In such a case, as the right *was not*, but only *is*, without a remedy at law, there seems no ground in general for the interference of a Court of equity (*d*).

Unless there be mistake.

7. But if the remedy was lost through *mistake*, the Court upon that principle may interpose: as where a lease was held for the lives of A. and his two daughters B. and C., and A. afterwards married again, and had another daughter, who was also named B., and the landlord on the expiration of the lease by the death of the real *cestui que vie*, did not enter (B. the daughter by the second marriage being mistaken for B. the life named in the lease) Lord Macclesfield said, "Where one has title of entry, and neglects to enter or to bring his ejectment, but sleeps upon it for several years, *as he has no remedy at law for the mesne profits, so neither has he in equity*, for it was his own fault he did not enter, and he shall never come into a Court of equity for relief against his own negligence, or to make the tenant in possession who held over his lease to be but his bailiff or steward, whether he will or not; but in the present case, *by reason of the circumstance of both daughters being of the same name, and the mistake consequent thereon*, the defendant must account for the *mesne* profits from the expiration of the lease" (*e*).

very of title deeds); *Gardiner* v. *Fell*, 1 J. & W. 22 (but the plaintiff was also an infant); and see *Thomas* v. *Oakley*, 18 Ves. 186; *Lansdowne* v. *Lansdowne*, 1 Mad. 116.

(*a*) See *Monypenny* v. *Bristow*, 2 R. & M. 125.

[(*b*) 36 & 37 Vict. c. 66, s. 34.]

[(*c*) See Rules of the Supreme Court, 1883, Order 19, Rule 15.]

(*d*) *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 71, *per* Lord Fitzgibbon; *Hutton* v. *Simpson*, 2 Vern. 722; *Norton* v. *Frecker*, 1 Atk. 525, 526, *per* Lord Hardwicke; and see *Pulteney* v. *Warren*, 6 Ves. 88.

(*e*) *Duke of Bolton* v. *Deane*, Pr. Ch. 516. (Note, in this case Lord

Or fraud.

8. So equity will relieve where the remedy was prevented by *fraud:* as where A. was entitled to a leasehold estate, but B., concealing the deeds, remained in possession until the term had expired, Lord King directed an account of the rents and profits from the time that A.'s title accrued, on the ground that A. had been kept in ignorance of his just rights through B.'s fraudulent concealment of the deed and counterpart (*a*).

Or some default in the defendant.

9. And generally the Court will in all cases lend its aid where the legal process has been lost, not by any delay on the part of the plaintiff, but through *some default* of the defendant (*b*).

Secondly. An account may be sought as *incident or collateral* to the relief. The doctrines upon this subject were very distinctly laid down by Lord Fitzgibbon, afterwards Lord Clare, in *Barnewall* v. *Barnewall* (*c*).

Plaintiff recovering the estate on an equitable title.

A.—1. "The general rule of equity," he said, "is, that if the suit for recovery of possession be properly cognisable in a Court of *equity*, and the plaintiff obtains a decree, the Court will direct an account of rents and profits, as incident to such relief."

Where *cestui que trust* follows trust estate into hands of a volunteer claiming under a trustee.

2. In the case of a *cestui que trust*, who is following the trust estate into the hands of a person *claiming through the trustee*, under such circumstances that the defendant is himself to be regarded as a trustee, it is clear that the *cestui que trust*, by establishing his claim to the land, has thereby established a right to the *mesne* rents and profits from the very commencement of his title (*d*). And *à fortiori* the rule is so where the plaintiff has been under the disability of infancy during the possession of the defendant, because then the latter is regarded as a bailiff or trustee for the former (*e*), or where there has been fraud or suppression on the part of the defendant.

Where plaintiff comes as equitable owner against one in *bonâ fide* adverse possession.

3. Where the case is that of a plaintiff coming forward not strictly as *cestui que trust*, but still as *equitable owner* to recover the estate against one in *bonâ fide adverse possession*, many of the older decisions and *dicta* point to the conclusion that, in the absence of special circumstances, the account will be directed

Hardwicke thought a remedy still existed at law, *Dormer* v. *Fortescue*, Ridg. Rep. *t.* Hardwicke, 190: but Lord Macclesfield was evidently of a different opinion, and so was Lord Fitzgibbon, *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 68.)

(*a*) *Bennett* v. *Whitehead*, 2 P. W. 644; and see *Duke of Bolton* v. *Deane*, Pr. Ch. 516, and *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 66.

(*b*) *Pulteney* v. *Warren*, 6 Ves. 73.

(*c*) 3 Ridg. P. C. 66.

(*d*) *Sturgis* v. *Morse*, 3 De G. & J. 1; 24 Beav. 541; *Wright* v. *Chard*, 4 Drew. 673; *Kidney* v. *Coussmaker*, 12 Ves. 158.

(*e*) *Hicks* v. *Sallitt*, 3 De G. M. & G. 782; *Schroder* v. *Schroder*, Kay, 591; *Pascoe* v. *Swan*, 27 Beav. 508; and cases cited p. 1013, note (*e*).

from the time of the accruer of the title (*a*), subject only to the qualification, that by analogy to the legal defence upon the Statute of Limitations, the account will not be carried back beyond six years before the institution of the suit (*b*). The more recent authorities seem, however, to establish that where there is no trust, no infancy, no fraud, and no suppression, where in short, there is a mere *bonâ fide adverse possession*, the practice of the Court is not to carry back the account beyond the *institution of the suit* (*c*); unless at least there was a demand of possession by the plaintiff or acts equivalent thereto before proceedings were taken, in which case the account will be carried back to the time of the demand or constructive demand (*d*).

Where defendant ignorant of his true character of trustee.

4. In one case, in which the plaintiff was an infant, and the defendant in fact a *trustee*, but *ignorant of his true character*, the account was limited to the filing of the bill, except as to money which had been paid into Court (*e*), but the decision is of doubtful authority (*f*).

Where there has been *laches* in suing.

5. If the *cestui que trust* or equitable owner be guilty of *laches*, the account will not [generally] be carried further back than to the time of the institution of the suit, for it was the plaintiff's own fault that he did not institute his suit at an earlier period (*g*); and if it be a case of *great laches*, the Court will show its displeasure by not directing an account beyond the date of the decree (*h*).

[But the Court will in its discretion allow the account to be carried back, where the circumstances of the case justify it, and the House of Lords has recently, in a case of great *laches*, carried

(*a*) *Dormer* v. *Fortescue*, Ridg. Rep. *t.* Hardwicke, 183; *S. C.* 3 Atk. 130, *per* Lord Hardwicke; *Hobson* v. *Trevor*, 2 P. W. 191; *Coventry* v. *Hall*, 2 Ch. Ca. 134.

(*b*) *Reade* v. *Reade*, 5 Ves. 749, 750; *Harmood* v. *Oglander*, 6 Ves. 215; *Drummond* v. *Duke of St. Albans*, 5 Ves. 439; *Stackhouse* v. *Barnston*, 10 Ves. 470.

(*c*) *Pulteney* v. *Warren*, 6 Ves. 93, *per* Lord Eldon; *Edwards* v. *Morgan*, M'Clel. 541, see 554, 555; *Hicks* v. *Sallitt*, 3 De G. M. & G. 813; *Thomas* v. *Thomas*, 2 K. & J. 79; *Morgan* v. *Morgan*, 10 L. R. Eq. 99; [but see *Hickman* v. *Upsall*, 4 Ch. Div. 144, where the Court of Appeal were of opinion that, in the absence of any special equitable considerations, the account should, by analogy to the legal rule, be carried back for such a period as the Statute of Limitations allowed.]

(*d*) *Penny* v. *Allen*, 7 De G. M. & G. 409; and see *Edwards* v. *Morgan*, M'Clel. 554.

(*e*) *Drummond* v. *Duke of St. Albans*, 5 Ves. 433, see 439.

(*f*) See *Hicks* v. *Sallitt*, 3 De G. M. & G. pp. 811, 815.

(*g*) *Dormer* v. *Fortescue*, Ridg. Rep. *t.* Hardwicke, 183; *S. C.* 3 Atk. 130, *per* Lord Hardwicke; *Cook* v. *Arnham*, 2 Eq. Ca. Ab. 235; *Pettiward* v. *Prescott*, 7 Ves. 541; *Bowes* v. *East London Waterworks Company*, 3 Mad. 375; *Pickett* v. *Loggon*, 14 Ves. 215; *Schroder* v. *Schroder*, Kay, 591; [*Smith* v. *Smith*, 1 L. R. Ir. 206;] see *Kidney* v. *Coussmaker*, 12 Ves. 158.

(*h*) *Acherley* v. *Roe*, 5 Ves. 565.

the account back for six years prior to the institution of the suit (*a*).]

3 & 4 W. 4, c. 27, not material.

6. It would seem that 3 & 4 W. 4. c. 27, has no bearing upon the question how far the account should be carried back, for the suit in these cases is not one for recovery of *rent* within the general purview of the Act (*b*); nor is it a suit within the meaning of the 42nd section for the recovery of *arrears of rent,* which must mean arrears of some definite reserved rent, and not *mesne* profits. If there be any Statute of Limitations applicable by analogy it must be the statute of James (*c*).

How the order for an account is worded.

7. The order to account for *mesne* rents and profits will not, except in a case of gross fraud (*d*), contain the words, "which, *without neglect or default,* the defendant might have received," and, on the other hand, a direction to make *just allowances* in taking the account will be inserted (*e*).

Who is the person to account.

8. The assignee who has had the perception of the rents and profits will, in the first instance, account for them, not, however, with interest (*f*). But if the assignee be insolvent, the trustee who tortiously assigned will then be answerable for the *mesne* rents and profits personally (*g*). The Court has also allowed distinct bills to be filed, first to recover the estate, and afterwards the *mesne profits* (*h*).

If a person have a legal title he cannot sue in equity either for the estate or the *mesne* rents and profits.

B.—1. "If a man," continued Lord Fitzgibbon, "have a mere *legal* title to the possession, he has no right to come into *equity* for the recovery of it; and if he has originally recovered the possession at *law,* he has no manner of right to proceed by *bill* for an account of rents and profits: as his title to the possession was at law, he must proceed for the whole there" (*i*).

Secus, a dowress, or an infant.

2. Upon this rule it must be remarked, that a *dowress* (*j*) and *infant* (*k*) are allowed to proceed in equity upon their legal title,

[(*a*) *Thomson* v. *Eastwood,* 2 App. Cas. 215.]

(*b*) *Grant* v. *Ellis,* 9 M. & W. 113.

(*c*) 21 Jac. 1. c. 16; see observations of L. J. Turner, *Hicks* v. *Sallitt,* 3 De G. M. & G. 816.

(*d*) *Stackpole* v. *Davoren,* 1 B. P. C. 9.

(*e*) *Howell* v. *Howell,* 2 M. & Cr. 478.

(*f*) *Macartney* v. *Blackwood,* Ridg. Lapp. & Sch. 602.

(*g*) *Vandebende* v. *Levingston,* 3 Sw. 625.

(*h*) *Hall* v. *Coventry,* 2 Ch. Ca. 134; *Wright* v. *Chard,* 4 Drew, 673.

(*i*) *Barnewall* v. *Barnewall,* 3 Ridg. P. C. 66. See also *Dormer* v. *Fortescue,* 3 Atk. 130; *Tilly* v. *Bridges,* Pr. Ch. 252; *Owen* v. *Aprice,* 1 Ch. Rep. 32; *Anon. case,* 1 Vern. 105, contradicted 3 Atk. 129.

(*j*) *Mundy* v. *Mundy,* 2 Ves. jun. 122; *D'Arcy* v. *Blake,* 2 Sch. & Lef. 387; *Wild* v. *Wells,* 1 Dick. 3; *Meggot* v. *Meggot,* 2 Id. 794; *Goodenough* v. *Goodenough,* 2 Id. 795; *Curtis* v. *Curtis,* 2 B. C. C. 620; *Moor* v. *Black,* Cas. *t.* Talbot, 126; and see *Dormer* v. *Fortescue,* 3 Atk. 130; *Pulteney* v. *Warren,* 6 Ves. 89; *Agar* v. *Fairfax,* 17 Ves. 552.

(*k*) See *Dormer* v. *Fortescue,* 3 Atk. 130, 134; *S. C.* Ridg. Rep. *t.* Hard-

and incidentally to the relief may pray an account of the *mesne* rent and profits. But by 3 & 4 W. 4. c. 27, s. 41, the arrears of dower are recoverable for six years only next preceding the commencement of the suit. And the account of an infant will be barred, if he do not institute a suit within six years after he has attained his majority (*a*).

If a person applied to equity to aid his action at law he might have come back for an account.

C.—1. "If a party," Lord Fitzgibbon proceeded, "be obliged to come into a Court of *equity* for aid to enable him to prosecute his title at *law*" (as where he could not recover in a legal action by reason of an outstanding term, or because the title deeds to the estate were in the hands of the defendant), "after possession recovered at *law*, there may be cases in which he may come back for an account of rents and profits in the suit depending in *equity*" (*b*). Or the plaintiff, being obliged to resort to equity on one ground, might, to prevent circuity, have asked complete relief in the first instance in that Court; and if his title were established, an account of the rents and profits would have been consequential upon the relief (*c*).

Or being obliged to come to equity on one ground, he might have obtained his whole relief there.

But the account in equity would be restricted to the legal limit, or to the institution of the suit.

2. In these cases the account ought upon principle to be restricted to the same period as that for which the *mesne profits* were recoverable at law; for the plaintiff recovers upon a *legal* title, and the circumstance of his being obliged to sue in equity ought not to vary his rights; and there is authority to support this view (*d*); but in a later case (*e*) Vice-Chancellor Wood stated the rule to be, that in an adverse suit *in the nature of an ejectment suit* the account is directed only from the filing of the bill; and there may be some difficulty in establishing a distinction between cases where the plaintiff sues upon a mere equitable title and cases where his title is rendered partially equitable, so to speak, by the existence of outstanding terms or estates.

Unless the defendant be guilty of fraud.

3. If the plaintiff has been kept out of the estate by the *fraud, misrepresentation,* or *concealment* of the defendant, the Court will suppose that, had the plaintiff known his just rights, he would have commenced his action at law on the first accruer of

wicke, 183, 191; *Pulteney* v. *Warren*, 6 Ves. 89; *Newburgh* v. *Bickerstaffe*, 1 Vern. 295.

(*a*) *Lockey* v. *Lockey*, Pr. Ch. 518; and see *Knox* v. *Gye*, 5 L. R. H. L. 674.

(*b*) See *Dormer* v. *Fortescue*, 3 Atk. 124; *S. C.* Ridg. Rep. *t.* Hardwicke, 176; *Reade* v. *Reade*, 5 Ves. 744.

(*c*) *Townsend* v. *Ash*, 3 Atk. 336; *Edwards* v. *Morgan*, M'Clel. 541; *Reynolds* v. *Jones*, 2 Sim. & St. 206.

(*d*) *Reynolds* v. *Jones*, 2 Sim. & St. 206.

(*e*) *Thomas* v. *Thomas*, 3 K. & J. 85.

his title, and will then decree an account of the *mesne* rents and profits against the defendant from that period (*a*).

SECTION II.

THE RIGHT OF ATTACHING THE PROPERTY INTO WHICH THE TRUST ESTATE HAS WRONGFULLY BEEN CONVERTED.

General rule.

1. If the trust estate has been tortiously disposed of by the trustee, the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust estate, so long as the metamorphosis can be traced.

Tortious conversion.

In *Taylor* v. *Plumer* (*b*) it was argued that although, where the conversion was *in pursuance of the trust*, the newly acquired property would be bound by the original equity (*c*); yet where the conversion was *tortious*, then, as the property purchased was not in a form consistent with the trust, and the *cestui que trust* would be under no obligation to accept it in lieu of the rightful property, the *cestui que trust* should come in as a general creditor, and not be permitted to assert a specific lien. But the distinction was disallowed (*d*); for "An abuse of trust," said Lord Ellenborough, "can confer no rights on the party abusing it, nor on those who claim in privity with him" (*e*).

"Money has no ear-mark."

2. It was said by Lord King that "*money* had no earmark, insomuch that if a receiver of rents should lay out all the money in the purchase of land, or if an executor should realize all his testator's estate, and afterwards die insolvent, yet a Court of equity could not charge or follow the land" (*f*); and *bank notes* and *negotiable bills* have been represented as possessing the

Bank-notes and negotiable bills.

(*a*) *Dormer* v. *Fortescue*, Ridg. Rep. *t.* Hardwicke, 184, 185; *S. C.* 3 Atk. 130.

(*b*) 3 M. & S. 562.

(*c*) *Burdett* v. *Willett*, 2 Vern. 638; *Ryall* v. *Rolle*, 1 Atk. 172; *Ex parte Chion*, 3 P. W. 187, note (A); *Waite* v. *Whorwood*, 2 Atk. 159; *Ex parte Sayers*, 5 Ves. 169; *Anon. case*, Sel. Ch. Ca. 57.

(*d*) The same point has been viewed as not maintainable in several *previous* cases, as in *Whitecomb* v. *Jacob*, 1 Salk. 160; *Lane* v. *Dighton*, Amb. 409; *Ryal* v. *Ryal*, Ib. 413; *Balgney* v. *Hamilton*, Ib. 414. N.B. *Wilson* v. *Foreman*, 2 Dick. 593, is misreported; see *Lench* v. *Lench*, 10 Ves. 519. The subsequent cases are *Lord Chedworth* v. *Edwards*, 8 Ves. 46; *Greatley* v. *Noble*, 3 Mad. 79; *Buckeridge* v. *Glasse*, Cr. & Ph. 126; *Murray* v. *Pinkett*, 12 Cl. & Fin. 784; *Sheridan* v. *Joyce*, 1 Jon. & Lat. 401; *Trench* v. *Harrison*, 17 Sim. 111; *Harford* v. *Lloyd*, 20 Beav. 310; *Frith* v. *Cartland*, 2 H. & M. 417.

(*e*) *Taylor* v. *Plumer*, 3 M. & S. 574.

(*f*) *Deg* v. *Deg*, 2 P. W. 414; and so his Lordship seems to have decided in *Cox* v. *Bateman*, 2 Ves. 19; and see *Waite* v. *Whorwood*, 2 Atk. 159; *Whitecombe* v. *Jacob*, 1 Salk. 160.

same quality. But the notion seems to have originated from some misconception, and cannot be supported. Lord Mansfield observed, "It has been quaintly said that the reason why money cannot be followed is because it *has no earmark*, but this is not true. The true reason is upon account of the currency of it—it cannot be recovered after it has passed in currency. Thus, in the case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bonâ fide* consideration: but before the money has passed in currency an action may be brought for the money itself. Apply this to the case of a bank-note—an action may lie against the finder, it is true, but not after it has been paid away in currency" (*a*). And Lord Ellenborough observed, "The dictum that *money has no earmark* must be understood as predicted only of an undivided and undistinguishable mass of current money; but money kept in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far earmarked as to fall within the rule which applies to every other description of personal property, whilst it remains in the hands of the factor or his general legal representatives" (*b*). The only distinction, then, between *money*, *notes*, or *bills*, and *other chattels*, appears to be this—that the former, for the protection of commerce, cannot be pursued into the hands of a *bonâ fide* holder, to whom they have passed in circulation (*c*), whilst other chattels can be recovered even from a purchaser for valuable consideration, provided he did not buy them in market overt. Money (*d*), notes (*e*), and bills (*f*), may be followed by the rightful owner, where they have not been circulated or negotiated, or if the person to whom they passed had express notice of the trust (*g*). And the only difference to be taken between *money* on the one

(*a*) *Miller* v. *Race*, 1 Burr. 457, 459.

(*b*) *Taylor* v. *Plumer*, 3 M. & S. 575.

[(*c*) *Collins* v. *Stimson*, 11 Q. B. D. 142.]

(*d*) See *Taylor* v. *Plumer*, 3 M. & S. 575; *Miller* v. *Race*, 1 Burr. 457; *Howard* v. *Jemmet*, 3 Burr. 1369; *King* v. *Eggington*, 1 T. R. 370; *Ryall* v. *Rolle*, 1 Atk. 172; [and see *Patten* v. *Bond*, 60 L. T. N.S. 583, 585; 37 W. R. 373.]

(*e*) *Anon. case*, 1 Salk. 126; *S. C.* 1 Raym. 738; *Miller* v. *Race*, 1 Burr. 457; *Taylor* v. *Plumer*, 3 M. & S. 562.

(*f*) *Bennet* v. *Mayhew*, cited *Pulteney* v. *Darlington*, 1 B. C. C. 232, and *Cator* v. *Earl of Pembroke*, 2 B. C. C. 287; *Frith* v. *Cartland*, 2 H. & M. 417; and see *Ex parte Sayers*, 5 Ves. 169; *Lord Chedworth* v. *Edwards*, 8 Ves. 46; *Ryall* v. *Rolle*, 1 Atk. 172; *Raphael* v. *Bank of England*, 17 C. B. 161.

(*g*) *Verney* v. *Carding*, cited *Joy* v. *Campbell*, 1 Sch. & Lef. 345.

hand, and *notes* and *bills* on the other, is that money is not earmarked, and therefore cannot be traced except under particular circumstances, but notes and bills, from carrying a number or date, can in general be identified by the owner without difficulty (*a*).

Trust money mixed with the trustee's money.

3. We may here put the case of trust money mixed in the same heap with the trustee's money. It may be said, that the trust money has, like water, run into the general mass, and become amalgamated, and therefore the *cestui que trust* has no *lien*. But clearly this cannot be maintained, for suppose a trustee, partly with his own money and partly out of the trust fund, to have purchased an estate. It cannot be predicated of any particular part of the estate that it was purchased with the *cestui que trust's* money, and yet the *cestui que trust* has a *lien* upon the whole for the amount that was misemployed (*b*). And it follows in the other case, that though the identical pieces of coin cannot be ascertained, yet, as there is so much belonging to the trust *in* the general heap, the *cestui que trust* is entitled to take so much *out* (*c*).

Assets employed in trade.

4. Upon a similar principle, if a *surviving partner*, being the executor of a deceased partner, continue the testator's capital without authority in his trade, though the capital may consist only of the stock and debts of the partnership, and these may undergo a continual course of change and fluctuation, yet the Court follows the trust capital throughout all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital so continually altered and changed (*d*).

Money followed through a bank.

5. And so if a trustee pay trust money into a bank to the account of himself, not in any way earmarked with the trust, and also keep private monies of his own to the same account, the Court will disentangle the account, and separate the trust from the private monies, and award the former specifically to the *cestui que trust* (*e*). [And the same rule will apply equally in

(*a*) See *Ford* v. *Hopkins*, 1 Salk. 283.

(*b*) *Lane* v. *Dighton*, Amb. 409; *Lewis* v. *Madocks*, 17 Ves. 57, 58; *Price* v. *Blakemore*, 6 Beav. 507; *Hopper* v. *Conyers*, 2 L. R. Eq. 549; [and see *In re Pumfrey*, 22 Ch. D. 255.]

(*c*) See *Pennell* v. *Deffell*, 4 De G. M. & G. 382; *Ex parte Sayers*, 5 Ves. 169; *Ernest* v. *Croysdill*, 2 De G. F. & J. 175, *Frith* v. *Cartland*, 2 H. & M. 417; [*Re Hallett's Estate*, 13 Ch. Div. 696.]

(*d*) See pp. 294, 295, *supra*.

(*e*) *Pennell* v. *Deffell*, 4 De G. M. & G. 372. The observations of L. J. Knight Bruce, p. 381, are well worth a careful perusal. [*Re Hallett's Estate*, 13 Ch. Div. 696; *Birt* v. *Burt*, 11 Ch.

the case of a person occupying a fiduciary position, although not an express trustee, as a factor, or agent (*a*); and has even been applied to the case of a person borrowing money for a specific purpose (*e.g.* for the purchase by him of property to be afterwards mortgaged to the lender), and not applying it for the purpose for which it was advanced (*b*). It was formerly held that] as against the *cestui que trust* the general rule must prevail that the sums drawn out must be attributed to the earliest deposits, according to the order in which they were paid in (*c*); [but, where the question is only between the *cestui que trust* and the trustee, the rule has been modified, and so long as the trustee has money of his own standing to the account, drawings by him for his private purposes will be attributed to his private money, leaving the trust money intact (*d*). This follows from the general principle that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally, and in fact, done wrongly; so far as possible the honest intention of drawing out his own money must be attributed to the trustee. Where, however, the trustee has exhausted his own money, and the account at the bank is composed of moneys belonging to different trusts, the general rule will prevail, and the sums drawn out will, in the absence of evidence to the contrary, be attributed to the earliest deposits (*e*).] If trust money be paid into a bank to an account headed in such a way that the banker cannot fail to know, and must be taken to know that it was a trust account, though the bankers are not bound to enquire into the propriety of the trustee's cheques upon that account, yet if the trustee becomes bankrupt and has overdrawn his *private* account, the bank cannot apply the credit of the *trust account* by way of set-off against the debit of the private account (*f*).

D. 773, note; and see *Ex parte Hardcastle*, 44 L. T. N.S. 523; 29 W. R. 615, where the case failed on the identification of the trust funds.]

[(*a*) *Re Hallett's Estate*, 13 Ch. Div. 696, where the earlier cases are discussed; *Birt* v. *Burt*, 11 Ch. D. 773, note; but there is no fiduciary relation between banker and customer; *Foley* v. *Hill*, 2 H. L. C. 28; *Marten* v. *Rocke*, 53 L. T. N.S. 946; 34 W. R. 253; in the absence of special circumstances; *Ex parte Plitt*, 60 L. T. N.S. 397; 37 W. R. 463.]

[(*b*) *Gibert* v. *Gonard*, 52 L. T. N.S. 54; 33 W. R. 302; 54 L. J. N.S. Ch. 439; and see *Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. Div. 264.]

[(*c*) *Pennell* v. *Deffell*, 4 De G. M. & G. 372; *Frith* v. *Cartland*, 2 H. & M. 417; *Brown* v. *Adams*, 4 L. R. Ch. App. 764.]

[(*d*) *Re Hallett's Estate*, 13 Ch. Div. 696; overruling *Pennell* v. *Deffell*, *ubi supra*, and the other earlier cases.]

[(*e*) *Re Hallett's Estate*, *ubi supra*; *Hancock* v. *Smith*, 41 Ch. Div. 456; *Re Ulster Building Society*, 25 L. R. Ir. 24, 29; *Re Murray*, 57 L. T. N.S. 223.]

(*f*) *Ex parte Kingston*, 6 L. R. Ch. App. 632.

[Where a banking company were employed as agents to collect money and to remit it to their employers, and they received the money in cash and placed it with the other cash of the bank, and informed their employers that the money had been remitted, but before it was actually remitted the bank failed, it was held that the money was part of the general assets of the bank, and that the employers of the bank had no priority over the other creditors (*a*); but this case has been disapproved of by the Court of Appeal and cannot be regarded as law (*b*).

[Trust money employed in business of partnership.]

6. By the Partnership Act, 1890 (*c*), section 13, if a partner, being a trustee, improperly employs trust property in the business or on account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein, but nothing in the section is to prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

[Different trust funds intermixed.]

7. In a recent Scotch case where the funds of two charities had been intermixed and dealt with as a common fund, and part of the trust funds, which, however, could be traced as having originally belonged to one of the charities, had been invested in land which subsequently increased very largely in value, it was held that the profit must be taken to have been made by the whole trust, and must be apportioned between the charities in the proportions in which they were originally entitled to the common fund (*d*).]

Following money into land with reference to the Statute of Frauds.

8. In tracing money into *land*, the principal difficulty in the old cases arose from the Statute of Frauds (*e*), the 7th section enacting that all declarations of trusts of land should be manifested and proved by some writing. It was formerly held that parol evidence, to prove a state of circumstances from which a Court of equity would elicit a constructive trust, was inadmissible (*f*); but Lord Hardwicke, on the ground that constructive trusts were excepted out of the Statute of Frauds (*g*), ruled that parol evidence might be given (*h*); and Sir T. Clarke, in the

[(*a*) *Ex parte Dale and Company*, 11 Ch. D. 772; and see *Whitecomb* v. *Jacob*, 1 Salk. 160; *Ryall* v. *Rolle*, 1 Atk. 165, 172; *Ex parte Dumas*, 1 Atk. 232; *Scott* v. *Surman*, Willes, 400; *Ex parte Plitt*, 37 W. R. 463; 60 L. T. N.S. 397.]

[(*b*) *Re Hallett's Estate*, 13 Ch. Div. 696.]

[(*c*) 53 & 54 Vict. c. 39.]

[(*d*) *The Lord Provost, &c., of Edinburgh* v. *The Lord Advocate*, 4 App. Cas. 823.]

(*e*) 29 Car. 2. c. 3.

(*f*) See *supra*, Chap. ix. s. 2, p. 176.

(*g*) By the 8th section; see p. 203, *supra*.

(*h*) *Ryal* v. *Ryal*, Amb. 413; and see *Anon. case*, Sel. Ch. Ca. 57.

leading case of *Lane* v. *Dighton* (*a*) (though had the point been *res integra*, he should have thought the evidence not admissible within the statute) followed the authority of Lord Hardwicke; and whatever doubts might formerly have been entertained upon the subject the law is now settled (*b*).

Trustee bound to invest a certain sum, and purchasing at that price.

9. The mere fact that a trustee has trust money in his hands when he makes a purchase, is not sufficient to attach the trust on lands bought by him (*c*). But if a trustee who is under an obligation to lay out money on land, purchase an estate at a price corresponding with the sum to be invested, the Court, independently of positive evidence, may presume the trust money to have been so applied (*d*). But no such presumption can be raised where it can be shown that the trustee, though under such an obligation, was mistaken in the nature of the trust, and acted under a different impression (*e*). And where a tenant for life with power to sell and invest in the purchase of other land purchased lands with *borrowed money*, and many years afterwards sold the settled estates, and applied the purchase money partly in discharge of the debts thus contracted by him, it was held that the purchased lands could not be treated as liable to the trusts of the settled estates (*f*).

Covenant to settle his whole personal estate and a subsequent purchase is made.

10. In *Lewis* v. *Madocks* (*g*), no evidence to connect any particular fund with the estate was necessary, for a person having covenanted on his marriage to settle *all* the personalty he should acquire upon certain trusts, and having afterwards invested parts of his personalty on land, it was clear that the money expended upon the estate was bound by the trust, and could therefore be followed into the purchase.

Whether *cestui que trust* can take the land itself, or has only a lien.

11. Where a trust fund is traceable into land, and the fund constitutes a part only of the money laid out in the purchase, the Court has usually given a lien merely on the land for the trust money and interest (*h*); but where the entire land is clearly the fruit of the trust fund, the *cestuis que trust* must upon principle have a right to take the land itself, whether

(*a*) Amb. 409.
(*b*) *Lench* v. *Lench*, 10 Ves. 517; *Hopper* v. *Conyers*, 2 L. R. Eq. 549.
(*c*) *Sealy* v. *Stawell*, 2 Ir. R. Eq. 326.
(*d*) See *Anon. case*, Sel. Ch. Ca. 57; *Price* v. *Blakemore*, 6 Beav. 507; *Mathias* v. *Mathias*, 3 Sm. & G. 552.
(*e*) *Perry* v. *Phelips*, 4 Ves. 108, see 116, 117.
(*f*) *Denton* v. *Davies*, 18 Ves. 499.
(*g*) 8 Ves. 150; *S. C.* 17 Ves. 48.
(*h*) *Lane* v. *Dighton*, Amb. 409; *Lewis* v. *Madocks*, 8 Ves. 150; 17 Ves. 48, see 57; *Price* v. *Blakemore*, 6 Beav. 507; *Scales* v. *Baker*, 28 Beav. 91; *Hopper* v. *Conyers*, 2 L. R. Eq. 549.

the purchase was or not of the description authorized by the trust (*a*).

[12. A trustee, who has himself concurred in a breach of trust, whereby the trust estate has been improperly spent upon buildings upon his co-trustee's property, may, notwithstanding such concurrence, take proceedings against his co-trustee to follow the trust property (*b*).] [Trustee may follow trust money though he has concurred in breach.]

13. Where trust money is followed into the hands of a person who, as having received it by collusion, or with express notice of the trust, becomes himself a trustee, he is precluded from pleading the Statute of Limitations (*c*). Statute of Limitations.

[14. It is not a fraudulent preference on the part of a trustee who has misappropriated trust money to make it good on the eve of bankruptcy (*d*). [Repayment of trust money not a fraudulent preference.]

15. Money obtained by fraud cannot be followed into the hands of persons who take it in satisfaction of a *bonâ fide* debt without notice (*e*). But where the payment is made without any legal consideration, as for the purpose of stifling a prosecution, the money may be followed by a person who is not *in pari delicto* by being a party to the illegal act (*f*). [Fraud or illegality.]

16. Where an agent corruptly receives commission he is accountable as a constructive trustee (*g*), but until some judgment has been obtained against him by the principal, the money cannot be treated as the money of the principal so as to entitle him to follow it into investments made by the agent, and obtain an injunction against his dealing therewith (*h*).] [Corrupt receipt of commission.]

(*a*) *Trench* v. *Harrison*, 17 Sim. 111. Lord Manners, in *Savage* v. *Carroll*, 1 B. & B. 265, see 284, seems to have thought otherwise; but this was before *Taylor* v. *Plumer*, p. 1019, *supra*.

[(*b*) *Carson* v. *Sloane*, 13 L. R. Ir. 139; *Price* v. *Blakemore*, 6 Beav. 507.]

(*c*) *Ernest* v. *Croysdill*, 3 De G. F. & J. 175; 6 Jur. N. S. 740; *Rolfe* v. *Gregory*, 11 Jur. N. S. 97; *S. C.* 4 De G. J. & S. 576; see *post*, p. 1029.

[(*d*) *Ex parte Stubbins*, 17 Ch. Div. 58; *Ex parte Tuylor*, 18 Q. B. Div. 295; *Ex parte Ball*; W. N. 1886, p. 211; 1887, p. 21; 35 W. R. 264.]

[(*e*) *Northern Counties, &c., Insurance Company* v. *Whipp*, 26 Ch. Div. 482, 495.]

[(*f*) *Ex parte Wolverhampton Banking Company*, 14 Q. B. D. 32.]

[(*g*) *Supra*, p. 196.]

[(*h*) *Lister & Co.* v. *Stubbs*, 45 Ch. Div. 1; and see *Re Thorpe*, (1891) 2 Ch. 360.]

SECTION III.

OF THE REMEDY FOR A BREACH OF TRUST AGAINST THE TRUSTEE PERSONALLY.

Fraudulent Trustees' Punishment Act.

1. We may remark *in limine* that, by a modern statute (*a*), a breach of trust has been made a *criminal* act, and that if a trustee of any property for the benefit of another person, or for any public or charitable purpose, *with intent to defraud*, appropriates the same to his own use or for any other purpose than the legitimate one, he is now to be deemed guilty of a *misdemeanour* and be liable to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without solitary confinement (*b*). But no prosecution is to be commenced without the sanction of Her Majesty's Attorney-General, or, in the vacancy of that office, of the Solicitor-General; nor, where civil proceedings have been taken, without the sanction of the Court of civil judicature before which the same are pending (*c*). And *no remedy* at law or in equity is to be *affected*, nor is the Act to *prejudice any agreement entered into or security given by any trustee*, having for its object the restoration or repayment of any trust property misappropriated.

Effect of Act upon civil proceedings.

2. The last mentioned enactment of the statute leaves the remedy of the *cestui que trust* in reference to civil proceedings exactly as it stood before the Act. It relieves him from such obligation, if any, as the statute might have been held to impose of prosecuting the fraudulent trustee before proceeding to recover his property (*d*); and, notwithstanding the general

(*a*) 24 & 25 Vict. c. 96, ss. 80, 86, re-enacting substantially 20 & 21 Vict. c. 54, which had been repealed by 24 & 25 Vict. c. 94.

[(*b*) Section 1 of the Penal Servitude Act, 1891 (55 & 56 Vict. c. 69) provides that where under any enactment in force when the section comes into operation (August 5, 1891) the Court has power to award a sentence of penal servitude, the sentence may, at the discretion of the Court, be for any period not less than three years, and not exceeding five years, or any greater period authorized by the enactment; and further, that, in lieu of a sentence of penal servitude, the Court may award imprisonment for any term not exceeding two years, with or without hard labour.]

(*c*) See *Wadham* v. *Rigg*, 1 Dr. & Sm. 216.

(*d*) As to the necessity for prosecuting before taking civil proceedings in cases of *felony*, see *Cox* v. *Paxton*, 17 Ves. 329; *White* v. *Spettigue*, 13 M. & W. 603; *Scattergood* v. *Sylvester*, 15 Q. B. 506; [*Midland Insurance Company* v. *Smith*, 6 Q. B. D. 561; *Roope* v. *D'Avigdor*, 10 Q. B. D. 412.]

policy of the law (*a*), may perhaps be held to go so far as to authorize an agreement for the restoration of the trust property, even though the withdrawal of an indictment against the trustee be one of the terms of the arrangement.

Where a solicitor is party to a breach of trust.

3. A solicitor, who *wilfully advises a breach of trust*, is liable to be struck off the roll (*b*). And *à fortiori* a solicitor, who, being a trustee, himself commits a *wilful breach of trust*, is amenable to the same penalty (*c*). But a solicitor (in common with any other agent) is not liable as a constructive trustee for the consequences of acts done by him, *pursuant to instructions* from his clients, who are trustees, and exercising their legal powers, unless he either receive some part of the trust property or assist with knowledge in some dishonest and fraudulent design on the part of his clients (*d*). Thus a testator devised and bequeathed his residuary estate to Crush, Lugar, and Addy, his three trustees and executors, upon trust for his four children, viz. Ann (who married Barnes), Susan (who married the trustee, Addy), and William and Mary. The shares of Ann and Susan were to be held upon trust for their separate use respectively, without power of anticipation, with remainder to their children; and the will contained a power of appointment of new trustees vested in the executors, but there was no authority to diminish their number. Crush renounced and disclaimed, and Clarke was appointed in his place; but Lugar and Clarke both died, and Addy became sole trustee of the trust fund. The shares of Susan and William had been satisfied, and Mary's share was not in question; but as to the share of *Ann*, the wife of Barnes, there being disputes between Addy, the trustee, and Barnes, Addy instructed his solicitor, Duffield, to appoint Barnes sole trustee in place of Addy, so far as regarded the share of Ann Barnes. Duffield represented the danger of placing the fund under the power of a single trustee, and advised Addy not to do it; but, as he persisted, he advised him at all events to take a deed of indemnity. Duffield afterwards declined to proceed unless a separate solicitor acted for Mrs. Barnes and her children, and Preston was thereupon appointed such solicitor, and he wrote to Ann Barnes a letter explanatory of the risk, but nevertheless

(*a*) See *Keir* v. *Leeman*, 9 Q. B. 371; [*Williams* v. *Bayley*, 1 L. R. H. L. 200; *Flower* v. *Sadler*, 10 Q. B. Div. 572; *Windhill Local Board* v. *Vint*, 45 Ch. Div. 351; *Jones* v. *Merionethshire Building Society*, (1891) 2 Ch. 587.]

(*b*) *Goodwin* v. *Gosnell*, 2 Coll. 457; see p. 462.

(*c*) *Re Chandler*, 22 Beav. 253; *Re Hall*, 2 Jur. N. S. 633.

(*d*) *Barnes* v. *Addy*, 9 L. R. Ch. App. 251, *per* Lord Selborne.

Ann Barnes wished it to be done. The deed of appointment of Barnes as sole trustee, and the deed of indemnity which had been proposed by Duffield, were then approved by Preston and executed; and Addy transferred the share of Ann Barnes (amounting, after certain deductions, to 2074*l.* consols), into the name of Barnes, who the next day sold it out, and applied the proceeds in his business and became bankrupt. The fund having been lost, the children of Ann Barnes filed their bill against the administratrix of Addy (then deceased), and against Duffield and Preston, to compel them to restore the trust fund. Addy's estate was declared liable, but the bill was dismissed as against Duffield and Preston. The plaintiffs appealed from this dismissal, and rested their case on the solicitors being parties to a threefold breach of trust, viz., first, the appointment of a single trustee; secondly, the transfer of the fund into the name of a sole trustee; and, thirdly, the division of the fund, so that there should be a separate trustee of each part. There was no evidence that either Duffield or Preston suspected, or had reason to suspect, the good faith of Barnes, and Lord Selborne and Lord Justice James concurred in the principle above laid down, and dismissed the appeal with costs (*a*). [And in a recent case it has been held that in order that a solicitor of a trustee may be debarred from accepting payments from the trustee out of the trust estate in respect of costs properly incurred, notice must be brought home to him that at the time when he accepted the payments the trustee had been guilty of such a breach of trust as would altogether preclude him from resorting to the estate for payment of costs (*b*).]

Civil proceedings.

4. As regards *civil* proceedings for compensation against the trustee, the *cestui que trust*, in the event of a breach of trust, is entitled to institute proceedings against the trustee to compel a compensation from him personally for the loss which the trust estate has sustained; and if the plaintiff has a vested interest and has reason to apprehend that the trustee is going abroad, he may obtain a writ of *ne exeat regno* (*c*). [But the breach of trust must be brought home to the trustee, and if there is a doubt whether the trustee has acted honestly and *bonâ fide* in

(*a*) *Barnes* v. *Addy*, 9 L. R. Ch. App. 244.

[(*b*) *Re Blundell*, 40 Ch. Div. 370.]

(*c*) *Hawkins* v. *Hawkins*, 1 Dr. & Sm. 75. As to the assignment of a right to sue for redress in respect of a breach of trust, see *Hill* v. *Boyle*, 4 L. R. Eq. 260. If a trustee has made default in payment of a trust fund which was in his hands, and was misapplied, he can be attached, though he may have spent the money before the date of the order for payment, and is unable to pay, and such trustee is within the third exception of the Debtors Act, 32 & 33 Vict. c. 62, s. 4; *Middleton* v. *Chichester*, 6 L. R. Ch. App. 152; and see *post*, p. 1050.

the discharge of his duty, although he may have made mistakes, the doubt should be determined in favour of the trustee (*a*).]

Statute of Limitations.

5. This right to sue was not (previously to the 1st of January, 1890 (*b*)) affected by the Statute of Limitations (*c*). And even a trustee, who was also a *cestui que trust* in remainder, and by whose neglect the tenant for life got possession of the fund, has been allowed, notwithstanding the statute, to recover it from the estate of the tenant for life who wrongfully possessed himself of it (*d*); and an agent who collects debts for his employer under a power of attorney to collect debts and hold the proceeds upon certain trusts, is regarded as a trustee, and cannot [otherwise than under the provisions of the Trustee Act, 1888, sect. 8], plead the statute (*e*). [So directors of a company who have improperly paid dividends out of capital were not permitted to plead the statute (*f*).] And in like manner the personal representative or heir or devisee of a deceased trustee who has committed a breach of trust, or a legatee or next of kin in possession of the assets, with notice of the breach of trust (*g*), must be

[(*a*) *Per* Jessel, M.R.; *Re Owens*, 47 L. T. N.S. 61.]

[(*b*) See 51 & 52 Vict. c. 59, sec. 8, *ante*, p. 1008.]

(*c*) *Phillipo* v. *Munnings*, 2 M. & C. 309; *Browne* v. *Radford*, W. N. 1874; p. 124; *Milnes* v. *Cowley*, 4 Price, 103; *Cator* v. *Croydon Railway Company*, 4 Y. & C. 405; *Downes* v. *Bullock*, 25 Beav. 61; *Clark* v. *Hoskins*, 36 L. J. N.S. Ch. 689; *Butler* v. *Carter*, 5 L. R. Eq. 276; *Brittlebank* v. *Goodwin*, 5 L. R. Eq. 545; *Hartford* v. *Power*, 2 Ir. Rep. Eq. 204; *Woodhouse* v. *Woodhouse*, 8 L. R. Eq. 514; *Burdick* v. *Garrick*, 5 L. R. Ch. App. 233; *Stone* v. *Stone*, 5 L. R. Ch. App. 74; *Mutlow* v. *Bigg*, 18 L. R. Eq. 246, reversed on other grounds, 1 Ch. Div. 385; *Watson* v. *Saul*, 1 Giff. 188; *Harris* v. *Harris*, (No. 2), 29 Beav. 110; *Ernest* v. *Croysdill*, 2 De G. F. & J. 175; *Rolfe* v. *Gregory*, 11 Jur. N. S. 98; *S. C.* 4 De G. J. & S. 576; and see *Bright* v. *Legerton*, 2 De G. F. & J. 606; *Tyson* v. *Jackson*, 30 Beav. 384; *Cresswell* v. *Dewell*, 4 Giff. 460; *Burrowes* v. *O'Brien*, 15 Ir. Ch. Rep. 424; *Burrows* v. *Gore*, 6 H. L. C. 907; [*Metropolitan Bank* v. *Heiron*, 5 Ex. Div. 319.] As to the cases of *Dunne* v. *Doran*, 13 Ir. Eq. R. 545, and *Brereton* v. *Hutchinson*, 3 Ir. Ch. Rep. 361; see *Brittlebank* v. *Goodwin*, 5 L. R. Eq. 551. But see *Carroll* v. *Hargrave*, 5 I. R. Eq. 123. As to suits between solicitor and client, see *Re Hindmarsh*, 1 Dr. & Sm. 129.

(*d*) *Butler* v. *Carter*, 5 L. R. Eq. 276.

(*e*) *Burdick* v. *Garrick*, 5 L. R. Ch. App. 233. Solicitors receiving money in the character of agents can in general plead the statute; *Re Hindmarsh*, 1 Dr. & Sm. 129; *Watson* v. *Woodman*, 20 L. R. Eq. 721; [*Dooby* v. *Watson*, 39 Ch. D. 178;] but not so, where they receive monies bound expressly by a particular trust of which they are conusant: see *Burdick* v. *Garrick*, 5 L. R. Ch. App. 240; [*Re Bell*, 34 Ch. D. 462; and see *Power* v. *Power*, 13 L. R. Ir. 281, where the principle was laid down, that "where there is not merely an agency between the parties, but also a superadded fiduciary relation, the remedy of the principal, who is then also the *cestui que trust*, is not one arising merely from contract, or duty springing from such contract, where a common law liability would alone exist, but is one to be dealt with on the equitable relation of trustee and *cestui que trust*."]

[(*f*) *Re Flitcroft's case*, 21 Ch. Div. 519.]

(*g*) *Woodhouse* v. *Woodhouse*, 8 L. R. Eq. 514; see p. 521.

answerable in the same way as the testator or intestate would have been (*a*). But though the statute could not be pleaded in bar, yet where the trust fund had no actual existence, but the suit was for damages, gross *laches* would *per cursum cancellariæ* disentitle a plaintiff to relief, the Statute of Limitations leaving it open to a Court of equity to act upon its own rule as to laches and acquiescence (*b*). [Where a suit is founded on a breach of duty or fraud committed by a person in the position of a trustee, as where a director receives a bribe to neglect his duty, time will commence to run so soon as the fraud has been discovered (*c*).]

36 & 37 Vict. c. 66.

6. By a recent statute, 36 & 37 Vict. c. 66, s. 25, sub-s. 2, it was expressly enacted that no claim by a *cestui que trust* against his trustee in respect of any breach of an express trust, should be barred by any statute of limitations. But 37 & 38 Vict. c. 57, s. 10, enacts that from 1st January, 1879, no money or legacy *charged on any land or rent* shall, though *secured by an express trust*, be recoverable but within the time allowed for recovery had there been no express trust (*d*).

37 & 38 Vict. c. 57.

[Trustee Act, 1888.]

[The provisions of the Trustee Act, 1888, sect. 8, to which reference has already been made (*e*), will not affect cases of the kind now under consideration where the claim of the *cestui que trust* against the trustee is "founded upon fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use," and if a claim of that description can be substantiated, the trustee will henceforth, as heretofore, be precluded from pleading the statute; but if not then it would seem that sub-sect. 8 (B) of that section will be applicable, and that the lapse of six years will be a protection to the trustee, as it would have been in an ordinary action of debt.]

Trust money taken by a firm.

7. Where the trustee is one of a firm, and trust money finds its way into the coffers of the firm, with the *sanction of the partners*, and is misapplied, not only the trustee but the partners also are liable (*f*). And if one of a firm of solicitors, in transact-

(*a*) *Story* v. *Gape*, 2 Jur. N.S. 706; *Obee* v. *Bishop*, 1 De G. F. & J. 137; *Brittlebank* v. *Goodwin*, 5 L. R. Eq. 545; [*Re Burge*, 57 L. T. N.S. 364.] But see the Irish cases, *Dunne* v. *Doran*, 13 Ir. Eq. Rep. 545; *Brereton* v. *Hutchinson*, 3 Ir. Ch. Rep. 361; *Carroll* v. *Hargrave*, 5 Ir. R. Eq. 123.

(*b*) *Philips* v. *Pennefather*, 8 Ir. R. Eq. 486, *per* Sir Jos. Napier, C.S.

[(*c*) *Metropolitan Bank* v. *Heiron*, 5 Ex. Div. 319.]

(*d*) See *ante*, p. 1008.

[(*e*) See *ante*, p. 1008, *et seq.*]

(*f*) *Eager* v. *Barnes*, 31 Beav. 579; [and see *Blyth* v. *Fladgate*, (1891) 1

ing business with trustees, practise a fraud upon the trustees, [or is a party to an improper investment of the trust fund (*a*),] the co-partners are liable (*b*).

[The Partnership Act, 1890 (*c*), sect. 13, enacts that "If a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein: Provided (1) this section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and (2) nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control." By section 5 of the same Act "every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner."] [Partnership Act, 1890.]

8. The remedy for a breach of trust lies against a *corporation* as well as against an individual; and a municipal corporation since the Municipal Corporation Act, has been held liable for a breach of trust committed before the Act (*d*). Corporation liable for breach of trust.

9. If a trustee dispose of the trust estate to a purchaser for valuable consideration *without notice*, the *cestui que trust* may compel the trustee to purchase other lands of equal value to be settled upon the like trusts (*e*), or the *cestui que trust* may at his option take the proceeds of the sale, with interest, or the present estimated value of the lands sold, after deducting any increase of price caused by subsequent improvements (*f*). Land tortiously sold.

[10. If a trustee for the separate use of a married woman for life allow the husband to get possession of and misapply the [Trustee allowing husband to misapply the fund.]

Ch. 337, 352; *Moore* v. *Knight*, (1891) 1 Ch. 547, *ante*, p. 1012.]

[(*a*) *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 352.]

(*b*) *Sawyer* v. *Goodwin*, 36 L. J. N.S. Ch. 578; *Long* v. *Hay*, W. N. 1871, p. 134, and as to the liability of the representative of a deceased partner, see *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 366.

[(*c*) 53 & 54 Vict. c. 39.]

(*d*) *Attorney-General* v. *Corporation of Leicester*, 9 Beav. 546.

(*e*) See *Mansell* v. *Mansell*, 2 P. W. 681; *Vernon* v. *Vaudrey*, Barn. 303; *Macnamara* v. *Carey*, 1 Ir. R. Eq. 23; and see 37 & 38 Vict. c. 78.

(*f*) See *Attorney-General* v. *Burgesses of East Retford*, 2 M. & K. 35; but see *Denton* v. *Davies*, 18 Ves. 504.

trust fund without the wife's knowledge, he is liable for the income which would but for the breach of trust have accrued on the fund, notwithstanding that the married woman had acquiesced in the payment of the income prior to the breach of trust to her husband, for in such a case no assent on her part to the retainer by the husband of the subsequent income can be presumed (*a*).]

Neglect to accumulate.

11. Where a testator had directed an investment in Three per Cent. Consolidated Bank Annuities and an *accumulation* of the dividends, the trustee was decreed to purchase the sum of stock which the fund, if regularly invested, would have produced, and to make good the amount due in respect of subsequent accumulation (*b*).

Covenant to transfer stock.

12. If a settlement contain a covenant for the transfer of stock, [or the creation of a charge upon property,] and the trustee *neglects to enforce the transfer* (*c*), [or *the creation of the charge* (*d*),] he is liable for all the consequences.

Neglect to sell.

13. So if there be a trust for sale, and the trustee *neglects to sell* for a great length of time, whereby the property is deteriorated, he is answerable for the loss (*e*).

Policy forfeited.

14. If a trustee suffer a *policy of insurance to become forfeited* through neglect to pay the premiums, he is bound to make good the loss to the *cestui que trust* (*f*); provided, that is, he had funds in hand for payment of the premiums, for if he had none and could procure none, he would be exempt from liability (*g*). He may, however, either advance money himself, or borrow it from another on the security of the policy, and a *lien* on the policy will be allowed (*h*). If there be no means of

[(*a*) *Dixon* v. *Dixon*, 9 Ch. D. 587.]

(*b*) *Pride* v. *Fooks*, 2 Beav. 430; see *Byrchall* v. *Bradford*, 6 Mad. 13; *S. C.* Id. 235; and see *ante*, p. 371.

(*c*) *Fenwick* v. *Greenwell*, 10 Beav. 412.

[(*d*) *Cleary* v. *Fitzgerald*, 7 L. R. Ir. 229.]

(*e*) *Devaynes* v. *Robinson*, 24 Beav. 86; *Sculthorpe* v. *Tipper*, 13 L. R. Eq. 232.

(*f*) *Marriott* v. *Kinnersley*, Taml. 470.

(*g*) Now so decided, *Hobday* v. *Peters* (No. 3), 28 Beav. 603.

(*h*) *Clack* v. *Holland*, 19 Beav. 273, 276; *per Cur.*; *Re Layton's Policy*, W. N. 1873, p. 49; and see *Johnson* v. *Swire*, 3 Giff. 194; *Todd* v. *Moorhouse*, 19 L. R. Eq. 69. [It has been said that the only cases in which a lien upon the money secured by a policy can be created in favour of a mere stranger, or a part owner by payment of premiums are the following: 1. By contract with the beneficial owner of the property. 2. By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation. 3. By subrogation to this right of trustees of some person who has at their request advanced money for the preservation of the property. 4. By reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property; *Re Leslie*, 23 Ch. D. 552; and see *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. Div. 234; *Patten* v. *Bond*, 60 L. T. N.S. 583. In *Strutt* v. *Tippett*, 62 L. T. N.S. 475, doubt was expressed

keeping up the policy the Court will direct it to be sold or surrendered (*a*).

[15. In a recent case where a trustee had neglected to give notice of a settlement affecting a policy to the insurance office, and had, in contemplation of a breach of trust, retired in favour of a single trustee, who allowed the husband to get possession of the policy, whereupon he had received a bonus and mortgaged the policy, and the mortgagee had surrendered it; it was held that, although there were no funds available for keeping up the policy, the original trustee, inasmuch as there was a clear breach of trust in neglecting to give notice to the office and in parting with the possession of the policy, was liable for the amount of the bonus and of the moneys received on the surrender (*b*). [Policy improperly given up to husband and surrendered by his mortgagee.]

16. Where a director of a company accepted fully paid up shares from the promoters, under circumstances which were held to amount to a misfeasance on his part, and the shares, which at one time had been worth £80 a share, had become so much depreciated as to be worth only £1 a share, it was held that the director was a trustee of the shares for the company, that restitution of the shares by the director was not sufficient, but that the company might elect to have the value of the shares, and that the value was to be taken at £80 a share, which was to carry interest at £4 per cent. from the date of the transfer to the director (*c*). "A gift by a promoter to a director whilst there are any questions open between the company and the promoter must be accounted for by the director to the company for whom he is an agent, and the company has the option of claiming what is given, or its value, *i.e.* the highest value whilst held by the director" (*d*).] [Director accepting shares from promoters.]

17. If the trustees of a marriage settlement take by assignment *choses en action* of the husband, and *neglect to give notice* of the settlement to the persons in whom the *choses en action* are vested, and on the bankruptcy of the husband the *choses en action*, as left in his order and disposition with the consent of Neglect to give notice of assignment.

by Lindley, L.J., whether this enumeration could be regarded as exhaustive. In the second class of cases the right to indemnity is strictly limited to the trust property. Thus a trustee, who was under a statutory duty to pay the premiums on a policy out of a fund which was insufficient, but who was not trustee of the policy, was held not entitled to a lien for moneys spent by him in paying a premium on the policy. *Re Earl of Winchelsea's Policy Trusts*, 39 Ch. D. 168.]

(*a*) *Hill* v. *Trenery*, 23 Beav. 16; *Beresford* v. *Beresford*, Ib. 292.

[(*b*) *Kingdon* v. *Castleman*, 46 L. J. N.S. Ch. 448.]

(*c*) *Nant-y-Glo and Blaina Ironworks Company* v. *Grave*, 12 Ch. D. 738.]

[(*d*) *Eden* v. *Ridsdale's Railway Lamp and Lighting Co.*, 23 Q. B. Div. 368, 372, *per* Lindley, L.J.]

the true owner, become forfeited in favour of the creditors, it is apprehended that the trustees would be liable for their neglect of duty in not having given notice of the settlement, so as to take the property out of the order and disposition of the settlor (*a*).

Registration.

18. So if the trustee of a deed which requires *registration* to protect the property *neglect to register it,* he is answerable for the consequences (*b*).

Power imperative.

19. A trust is sometimes in the form of a *power imperative ;* that is, a power which it is the bounden duty of the trustee to execute, and if through his neglect to execute it a loss arises he will be held responsible (*c*).

Receipt by person not a trustee, but acting as such.

20. If a person has *assumed to act as trustee,* and having received money in that character misapplies it, he is accountable for the proceeds to the *cestui que trust,* and cannot defend himself by showing that in fact he was not legally a trustee (*d*), or that when he committed the breach he did not know who his *cestui que trust* was (*e*) ; [and this principle was applied to the case of an agent for an owner in fee who after the death of such owner continued to receive the rents and pay them into a separate account at his own bank, and stated that he was acting as agent and receiver for the person next entitled (*f*).] But the trustee of a devised estate will not be accountable for property comprised in the devise, but the existence of which did not come to his *knowledge,* and which he was not *bound to have discovered* (*g*).

Wilful default.

21. If an action be brought for an account and the plaintiff seeks relief against *wilful default,* he must in his pleadings allege some *specific act* of wilful default (*h*), and *pray* con-

(*a*) As to what particulars are within the operation of the clause, see [46 & 47 Vict. c. 52, s. 44; and *ante,* p. 256.]

(*b*) *Macnamara* v. *Carey,* 1 Ir. Rep. Eq. 9.

(*c*) *Luther* v. *Bianconi,* 10 Ir. Ch. Rep. 194.

(*d*) *Rackham* v. *Siddal,* 16 Sim. 297; affirmed on appeal to the extent of the interest of the plaintiff, the tenant for life, 1 Mac. & G. 607; *Pearce* v. *Pearce,* 22 Beav. 248; and see *Derbishire* v. *Home,* 3 De G. M. & G. 80; *Hope* v. *Liddell,* 21 Beav. 183; *Life Association of Scotland* v. *Siddal,* 3 De G. F. & J. 58; *Hennessey* v. *Bray,* 33 Beav. 96; *Ex parte Norris,* 4 L. R. Ch. App. 280; *Yardley* v. *Holland,* 20 L. R. Eq. 428; *Smith* v. *Smith,* 10 Ir. Rep. Eq. 273; [*Lyell* v. *Kennedy,* 14 App. Cas. 437.]

(*e*) *Ex parte Norris,* 4 L. R. Ch. App. 280.

[(*f*) *Lyell* v. *Kennedy,* 14 App. Cas. 437, 457, where Lord Selborne observed, "A man who receives the money of another on his behalf, and places it specifically to an account with a banker, car-marked and separate from his own moneys, though under his own control, is in my opinion a trustee of the fund standing to that account. For the constitution of such a trust no express words are necessary; anything which may satisfy a court of equity that the money was received in a fiduciary character is enough."]

(*g*) *Youde* v. *Cloude,* 18 L. R. Eq. 634.

(*h*) *Bond* v. *McWatty,* 14 Ir. Ch. Rep. 174; *Wildes* v. *Dudlow,* W. N.

sequential relief; and at the hearing must *prove* some act of wilful default, or at least establish a case for enquiry (*a*); and *à fortiori* where, at the original hearing, the common accounts only were directed, it is too late to ask relief on further directions against any wilful act that may have transpired accidentally in the course of other enquiries (*b*); and a trustee cannot be declared liable for wilful default upon a *common order* made at chambers for the administration of the testator's estate (*c*), [or upon an originating summons, otherwise than by consent (*d*).] But if the plaintiff pray an account with interest, and at the original hearing an account is directed, and in the course of the accounts improper balances appear to have been retained, interest on the balances may be asked for at the hearing on further directions (*e*). And if relief against a breach of trust be prayed, and at the original hearing the usual accounts only are directed, but with an enquiry who are the parties interested, it is not too late to ask relief against the breach of trust on further directions, as before that time the Court was not in a condition to deal with the question (*f*); [and under the modern practice where the statement of claim alleges wilful default the Court may at any stage of the proceedings direct accounts and enquiries upon that footing (*g*). But where there are allegations of wilful default or improper conduct on the part of the defendants, it is the duty of the plaintiff to be ready at the hearing to prove such allegations, and where the plaintiff was not in a position at the hearing to go into the charges (*h*) the Court would not, unless a strong case were made out for so doing, postpone the enquiry into the conduct of the trustees.] And in a *redemption suit* it is not necessary that the plaintiff should charge wilful default (*i*); nor is the case altered if the deed, though in substance a security, be in the form of a deed of trust (*j*). And in a case under the old

1870, pp. 85, 231; [and see *Mayer* v. *Murray*, 8 Ch. D. 424; *Smith* v. *Armitage*, 24 Ch. D. 727.]

(*a*) *Sleight* v. *Johnson*, 3 K. & J. 292.

(*b*) *Coope* v. *Carter*, 2 De G. M. & G. 292; *Askew* v. *Woodhead*; 28 L. T. N.S. 465; 21 W. R. 573.

(*c*) *Re Fryer*, 3 K. & J. 317; *Partington* v. *Reynolds*, 4 Drew. 253; *Re Delevante*, 6 Jur. N.S. 118; but see *Brooker* v. *Brooker*, 3 Sm. & G. 475.

[(*d*) *Dowse* v. *Gorton*, (1891) A. C. 190, 202, *per* Lord Macnaghten, and see *ante*, p. 388.]

(*e*) *Shaw* v. *Turbett*, 13 Ir. Ch. Rep. 476.

(*f*) *Pattenden* v. *Hobson*, 1 Eq. Rep. 28.

[(*g*) *Job* v. *Job*, 6 Ch. D. 562; *Re Symons*, 21 Ch. D. 757; *Mayer* v. *Murray*, 8 Ch. D. 424; and see *Laming* v. *Gee*, 10 Ch. D. 715.]

[(*h*) *Smith* v. *Armitage*, 24 Ch. D. 727.]

[(*i*) *Mayer* v. *Murray*, 8 Ch. D. 424.]

(*j*) *O'Connell* v. *O'Callaghan*, 15 Ir. Ch. Rep. 31.

practice it was held that where *executors filed a bill* for the administration of their testator's estate, it was competent to a *defendant* to allege by his *answer* a case of wilful default by the executors, and that on proof of it at the hearing, the Court would give the necessary directions without obliging the defendant to file a cross bill (*a*). It is not competent to a remainderman to institute proceedings for relief against wilful default in respect of the *prior life estate*, for he has no interest in the income, but only in the corpus (*b*).

Suit against trustee's personal representative.

22. An executor or administrator of a trustee will be answerable for a breach of trust, though he may have distributed the assets amongst the legatees or next of kin without previous notice of the breach of trust (unless it was done under the sanction of the Court (*c*), or under the provisions of Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 29); and the Statute of Limitations affords him no protection (*d*), [unless the nature of the breach of trust is such as to bring the case within the provisions of the Trustee Act, 1888, sect. 8 (*e*)]: or the *cestui que trust*, if he has not been lying by while the rights of the defendants have been varied by lapse of time (*f*), may recover the assets directly from the legatees or next of kin amongst whom they have been distributed (*g*).

Breach of trust an equitable debt only.

23. The *debt* constituted by a *breach of trust* is, even after it has been established by a decree, an *equitable* debt only, and until the Bankruptcy Act, 1869, would not have supported a petition in bankruptcy (*h*).

Breach of trust constitutes simple contract debt, unless the trustee has covenanted.

24. The claim of the *cestui que trust* is in general a *simple contract debt*, and therefore, until the Act, 3 & 4 W. 4. c. 104, making a person's whole real and personal estate liable to his simple contract debts it was recoverable, not from the real, but only from the personal estate. But if the trustee sign the trust deed and engage under his hand and seal, by words that amount to a covenant

(*a*) *Harvey* v. *Bradley*, 4 L. R. Eq. 13.

(*b*) *Whitney* v. *Smith*, 4 L. R. Ch. App. 513.

(*c*) *Knatchbull* v. *Fearnhead*, 3 M. & Cr. 122; *March* v. *Russell*, 3 M. & Cr. 31; *Low* v. *Carter*, 1 Beav. 423; *Hill* v. *Gomme*, Ib. 540; *Underwood* v. *Hatton*, 5 Beav. 39; *Waller* v. *Barrett*, 24 Beav. 413.

(*d*) See p. 1025, *ante*.

[(*e*) See *ante*, p. 1008.

(*f*) *Ridgway* v. *Newstead*, 3 De G. F. & J. 474; [*Blake* v. *Gale*, 31 Ch. D. 196; 32 Ch. Div. 571.]

(*g*) *March* v. *Russell*, 3 M. & Cr. 31; *Knatchbull* v. *Fearnhead*, 3 M. & Cr. 126; *Underwood* v. *Hatton*, 5 Beav. 38.

(*h*) *Ex parte Blencowe*, 1 L. R. Ch. App. 393. See 32 & 33 Vict. c. 71, s. 6, and *Ex parte Sturt & Co.*, 13 L. R. Eq. 309; [and see now 46 & 47 Vict. c. 52, s. 6; which although not specially mentioning equitable debts includes them.]

at law to execute the trust, then the breach of trust becomes a specialty debt (*a*).

Retainer by personal representative of insolvent trustee.

25. If a [sole] trustee die insolvent and indebted to the trust estate, the personal representative of the trustee has a *right of retainer* in respect of the debt to the trust as against other creditors, and on the *cestuis que trust* requiring him to exercise such right of retainer, he is bound to do so (*b*). [But as the right to retain only exists when the person to sue and the person to pay are the same, there will be no such right of retainer if the trustee who has died indebted to the estate has left a co-trustee surviving him (*c*).]

Immaterial whether trustee was gainer or loser by the breach of trust.

26. In awarding compensation to the *cestui que trust* against the trustee, the Court pays no regard to the circumstance whether the trustee *derived any actual advantage or not*, but proceeds upon the principle, that a trustee, who deviates from the line of his duty, is under an obligation to make good the loss to the *cestui que trust* (*d*): and if a trustee be guilty of misconduct, and a loss follows, the Court does not acquit him, because the loss was more immediately caused by some event wholly beyond the control of the trustee, such as fire, lightning, or other accident (*e*), [or because of conduct in the nature of contributory negligence on the part of the *cestui que trust* (*f*)]. "Although," said Lord Cottenham, "a personal representative acting *strictly* within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds, or upon securities, not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be

(*a*) See *supra*, pp. 215–217.

(*b*) *Sander* v. *Heathfield*, 19 L. R. Eq. 21; [*Crowder* v. *Stewart*, 16 Ch. D. 368; *Re Faithfull*, 57 L. T. N.S. 14; *Re Sutton*, 56 L. T. N.S. 14. But see *ante*, p. 946, as to the right of the creditors to have the estate administered in Bankruptcy.]

[(*c*) *Re Dunning*, 54 L. J. N.S. Ch. 900; 33 W. R. 760.]

(*d*) See *Dornford* v. *Dornford*, 12 Ves. 129; *Raphael* v. *Boehm*, 13 Ves. 411; *S. C.* Ib. 590, 591; *Moons* v. *De Bernales*, 1 Russ. 305; *Adair* v. *Shaw*, 1 Sch. & Lef. 272; *Lord Montford* v. *Lord Cadogan*, 17 Ves. 489; *Scurfield* v. *Howes*, 3 B. C. C. 90; but see *Attorney-General* v. *Greenhouse*, 1 Bligh, N. S. 57–59.

(*e*) See *Caffrey* v. *Darby*, 6 Ves. 496; *Cocker* v. *Quayle*, 1 R. & M. 535; *Fyler* v. *Fyler*, 3 Beav. 568; *Kellaway* v. *Johnson*, 5 Beav. 324; *Munch* v. *Cockerell*, 5 M. & Cr. 212; *Gibbins* v. *Taylor*, 22 Beav. 344.

[(*f*) See *Magnus* v. *Queensland National Bank*, 37 Ch. Div. 466.]

thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive"(*a*).

Case of trustee bringing a profit as well as a loss to the trust.

27. And a trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of a trust fund, cannot *set off against his liability* a *gain* which has accrued to another portion of the trust fund through another distinct and wholly unconnected breach of trust (*b*); and even in the *same matter*, where executors were directed to convert the testator's property and invest it in Government or real securities, and they allowed the tenant for life for eleven years to receive 10 per. cent. on an Indian loan, and then invested the capital in a purchase of Bank Annuities, and the stock purchased was considerably more than could have been purchased with the same capital at the end of one year from the testator's death, they were not only made liable for the excess of interest paid to the tenant for life, but were disallowed their claim to set off against their liability the accidental advantage accruing to the trust from a purchase of a larger sum of Bank Annuities than could otherwise have been purchased from their *laches* in making the investment, and the depreciation of the funds during the interim (*c*).

Trustee not chargeable with imaginary values.

28. A defaulting trustee will not be charged with *imaginary values* (*d*); and being regarded as a mere stakeholder, he will not be liable for more than he has actually received (*e*), except in cases of very supine negligence, or wilful default (*f*).

[Liable for value of new allotted shares.]

[29. Where a trustee neglected to get in certain gas shares which formed part of the trust estate, and new shares were allotted in respect of the old gas shares, and were taken up by the person who had been allowed to hold the original shares, it was held that the trustee must make good the value of the new shares, less the amount of calls paid upon them, for they were an accretion to and, as such, part of the trust (*g*). And where a *cestui que trust*, by means of an appointment which was a fraud upon the power under which it purported to be made, received the surrender value of a policy belonging to the trust, his

[Improper surrender of policy.]

(*a*) *Clough* v. *Bond*, 3 M. & Cr. 496; [and see *Re Brogden*, 38 Ch. Div. 546, 567.]

(*b*) *Wiles* v. *Gresham*, 2 Drew. 258; see p. 271.

(*c*) *Dimes* v. *Scott*, 4 Russ. 195; and see *Fletcher* v. *Green*, 33 Beav. 426.

(*d*) *Palmer* v. *Jones*, 1 Vern. 144.

(*e*) *Harnard* v. *Webster*, Sel. Ch. Ca. 53.

(*f*) *Pybus* v. *Smith*, 1 Ves. jun. 193, *per* Lord Thurlow; *Palmer* v. *Jones*, 1 Vern. 144, *per* Lord Nottingham.

[(*g*) *Briggs* v. *Massey*, 50 L. J. N.S. 747; varied on app. 51 L. J. N.S. 447.]

estate, after his death, was held liable not merely for the sum so received, but for the sum which would have been received under the policy if it had been kept on foot (*a*).

[Improper security.]

30. Where trust money is invested on an improper security, the liability of the trustee to make good the loss occasioned to the trust estate by the improper investment is not conditional upon an option being given to him of taking to the security (*b*); and new trustees, to whom such security has been transferred by the trustee who made the investment, can realize under the power vested in them by the transfer, and hold him liable for the deficiency, and may be justified in so realizing without notice to him. "The mode of enforcing this liability depends on the circumstances of the particular case. In some cases justice will be best done by realizing the security and making him pay the deficiency; but in some cases it may be right to make him pay at once the whole sum improperly invested, and let him take the benefit of the security" (*c*). In applying these principles, however, the provisions of sect. 5 of the Trustee Act, 1888 (*d*), already referred to (*e*) must be borne in mind.

If trust money be advanced on an insufficient security, the Court will not, in an action instituted by one trustee against his co-trustees in the absence of the *cestuis que trust*, order the securities to be realized merely to ascertain the deficiency, for the *cestuis que trust* may prefer either to retain the securities or proceed to a foreclosure, and they cannot in their absence be deprived of their rights (*f*).]

Co-trustees guilty of breach of trust are severally responsible for the whole loss.

31. Where *co-trustees* are *jointly* implicated in a breach of trust, the *cestui que trust*, though he obtains a decree against the trustees jointly, may have process of execution against any one of them separately (*g*); for as regards the remedy of the *cestui que trust* there is no *primary* liability, but each trustee is responsible for the entirety of the loss incurred (*h*). However,

[(*a*) *Re Deane*, 42 Ch. Div. 9.]

[(*b*) *Re Salmon*, 42 Ch. Div. 351; and see *Re Massingberd's Settlement*, 63 L. T. N.S. 296, C.A., and *ante*, p. 371.]

[(*c*) *Per* Fry, L.J., 42 Ch. Div. 371.]

[(*d*) 51 & 52 Vict. c. 59.]

[(*e*) *Ante*, p. 359.]

[(*f*) *Butler* v. *Butler*, 5 Ch. D. 554; 7 Ch. Div. 116.]

(*g*) *Ex parte Shakeshaft*, 3 B. C. C. 197; *Walker* v. *Symonds*, 3 Sw. 74, 75; *Attorney-General* v. *Wilson*, Cr. & Ph. 28, *per* Lord Cottenham; *Taylor* v. *Tabrum*, 6 Sim. 281; *Fletcher* v. *Green*, 33 Beav. 426; and see *Ex parte Angle*, Barn. 425; *Re Chertsey Market*, 6 Price, 278, 279; *Ex parte Norris*, 4 L. R. Ch. App. 280; [*Ex parte Craven*, W. N. 1885, p. 21.]

(*h*) See *Wilson* v. *Moore*, 1 M. & K. 146; *Lyse* v. *Kingdon*, 1 Coll. 188; *Richardson* v. *Jenkins*, 1 Drew. 477; *Alleyne* v. *Darcy*, 4 Ir. Ch. Rep. 206; *Jenkins* v. *Robertson*, 1 Eq. Rep. 123; [*Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 358.]

where the trustees are *in pari delicto* the decree is usually *enforced* against the trustees equally (*a*); and in one case, where a trustee had refused to accept the office unless another should be named with him, and the trust money be divided between them, so that each might be responsible for a moiety only, and this was accordingly done, but the trust deed was drawn in the usual form as if they were joint trustees of the whole sum, it was held, upon the insolvency of one of the trustees, that the co-trustee should not be answerable for more than the moiety paid to himself, the division of the trust money having been, Sir J. Leach observed, "a term in the creation of the trust" (*b*).

[Joint judgment against partners no merger of separate liability.]

[32. Where trust property is misappropriated by a firm so that the partners are jointly and severally liable to make good the loss, and the firm is adjudicated bankrupt on a judgment debt recovered against the firm by the owner of the trust property, the several liability of the partners is not, solely by reason of the creditor having recovered a joint judgment, merged in such judgment so as to preclude proof by him against the separate estates (*c*).]

Liability for the costs of suit.

33. Where the defendants are involved in a breach of trust, the Court decrees *costs* against them *jointly*, and does not distinguish between the relative culpabilities of the defendants (*d*). But where the plaintiff in pursuance of the decree recovered *all the costs* from a *single co-defendant*, the latter obtained an order in the same cause upon a motion (which however was not opposed) for contribution by the other defendants (*e*).

Liability and contribution as between the trustees themselves, or between them and other parties.

34. Though, as respects the remedy of the *cestui que trust*, each trustee is individually responsible for the whole amount of the loss, whether he was the principal in the breach of trust, or was merely a consenting party, yet, as between the trustees themselves, the loss may be thrown upon the party on whom, as recipient of the money or otherwise, the responsibility ought in equity to fall, or, if he be dead, upon his estate; and this claim of the innocent trustee (though formerly only a simple contract debt as between himself and his co-trustee, even where the breach of trust as between them and the *cestuis que trust* was a specialty debt), is now in such cases by the effect of the

(*a*) *Rehden* v. *Wesley*, 29 Beav. 215, *per* M. R.

(*b*) *Birls* v. *Betty*, 6 Mad. 90.

[(*c*) *Re Davison*, 13 Q. B. D. 50; and see *Blyth* v. *Fladyate*, (1891) 1 Ch. 337, 353.]

(*d*) *Lawrence* v. *Bowle*, 2 Ph. 140; 1 C. P. Coop. *t.* Cott. 241.

(*e*) *Pitt* v. *Bonner*, 1 Y. & C. C. C. 670.

Mercantile Law Amendment Act (*a*) a specialty debt also (*b*). If all the trustees be equally guilty, then (unless the transaction was vitiated by not only constructive, but such actual fraud, that the Court will hold itself entirely aloof (*c*),) in accordance with the established doctrine of equity (*d*), an *apportionment* or *contribution* amongst the trustees may be compelled, which under the old practice was not allowed, in the same suit, but on a bill filed for the purpose (*e*). And if in the suit for recovery of the trust fund any benefit, as a legacy, be coming in the same matter to one of two defaulting trustees, the other trustee, if he pay the whole of what is due to the *cestuis que trust*, will have a *lien* on the legacy of the co-trustee for the amount of contribution he ought to pay (*f*).

[35. If a breach of trust be committed from which one of the trustees derives indirectly a personal benefit, the other trustees who were parties to the breach have no equity against the trustee deriving the benefit to make him primarily liable for the breach (*g*). [One of the trustees gaining by breach not primarily liable.]

If one of the trustees has the active management of the trust, and, acting honestly though erroneously, commits a breach of trust which leads to loss, he is not bound to indemnify his co-trustees who were passive in the matter, and who, by doing nothing, neglected their duty more than the active trustee (*h*); [Nor an *acting* trustee.]

(*a*) 19 & 20 Vict. c. 97.

(*b*) *Lockhart* v. *Reilly*, 1 De G. & J. 464; *Priestman* v. *Tyndall*, 24 Beav. 244.

(*c*) See *Lingard* v. *Bromley*, 1 V. & B. 114; *Tarleton* v. *Hornby*, 1 Y. & C. 336; *Attorney-General* v. *Wilson*, Cr. & Ph. 28.

[(*d*) *Bacon* v. *Camphausen*, 58 L. T. N.S. 851, citing *Dering* v. *Earl of Winchelsea*, 1 Cox, 318; and *Stirling* v. *Forester*, 3 Bligh, 575.]

(*e*) *Fletcher* v. *Green* (No. 2), 33 Beav. 513; *Attorney-General* v. *Dallgars*, 33 Beav. 624, *per Cur.*; *Coppard* v. *Allen*, 2 De G. J. & S. 177, *per* L.J. Turner; *Ex parte Shakeshaft*, 3 B. C. C. 198, *per* Lord Thurlow; *Lingard* v. *Bromley*, 1 V. & B. 114; *Perry* v. *Knott*, 4 Beav. 180, *per* Lord Langdale; and see *Knatchbull* v. *Fearnhead*, 3 M. & Cr. 122; *Pitt* v. *Bonner* 1 Y. & C. C. C. 670; *Ex parte Burton*, 3 M. D. & De G. 373; *Baynard* v. *Woolley*, 20 Beav. 583; *Jesse* v. *Bennett*, 6 De G. M. & G. 609; and see *Wilson* v. *Goodman*, 4 Hare, 54; *Paull* v. *Mortimer*, W. N. 1873, p. 199; *Keogh* v. *Keogh*, 8 Ir. R. Eq. 179; [*Ramskill* v. *Edwards*, 31 Ch. D. 101.] But see now 36 & 37 Vict. c. 66, s. 24, sub-s. 3, and the 11th, 48th, and following rules, and rule 55 of the 16th Order of the Rules of the Supreme Court, 1883; [and *Butler* v. *Butler*, 14 Ch. D. 329; and *Sawyer* v. *Sawyer*, 28 Ch. Div. at p. 601; where an enquiry was directed how and in what proportions as between the trustees the sum to be paid to the plaintiffs should be borne and paid; and that the plaintiff in an action against a surviving trustee for breach of trust cannot be required to make the representatives of the co-trustee defendants as they can, when necessary, be added under rule 11, see *Re Harrison*, 60 L.J. Ch. 287.]

(*f*) *Birks* v. *Micklethwait*, 33 Beav. 409.

[(*g*) *Butler* v. *Butler*, 5 Ch. D. 554; 7 Ch. Div. 16.]

[(*h*) *Bahin* v. *Hughes*, 31 Ch. Div. 390, where Fry, L.J., observed that in

but where the acting trustee is the solicitor for the trust, or derives any personal benefit from the breach of trust, he may be compelled to indemnify his co-trustees (*a*). An executor who has been decreed to make good the loss incurred by his wilful default in not getting in part of the assets from the trustee of a settlement who has been allowed to retain and misappropriate them, is not thereby precluded from subsequently recovering from the trustee the amount misappropriated by him (*b*).]

The gainer by the breach of trust is ultimately liable.

36. As between the trustees and a *third* person who has *reaped the benefit* of the breach of trust, though the trustees must make the disbursement in the first instance to the injured party, the loss will eventually be cast on the person who was the gainer by the breach of trust (*c*). But the circumstance that the breach of trust was committed at the instance of a *cestui que trust* will not *per se* impose upon him the obligation of indemnifying the trustee generally. Thus in *Raby* v. *Ridehalgh* (*d*), where the *cestuis que trust*, the tenants for life, had instigated the breach of trust, L. J. Turner asked, "Has the Court in a suit of this nature ever gone the length of ordering the *cestuis que trust* personally to recoup the trustee?" and the Court directed the tenants for life to account to the trustee only for the *monies which had been received* by them under the breach of trust, and this has since been followed by other decisions (*e*).

The interest of parties committing a breach of trust may be impounded to compensate the trust, or indemnify the trustee.

37. If a *cestui que trust* whether tenant for life, or other person having a partial interest, be responsible for having joined in a breach of trust, all the benefit that would have accrued to him,

his judgment the Courts ought to be very jealous of raising an implied liability of the kind under consideration, "because if such existed it would act as an opiate upon the consciences of the trustees; so that instead of the *cestuis que trust* having the benefit of several acting trustees, each trustee would be looking to the other for a right of indemnity, and so neglect the performance of his duties. Such a doctrine would be against the policy of the Court in relation to trusts;" and see *Bacon* v. *Camphausen*, 58 L. T. N.S. 851; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 365.]

[(*a*) *Lockhart* v. *Reilly*, 25 L. J. N.S. Ch. 697; *Thompson* v. *Finch*, 8 De G. M. & G. 560; *Bahin* v. *Hughes*, 31 Ch. Div. 390.]

[(*b*) *Scotney* v. *Lomer*, 29 Ch. D. 535, *vide supra*, p. 774.]

(*c*) *Trafford* v. *Boehm*, 3 Atk. 440; *Greenwood* v. *Wakeford*, 1 Beav. 580; *Booth* v. *Booth*, 1 Beav. 125; *Lord Montfort* v. *Lord Cadogan*, 17 Ves. 485; 19 Ves. 635; *S. C.* 2 Mer. 3; *Birks* v. *Micklethwait*, 33 Beav. 409; and see *Howe* v. *Earl of Dartmouth*, 7 Ves. 150, 151; *Jacob* v. *Lucas*, 1 Beav. 436; *Lincoln* v. *Wright*, 4 Beav. 432; *Tickner* v. *Old*, 18 L. R. Eq. 422; *Vaughan* v. *Vanderstegen*, 2 Drew. 165, 363; *Hobday* v. *Peters* (No. 2), 28 Beav. 354; *Fetherstone* v. *West*, 6 Ir. R. Eq. 86.

(*d*) 7 De G. M. & G. 108.

(*e*) *Brown* v. *Maunsell*, 5 Ir. Ch. Rep. 351; *Bentley* v. *Robinson*, 9 Ir. Ch. Rep. 479; and see *Walsham* v. *Stainton*, 1 H. & M. 337; [*Butler* v. *Butler*, 3 Ch. D. 554; 7 Ch. Div. 116.

either directly or derivatively (*a*), either from that trust fund, or any other estate comprised in the same settlement (*b*), may be stopped by the *cestuis que trust*, or other person having a similar equity, as against him, his assignees in bankruptcy (*c*), or judgment creditors (*d*), or general creditors (*e*); and (except so far as the defence of purchase for value without notice may be applicable) against *all* who claim under him (*f*), until the amount impounded, with the accumulations thereon (*g*), has compensated the trust estate for the loss for which that *cestui que trust* is responsible. [And even an estate *legally* vested in the wrongdoer by the settlement (being an instrument *inter vivos*) may by virtue of an implied contract be made available for repairing the breach of trust (*h*), but the doctrine cannot be extended to a *legal* devisee, as there no contract can be implied, and in the absence of contract a Court of equity has no control over the estate (*i*).] And the rule was held to apply to a *feme covert* entitled to her separate use [with no restraint on anticipation, where she had full knowledge of all the circumstances and acted independently in the transactions which constituted the breach of trust, but she was not held liable merely because she acquiesced in or approved of the breach of trust unless she took part in it (*j*); and she could not be made liable] where her power of anticipation was restrained (*k*).

[Lien on share of co-trustee.]

If the *cestui que trust* be one of three trustees and joins with his co-trustees in a breach of trust, and the co-trustees have been made to repair the breach of trust, the co-trustees have a lien on the share of the *cestui que trust*, who is also a trustee, for a con-

(*a*) *Jacubs* v. *Rylance*, 17 L. R. Eq. 341; [*Doering* v. *Doering*, 42 Ch. D. 203.]

(*b*) *Woodyatt* v. *Gresley*, 8 Sim. 183; *Ex parte Mitford*, 1 B. C. C. 398; see *Priddy* v. *Rose*, 3 Mer. 105; *Burridge* v. *Row*, 1 Y. & C. C. C. 183, 583; *Lincoln* v. *Wright*, 4 Beav. 432, *per* Lord Langdale; *Fuller* v. *Knight*, 6 Beav. 205; *M'Gachen* v. *Dew*, 15 Beav. 84; *Vaughton* v. *Noble*, 30 Beav. 34.

(*c*) *Ex parte Turpin*, 1 D. & C. 120; *Ex parte Smith*, 1 Deac. 143; *Ex parte King*, 2 M. & A. 410; *Prime* v. *Savell*, W. N. 1867, p. 227; *Jacubs* v. *Rylance*, 17 L. R. Eq. 341; see *Smith* v. *Smith*, 1 Y. & C. 338; *Burridge* v. *Row*, 1 Y. & C. C. C. 183, 583; [*Corr* v. *Corr*, 3 L. R. Ir. 435.]

(*d*) *Kilworth* v. *Mountcashell*, 15 Ir. Ch. Rep. 565.

(*e*) *Williams* v. *Allen* (No. 2), 32 Beav. 650.

(*f*) *Woodyatt* v. *Gresley*, 8 Sim. 180; *Priddy* v. *Rose*, 3 Mer. 86; *Cole* v. *Muddle*, 10 Hare, 186; [*Doering* v. *Doering*, 42 Ch. D. 203;] and see *Morris* v. *Livie*, 1 Y. & C. C. C. 380; [*Re Hervey*, 61 L. T. N.S. 429.]

(*g*) *Ex parte King*, 2 M. & A. 410.

[(*h*) *Woodyatt* v. *Gresley*, 8 Sim. 180.]

[(*i*) *Egbert* v. *Butter*, 21 Beav. 560; *Fox* v. *Buckley*, 3 Ch. Div. 508; and see *Re Brown*, 32 Ch. D. 597; *Ex parte Barff*, De Gex, 613.]

[(*j*) *Sawyer* v. *Sawyer*, 28 Ch. Div. 595; and see *ante*, p. 867.]

(*k*) See *ante* pp. 867 *et seq.*; [and *Hale* v. *Sheldrake*, 60 L. T. N.S. 291.]

tribution of one-third, but without interest, towards the amount paid by them for clearing the joint breach of trust (*a*). It was contended in one case, that where an estate was *devised* to a person who was a *debtor to the testator*, the debt was *a lien on the devised estate*, but the Court not finding any precedent did not allow the claim (*b*).

[Trustee Act, 1888.]

[Now by the Trustee Act, 1888 (*c*), sect. 6, it is enacted as follows:—

"(1) Where a trustee shall have committed a breach of trust, at the instigation or request or with the consent *in writing* of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a *married woman* entitled for *separate use, whether with or without a restraint upon anticipation*, make such order as to the Court shall seem just for impounding all or any part of the interest of the beneficiary in the trust estate *by way of indemnity to the trustee* or person claiming through him. This section shall apply to breaches of trust committed as well before as after the passing of this Act, except where an action or other proceeding shall be pending with reference thereto at the passing of this Act."

In a recent case decided under this section the facts were shortly as follows:—

By a marriage settlement a settlor covenanted to pay to the trustees a sum of money at a future date, and limited to himself a life interest in the settled funds with remainder to his wife for life, and he also assigned to the trustees, as security for the payment, certain trust funds to which he was absolutely entitled in reversion under the marriage settlement of his mother. Notice of this assignment was duly given to the trustees of the mother's marriage settlement. These latter trustees, admittedly in breach of trust, paid to the mother, the son, and his wife, on their entreaty, part of the trust funds comprised in the mother's settlement. In an action by the trustees of the son's settlement against the trustees of the mother's settlement, it was held by Romer, J., that the latter trustees were not entitled to indemnity from the son's wife, as she was not a beneficiary under the mother's settlement, of which alone they were trustees, and his lordship said that even if she were such a beneficiary he would not have exercised the discretion vested in the Court by this section to impound her interest, as the trustees had not committed the

(*a*) *Prime* v. *Savell*, W. N. 1867, p. 227.

(*b*) *Ex parte Barff*, De Gex, 613.

[(*c*) 51 & 52 Vict. c. 59.]

breach of trust owing to any misrepresentation or deceit on her part, but with their eyes open (*a*).

If the decision that the son's wife was not a beneficiary is to be read as involving the general proposition that the assignee of a beneficiary is not a beneficiary within the meaning of the section, and if the language of the learned judge is to be understood as conveying that, in order to induce the Court to exercise its discretion under the section, it is necessary that deception of or misrepresentations to the trustee should be shown, the operation of the section will apparently be restricted within narrow limits.]

Bankruptcy of the trustee.

38. If the trustee become *bankrupt*, the loss may be proved against his estate (*b*), and without proceeding in equity to establish the breach of trust (*c*), and if interest would have been decreed in equity against the trustee himself, it will constitute part of the debt in the proof against his estate in the hands of his trustee in bankruptcy (*d*), and if the breach of trust was *a sale of stock*, the *cestui que trust* may, at his option, prove for the proceeds of the sale, or for the value of the stock at the date of the bankruptcy (*e*), and if a debtor to the trust be bankrupt, and entitled himself to a *reversionary* interest in the debt, the trustee of the settlement may nevertheless prove for the whole debt, without any set-off for the reversionary interest, for if such a set-off were allowed it would diminish what the tenants for life would have to receive (*f*). And if a trustee prove for the whole debt he may still retain any beneficial interest of the bankrupt in the trust estate by way of lien or set-off in further discharge of the debt (*g*), [for the trustee cannot be allowed by proving in bankruptcy to prejudice the *cestuis que trust* (*h*).] But if an executor, who represents the absolute ownership of the personal estate, and has therefore an absolute power over the debts due to his testator, prove for the whole debt, it is deemed a waiver of any lien which the executor might otherwise have had upon the bankrupt's interest in such per-

(*a*) *Ricketts* v. *Ricketts*, 62 L. T. N.S. Ch. 263.

(*b*) *Keble* v. *Thompson*, 3 B. C. C. 112; *Moons* v. *De Bernales*, 1 Russ. 301; *Dornford* v. *Dornford*, 12 Ves. 127; *Ex parte Shakeshaft*, 3 B. C. C. 197; *Bick* v. *Motley*, 2 M. & K. 312; *Lincoln* v. *Wright*, 4 Beav. 427; [46 & 47 Vict. c. 52, s. 37.]

(*c*) *Ex parte Norris*, 4 L. R. Ch. App. 280.

(*d*) *Dornford* v. *Dornford*, 12 Ves. 127; *Bick* v. *Motley*, 2 M. & K. 312; *Moons* v. *De Bernales*, 1 Russ. 301.

(*e*) *Ex parte Shakeshaft*, 3 B. C. C. 197; *Ex parte Gurner*, 1 M. D. & De G. 497; and see *Ex parte Moody*, 2 Rose, 413; *Ex parte Stuteley*, 1 M. D. & De G. 643.

(*f*) *Ex parte Stone*, 8 L. R. Ch. App. 914.

(*g*) *Ex parte Dicken*, Buck, 115.

[(*h*) *Per* Lord Chelmsford, L. C., *Stammers* v. *Elliott*, 3 L. R. Ch. App. 200.]

sonal estate (*a*), and if the bankrupt, in whose hands the trust fund was, be one of the trustees, and indebted to the trust estate, and also have a *present* beneficial interest in the trust, proof cannot be made for the whole amount, but only for the balance, after setting off the bankrupt's beneficial interest against the debt due from him (*b*).

[Where one trustee a bankrupt but balance due to the trustees on the accounts.]

[39. If one of two trustees becomes bankrupt and is a debtor to the trust estate, and a balance is found due to the two trustees in taking their accounts, the balance will not be set off against the debt of the bankrupt trustee to the prejudice of the solvent trustee, but an account will be directed, so as to ascertain how much of the balance is due to the solvent trustee and how much to the bankrupt trustee, and the set off will be confined to the latter account (*c*).]

Trustee a partner and lending the trust money to the firm with notice.

40. If the trustee was *one of a bankrupt firm*, to which the trust money had been lent, proof may be made either against the *joint estate* of the firm, or the *separate estate* of the bankrupt trustee, and of any other of the partners who may have constituted themselves trustees or taken an active part in the breach of trust (*d*); but not [in general] against both the joint and separate estates (*e*). [Where, however, the trust fund was handed by the trustee to his firm for investment, and they misappropriated the fund and became bankrupt, so that there were distinct liabilities, namely, the liability of the firm arising out of the contract entered into or implied when the money was handed to them for investment, and the separate liability of the trustee arising out of the contract entered into or implied when he accepted the trusts, it was held that under sched. II. r. 18 of the Bankruptcy Act, 1883, proof might be made against the joint estate of the firm as well as the separate estate of the defaulting trustee (*f*).] If the bankrupt had laid out the trust money on a mortgage, the *cestui que trust* is not put to his election whether he will prove for the debt, and abandon the mortgage, or take the mortgage and abandon the debt, but may prove for the debt, and have the benefit of the mortgage also (*g*):

(*a*) *Stammers* v. *Elliott*, 3 L. R. Ch. App. 195.

(*b*) *Ex parte Turner*, 2 De G. M. & G. 927; *Ex parte Bishop*, 8 L. R. Ch. App. 718.

[(*c*) *McEwan* v. *Crombie*, 25 Ch. D. 175; and see *ante*, p. 715.]

(*d*) *Ex parte Heaton*, Buck, 386; *Ex parte Watson*, 2 V. & B. 414; *Smith* v. *Jameson*, 5 T. R. 601; *Ex parte Bolland*, 1 Mont. & Mac. 315; *Ex parte Poulson*, De Gex, 79; *Ex parte Barnewall*, 6 De G. M. & G. 801.

(*e*) *Ex parte Barnewall*, 6 De G. M. & G. 795.

[(*f*) *Re Parkers*, 19 Q. B. D. 84.]

(*g*) *Ex parte Biddulph*, 3 De G. &

and if the trust money had been invested, but improperly, the *cestui que trust* has a right to elect to prove for the money and interest, *or* for the value of the securities and profits (*a*).

Trustee not a partner and lending money to the firm or the partners.

41. If the trustee was *not one of the firm*, but he lent the trust fund to the bankrupt *firm*, proof can be made as for an ordinary debt against the joint estate. If the trustee lent the money, not to the firm, but to *one of the members* of the firm, and the partners had *no notice* of the source from which it came, proof can only be made against the separate estate of the partner who received, though the money may, in fact, have been applied to partnership purposes (*b*). But if the other partners had notice of the source of the money, proof can be made against the joint estate of the firm (*c*), but not, it seems, against the separate estate of each partner (*d*), unless the firm by their dealings with the *cestuis que trust* constituted themselves trustees *directly* for them (*e*). Nor can proof be made, on the mere ground of *notice*, for the *profits* made by the *use* of the money; for the partners in the firm are regarded not as *actual* but only as *constructive* trustees, that is, having notice of the trust they are accountable for the money, but not being clothed with any special duty, they do not come within the rule that "a trustee shall not profit by his trust" (*f*).

Apportionment between tenant for life and remaindermen of amount recovered from bankrupt trustee.

42. It was held by Lord Romilly, M.R., that where a trustee had proved against a bankrupt's estate for 6985*l.* 19s. 7d. *principal* money made away with by the bankrupt, and for 2744*l.* 9s. 11d. *interest* (which should have been paid to the tenant for life), making together a sum total of 9730*l.* 9s. 6d., all dividends received under the bankruptcy should first make up the lost capital, and that the tenant for life had no lien for his lost income, but was entitled only to the interest of the capital sums received by way of dividend under the bankruptcy (*g*). The natural course would have been to apportion the fund as between the tenant for life and remaindermen according to their respective

Sm. 587; *Ex parte Geaves*, 8 De G. M. & G. 291; 25 L. J. N.S. Bank. 53.

(*a*) *Re Montefiore*, 9 Jur. 562.

(*b*) *Ex parte Apsey*, 3 B. C. C. 265; *Ex parte Wheatley*, Cooke's Bankrupt Law, 534, 8th ed.

(*c*) *Ex parte Peele*, 6 Ves. 603; *Ex parte Clowes*, 2 B. C. C. 595; and see *Ex parte Burton*, 3 M. D. & De G. 364; *Ex parte Bolland*, 1 Mont. & Mac. 315.

(*d*) *Ex parte Beilby*, 1 Gl. & J. 167; and see *Ex parte Burton*, 3 M. D. & De G. 364; *Ex parte Woodin*, 3 M. D. & De G. 399; [and the provisions of the Partnership Act, 1890, referred to *ante*, p. 1023.]

(*e*) *Ex parte Woodin*, 3 M. D. & De G. 399.

(*f*) *Stroud* v. *Gwyer*, 28 Beav. 130; see 141; and see *Ex parte Burton*, 3 M. D. & De G. 364.

(*g*) *Re Grabowski's Settlement*, 6 L. R. Eq. 12.

losses, as otherwise it would work occasionally a great hardship. Suppose for instance the tenant for life, though entitled for the last ten years, had received nothing and then died before the dividend was paid. The whole would go to the remainderman, and the executor of the tenant for life would receive nothing, though a large part of the dividend was recovered in respect of the life estate (*a*).

Since these remarks were written, the case has in effect been overruled. In *Cox* v. *Cox* (*b*), A. covenanted on his marriage that his executors, within three months after his death, should pay to the trustees a sum of 6,000*l.* with interest, from his death, at 4 per cent., to be held in trust for his widow for life, with remainder to the children. A. died in 1862, and his estate was administered by the Court. The assets were insufficient to satisfy the principal and interest, and the question was, how the amount recovered was to be dealt with as between the tenant for life and the remaindermen, and V. C. Sir W. James said, "The true principle in all these cases is, that neither the tenant for life nor the remainderman is to gain an advantage over the other, neither is to suffer more damage in proportion to his estate and interest than the other suffers from the default of the obligor. Assuming that 5500*l.* is the sum that will be recovered, a calculation must be made back, What principal, if invested on the day of the obligor's death (the date from which the interest was to run) at 4 per cent. would amount with interest to the sum so recovered? Interest at 4 per cent. on this principal, or in other words the difference between the principal and the amount, will then go to the tenant for life, and the rest must be treated as principal."

[Of proceeds of sale of mortgaged property.]

[So where money had been properly invested upon mortgage, but the interest fell into arrear, the mortgaged property was ultimately realized, and the proceeds were insufficient to pay the principal and interest, it was held that the proceeds were apportionable between capital and income in the ratios of the capital sum originally invested and the actual arrears of simple interest on the mortgage (*c*).]

How far trust debt barred by the bankrupt's certificate.

43. The original trust debt was formerly barred by the certificate of the bankrupt, though no proof was made, and the *cestui que*

(*a*) See *Innes* v. *Mitchell*, 1 Ph. 710, and *Turner* v. *Newport*, 2 Ph. 14, which were not cited to M. R.

(*b*) 8 L. R. Eq. 343; and see *Re Tinkler's Estate*, 20 L. R. Eq. 456.

[(*c*) *Re Moore*, 54 L. J. N.S. Ch. 432; and for a precise statement of the mode of apportionment in a similar case, see *Re Foster*, *Lloyd* v. *Carr*, 45 Ch. D. 629.]

trust did not know of the misapplication of the trust fund (*a*). But it was the duty of the trustee to see that *some person* proved on behalf of the trust, and if he did not, he was liable in equity for this neglect of duty : and though he had obtained his certificate he was held responsible personally for the amount that might have been received by way of dividend (*b*). And a demand in respect of a breach of trust was held to be equally barred by the trustee's discharge under the Insolvent Acts, provided the liability was duly mentioned in the schedule (*c*).

Proof where one of several trustees is bankrupt.

44. If the bankrupt was one of two *co-trustees*, who were jointly implicated in a breach of trust, then proof may be made against the bankrupt's estate for the whole money lost, though he was not the party benefited by the breach of trust (*d*); and though the other trustee be living and solvent (*e*); or, at the same time that proof is made against the estate of one who is a bankrupt, legal proceedings may be taken against the solvent trustee; for *proof* under a bankruptcy is not *payment* (*f*). And the proof against the bankrupt will not be precluded by a *bond* given not to sue the other trustee, reserving the right against all other parties (*g*), though a *release* to the other trustee, being an extinguishment of the debt, would prevent any subsequent proof (*h*).

Co-trustees bankrupts.

45. So if two co-trustees be bankrupts, proof may be made against the estate of each (*i*); but of course more than 20s. in the pound cannot be received in the whole.

Contribution.

46. Where the whole debt is proved against the estate of the bankrupt trustee, the trustee in bankruptcy may afterwards take proceedings, and compel contribution from the other trustee (*j*), even where the bankrupt trustee himself could not, from his fraudulent conduct, have obtained such relief (*k*).

Trust money authorized to be employed in trade.

47. Where a testator has *authorized the employment of his estate in trade*, if the firm in which it was employed become bankrupt, proof cannot be made against the estate of the bankrupts in respect of the money so employed; for it is not a debt of the firm, but

(*a*) *Ex parte Holt*, 1 Deac. 248.
(*b*) *Orrett* v. *Corser*, 21 Beav. 52; and see *Woodhouse* v. *Woodhouse*, 8 L. R. Eq. 521.
(*c*) *Thompson* v. *Finch*, 22 Beav. 316; on appeal, 8 De G. M. & G. 560.
(*d*) *Ex parte Shakeshaft*, 3 B. C. C. 197.
(*e*) *Ex parte Beilby*, 1 Gl. & J. 167.
(*f*) *Ex parte King*, 1 Deac. 164, &c.
(*g*) Ib.
(*h*) See *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 478.
(*i*) *Keble* v. *Thompson*, 3 B. C. C. 112; *Ex parte Poulson*, De Gex, 79.
(*j*) See *Ex parte Shakeshaft*, 3 B. C. C. 197; *Lingard* v. *Bromley*, 1 V. & B. 114.
(*k*) See *Muckleston* v. *Brown*, 6 Ves. 68; *Joy* v. *Campbell*, 1 Sch. & Lef. 335, 339; *Ottley* v. *Browne*, 1 B. & B. 360.

merely capital brought into it: but, when the joint creditors have been satisfied, the trustee member of the firm may, as one of the partners, establish a balance, if there be one, against the separate estates of the co-partners (*a*).

32 & 33 Vict. c. 71.

48. By the Bankruptcy Act, 1869 (*b*), a bankrupt after, and notwithstanding his order of discharge, remains liable to his *cestui que trust* for a breach of trust. But as the breach of trust constitutes a debt, which may be proved for in the bankruptcy, the debtor is protected from all other proceedings against him for the breach of trust until after his discharge, when the creditor may proceed either against him personally or against his property as if no bankruptcy had intervened (*c*). [The section applies to the breach of a constructive trust as well as that of an express trust (*d*), and the liability of a defaulting trustee to contribute, where his co-trustee has made good a breach of trust, is a "liability incurred by means of a breach of trust" within the Act from which the bankrupt trustee is not released by the discharge (*e*).

[46 & 47 Vict. c. 52.

By the Bankruptcy Act, 1883 (*f*), the liability of a bankrupt to his *cestui que trust* continues after his discharge only in cases where the breach of trust is *fraudulent*.]

The Debtors Act, 1869.

49. The Debtors Act, 1869 (*g*), abolishes arrest and imprisonment for debt, but excepts, amongst other things, default by a trustee or person acting in a fiduciary capacity (*h*), and ordered to pay by a Court of equity (*i*) any sum *in his possession or under his control*. [A trustee who has once had trust funds in his possession is treated by a Court of equity as still having

(*a*) *Scott* v. *Izon*, 34 Beav. 434; and see *M'Neillie* v. *Acton*, 2 Eq. Rep. 21.

(*b*) 32 & 33 Vict. c. 71, s. 49.

(*c*) *Cobham* v. *Dalton*, 10 L. R. Ch. App. 655; [*Emma Silver Mining Company* v. *Grant*, 17 Ch. D. 122; *Cooper* v. *Prichard*, 11 Q. B. Div. 351; and see *Nowell* v. *Nowell*, W. N. 1876, p. 248.]

[(*d*) *Emma Silver Mining Company* v. *Grant*, 17 Ch. D. 122.]

(*e*) *Ramskill* v. *Edwards*, 31 Ch. D. 100.]

[(*f*) 46 & 47 Vict. c. 52, s. 30.]

(*g*) 32 & 33 Vict. c. 62, s. 4.

[(*h*) The term "person acting in a fiduciary capacity" means a person standing in a fiduciary relation towards any other person whether such other person is, or is not, the plaintiff or one of the plaintiffs in the action in which the order for payment has been made; *Marris* v. *Ingram*, 13 Ch. D. 338. An auctioneer is within the term as to the proceeds of the sale of property received by him, *Crowther* v. *Elgood*, 34 Ch. Div. 691; and so is the London agent of a country solicitor ordered to pay money into court in an action against him for an account of his agency, *Lichfield* v. *Jones*, 36 Ch. D. 530 (and see *Re Hickey*, 35 W. R. 53); and a receiver, notwithstanding he has been discharged, *Re Gent*, 40 Ch. D. 196.]

[(*i*) Under section 76 of the Judicature Act, 1873, the words "the High Court of Justice," should be read in substitution for the words "a Court of equity," *Marris* v. *Ingram*, 13 Ch. D. 338.]

them in his possession until he has properly discharged himself, and it is not necessary, to bring a trustee within the exception, that he should have the trust funds in his actual possession, or under his control, at the time the order is made. Thus if an order be made upon a trustee to repay a sum which he had previously misappropriated and spent, he may be attached for neglecting to obey the order (*a*), and it makes no difference that the trustee has ceased to be a trustee in the interval between the commission of the wrongful act and the making of the order for payment (*b*). So where two trustees, A. and B., received a sum of money and placed it in a bank to their joint account, but made payable to the cheque of A. alone, who drew it out and misapplied it, and thereupon B. was ordered in a suit to make it good, it was held that B. on non-payment was liable to be attached and sent to prison (*c*). And a debtor who has admitted that a sum of money due from him is in his hands, and has submitted to an order directing that he hold such sum upon certain trusts, is liable to attachment (*d*). But it must be shown that the money has been in the trustee's possession or under his control, and therefore] a trustee who had been ordered to pay a sum of money which he had *neglected* only in breach of his duty to recover, was held not to fall within the exception and could not therefore be arrested and imprisoned (*e*); [and where an order directed payment of a sum composed of principal and interest, not distinguished, no attachment could be issued, because so much as represented interest could not be said to have been in the possession or under the control of the trustee (*f*); and so where the order was for payment of the existing market value of lands improperly sold, as the difference between such value and the amount produced by the sale never came to the trustee's hands (*g*).

Where a trustee disobeyed an order to pay money into Court and was afterwards bankrupt, it was held that sect. 9 of the Bankruptcy Act, 1883, providing that, after the making of a

[(*a*) *Middleton* v. *Chichester*, 6 L. R. Ch. App. 152; *Marris* v. *Ingram*, 13 Ch. D. 338; *Re Knowles, Doodson* v. *Turner*, 52 L. J. N.S. Ch. 685; 48 L. T. N.S. 760.]

[(*b*) *Re Strong*, 32 Ch. Div. 342.]

[(*c*) *Evans* v. *Bear*, 10 L. R. Ch. App. 76.]

[(*d*) *Preston* v. *Etherington*, 37 Ch. Div. 104.]

(*e*) *Ferguson* v. *Ferguson*, 10 L. R. Ch. App. 661.

[(*f*) *Re Hickey*, 55 L. T. N.S. 588; 35 W. R. 53; and see Seton, 5th ed., p. 175.]

[(*g*) *Re Walker*, 38 W. R. 766; 60 L. J. N.S. Ch. 25; 63 L. T. N.S. 237; and see *Cronin* v. *Twinberrow*, W. N. 1887, p. 201.]

receiving order, no creditor shall have any remedy against the person or property of the debtor applied so as to suspend the jurisdiction of the Court to order attachment to issue against him (*a*); but in a more recent case Chitty, J., declined to follow this decision, and held that, the proceeding being not merely civil but of a punitive and disciplinary character, the Bankruptcy Act had not taken away the jurisdiction (*b*).

[The Debtors Act, 1878.]

50. By the Debtors Act, 1878 (41 & 42 Vict. c. 54), the Court is empowered among other things "to inquire into the case of a defaulting trustee, and to grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process, or order of arrest or imprisonment, and any application to stay the operation of any such writ, process, or order, or for discharge from arrest or imprisonment thereunder." Under this section the Court has refused to issue a writ of attachment against a defaulting trustee, where it appeared that he was unable to pay, and that no good purpose could be served by sending him to prison (*c*). But as the Debtors Act, 1869, while abolishing the penalty of imprisonment for debt in the case of an honest debtor was intended for the *punishment* of a fraudulent or dishonest debtor, and as it was not intended by the Amendment Act to get rid of the penal clauses of the previous Act, but only to give the judges a judicial discretion to deal with exceptional cases, the Court ought, in the case of a dishonest debtor, to send him to prison, unless it is satisfied that he has no means of satisfying the debt (*d*); and in a recent case in which the Court was not satisfied that the debtor was unable to pay, Kay, J., observed, "I think that this is a case in which the punishment ought to be inflicted for the purpose of teaching this man that a dishonest act of this kind will not be passed over with impunity even though he is unable to pay, and for the purpose of teaching other trustees the same lesson" (*e*). But where there had been no actual fraud or embezzlement, but only an erroneous application of the trust funds, the Court, upon the trustee undertaking to execute a charge upon all the property to which he was or might become entitled, declined to attach

[(*a*) *Re Simes*, 38 W. R. 570; 62 L. T. N.S. 721.]

[(*b*) *Re Edge*, 63 L. T. N.S. 762, following *Re Wray*, 37 Ch. D. 138, 143.]

[(*c*) *Street* v. *Hope*, 10 Ch. D. 286 n.; *Barrett* v. *Hammond*, 10 Ch. D. 285.]

[(*d*) *Marris* v. *Ingram*, 13 Ch. D. 308.]

[(*e*) *Re Knowles*, *Doodson* v. *Turner*, 52 L. J. N.S. Ch. 685; 48 L. T. N.S. 60.]

him for having failed to comply with an order for payment of the trust fund into Court (*a*).]

In assigning to the *cestui que trust* the foregoing remedies against the trustee, it must be understood that the *cestui que trust* has not himself *concurred* in the breach of duty, or subsequently *acquiesced* in it, and, *à fortiori*, has not executed a formal *release* or *confirmation*.

I. *Of concurrence.*

Concurrence of the *cestui que trust* in the breach of trust.

1. If a *cestui que trust concur* in the breach of trust he is for ever estopped from proceeding against the trustee for the consequences of the act (*b*), and *à fortiori* a *cestui que trust*, who is also a trustee, cannot hold his co-trustee responsible for any act in which they both joined (*c*).

Ignorance.

2. But persons cannot be held to have concurred in a breach of trust who had not the means of knowing that the acts to which they were parties involved a breach of trust (*d*).

Femes covert and infants cannot concur.

3. And persons cannot *concur* in a breach of trust, who, as *femes covert* (*e*) and infants (*f*), have no legal capacity to consent to the transaction.

Except guilty of actual fraud.

4. But neither coverture nor infancy will be a protection from a charge of *fraud*, and therefore if a *feme covert* (*g*), or infant (*h*),

[(*a*) *Holroyde* v. *Garnett*, 20 Ch. D. 532.]

(*b*) *Brice* v. *Stokes*, 11 Ves. 319, and *Walker* v. *Symonds*, 3 Sw. 64, *per* Lord Eldon; *Wilkinson* v. *Parry*, 4 Russ. 272; *Cocker* v. *Quayle*, 1 R. & M. 535; *Nail* v. *Punter*, 5 Sim. 555; *Newman* v. *Jones*, Rep. *t.* Finch, 58; and see *Fellows* v. *Mitchell*, 1 P. W. 81; *Booth* v. *Booth*, 1 Beav. 125; *Langford* v. *Gascoyne*, 11 Ves. 336; *White* v. *White*, 5 Ves. 555; *Re Chertsey Market*, 6 Price, 280, 284; *Baker* v. *Carter*, 1 Y. & C. 255; *Byrchall* v. *Bradford*, 6 Mad. 13; *Morley* v. *Lord Hawke*, cited in *Small* v. *Attwood*, 2 Y. & J. 520; *Fyler* v. *Fyler*, 3 Beav. 550; *Griffiths* v. *Porter*, 25 Beav. 236; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 74; *Ex parte Barnewall*, 6 De G. M. & G. 801; [*Evans* v. *Benyon*, 37 Ch. Div. 329.]

(*c*) *Butler* v. *Carter*, 5 L. R. Eq. 281, *per Cur.*

(*d*) *Buckeridge* v. *Glasse*, Cr. & Ph. 135, *per* Lord Cottenham.

(*e*) *Ryder* v. *Bickerton*, cited *Walker* v. *Symonds*, 3 Sw. 80; *Underwood* v. *Stevens*, 1 Mer. 717; *Smith* v. *French*, 2 Atk. 243; *Needler's case*, Hob. 225; *Lench* v. *Lench*, 10 Ves. 517, *per* Sir W. Grant; *Lord Montford* v. *Lord Cadogan*, 19 Ves. 639, 640, *per* Lord Eldon; and see *Parkes* v. *White*, 11 Ves. 221; *Bateman* v. *Davis*, 3 Mad. 98; *Cresswell* v. *Dewell*, 4 Giff. 460; and see *ante*, p. 1043.

(*f*) See *supra*, pp. 36, 38; and *Wilkinson* v. *Parry*, 4 Russ. 276.

(*g*) *Ryder* v. *Bickerton*, cited *Walker* v. *Symonds*, 3 Sw. 82, *per* Lord Hardwicke; and see *Savage* v. *Foster*, 9 Mod. 35; *Lord Montford* v. *Lord Cadogan*, 19 Ves. 640; *Vandebende* v. *Levingston*, 3 Sw. 625; *Evans* v. *Bicknell*, 6 Ves. 181; *Jones* v. *Kearney*, 1 Dru. & War. 166; *Davies* v. *Hodgson*, 25 Beav. 187; *Sharpe* v. *Foy*, 4 L. R. Ch. App. 35; *Re Lush's Trusts*, 4 L. R. Ch. App. 591; *Green* v. *Lyon*, 21 W. R. 695, reversed on the facts, Ib. 830; *Arnold* v. *Woodhams*, 16 L. R. Eq. 33, *per Cur.*; [*Cahill* v. *Cahill*, 8 App. Cas. 437; see *S. C. nom. Cahill* v. *Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361.]

(*h*) See the cases at note (*g*) p. 38, *supra*.

draw in a trustee to commit a breach of trust, such *feme covert* or infant cannot afterwards call the trustee to account for having violated his duty.

Separate use.

5. A *feme covert* will be bound by her concurrence in a breach of trust as to any fund which is settled to her *separate use*, where there is no *restraint against anticipation* (*a*), and such *feme covert*, if she execute a deed, will not be allowed to controvert the statements of facts contained in the deed (*b*). But she will not be estopped upon the ground of concurrence where the act was not voluntary, but her judgment was misled, or she was under undue influence (*c*). And a *feme covert* has no power to concur in any act as to a fund settled to her separate use where there is a *restraint against anticipation* (*d*).

Power of appointment.

And her concurrence will not operate beyond the interest settled to her separate use, though she have a *power of appointment* in addition; as if a *feme* be tenant for life to her separate use, with a power of appointing the *corpus* by *will*, though her concurrence would affect the life interest, it does not prevent the appointees under the will from holding the trustees responsible (*e*). [But if the trustees, by reason of any engagement entered into by the *feme covert*, have a right to be indemnified out of her estate they may, in accordance with the decisions already referred to (*f*), be entitled to resort to the appointed fund as part of the *feme's* assets for their indemnity (*g*).]

II. *Of acquiescence.*

Acquiescence of *cestui que trust.*

1. Again, a *cestui que trust*, though he did not *concur* at the time, may debar himself from relief by having *acquiesced* (*h*) in the breach of trust subsequently (*i*).

(*a*) See *ante*, pp. 867, 1044.

(*b*) *Keays* v. *Lane*, 3 Ir. R. Eq. 8, *per Cur.*

(*c*) *Whistler* v. *Newman*, 4 Ves. 129; *Hughes* v. *Wells*, 9 Hare, 773; and see *Walker* v. *Shore*, 19 Ves. 393.

(*d*) *Cocker* v. *Quayle*, 1 R. & M. 535; *Walrond* v. *Walrond*, Johns. 24; *Leedham* v. *Chawner*, 4 K. & J. 465; *Clive* v. *Carew*, 1 J. & H. 199; *Pemberton* v. *McGill*, 8 W. R. 290; *Fletcher* v. *Green*, 33 Beav. 426; *Arnold* v. *Woodhams*, 16 L. R. Eq. 29; [*Stanley* v. *Stanley*, 7 Ch. D. 589; *Heath* v. *Wickham*, 3 L. R. Ir. 376; 5 L. R. Ir. 285;] and see *Wilton* v. *Hill*, 25 L. J. N.S. Ch. 156; *Derbishire* v. *Home*, 3 De G. M. & G. 102, 113.

(*e*) *Kellaway* v. *Johnson*, 5 Beav. 319.

[(*f*) *Ante*, p. 877 *et seq.*]

[(*g*) See *Williams* v. *Lomas*, 16 Beav. 1.]

[(*h*) As to the meaning of acquiescence, see pp. 994, 995, *supra*.]

(*i*) *Harden* v. *Parsons*, 1 Eden, 145; *Thompson* v. *Finch*, 22 Beav. 324, *per* M. R.; *Griffiths* v. *Porter*, 25 Beav. 241, *per* M. R.; *Walker* v. *Symonds*, 3 Sw. 63, *per* Lord Eldon; *Hope* v. *Liddell*, 21 Beav. 183; *Brice* v. *Stokes*, 11 Ves. 326; *Macdonnell* v. *Harding*, 7 Sim. 190; *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16; *Lincoln* v. *Wright*, 4 Beav. 432; *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 459; *Farrant* v. *Blanch-*

Whether mere knowledge and abstinence from suing a bar in cases of breach of trust.

2. How far the *mere knowledge* of a right to sue in respect of a breach of trust, and the abstaining to sue will, without any other act, constitute *laches* in the eye of a Court of equity, and disentitle the plaintiff to relief, as in the particular instances of purchases by trustees, &c., above referred to (*a*), was until lately very uncertain; but it seems to be now settled that gross *laches*, as for twenty years, will disentitle a *cestui que trust* to relief (*b*). But of course mere knowledge without suing for a few years, as for three years (*c*), [four years (*d*),] or ten years (*e*), will not destroy the right to impeach the transaction. And where there is an express trust for *successive incumbrancers*, on a limited interest, as a life estate, the subsequent incumbrancers are not chargeable with *laches* so long as the whole beneficial interest is absorbed by the prior incumbrancers (*f*).

No bar where notice of breach of trust is constructive only.

3. A *cestui que trust*, who does not actually know, is not to be affected with knowledge of a breach of trust because he *might by enquiry have ascertained the fact*, for it is not *his* duty but that of the trustee to see that the trust fund is in a proper state (*g*).

Ward of Court.

4. A settlement by a ward of Court under the direction of the Court, of funds stated to represent the *infant's fortune*, will not operate as a confirmation of past breaches of trust (*h*).

Fluctuating body as parishioners or creditors.

5. It seems that a public and fluctuating body, as *parishioners*, may be bound by acquiescence (*i*). But it is almost unnecessary to repeat, that acquiescence cannot be objected against a class of persons, as parishioners or creditors, *with the same degree of force* as against a single individual (*j*).

ford, 1 De G. J. & S. 107; *Rutherfoord* v. *Maziere*, 13 Ir. Ch. Rep. 204; *Stevens* v. *Robertson*, 37 L. J. N.S. Ch. 499; *Sleeman* v. *Wilson*, 13 L. R. Eq. 36; *Philips* v. *Pennefather*, 8 I. R. Eq. 474; [*Re Hulkes*, 33 Ch. D. 552.]

(*a*) See *ante* p. 542, *et seq.*

(*b*) *Bright* v. *Legerton* (No. 1), 29 Beav. 60; 2 De G. F. & J. 606; *Hodgson* v. *Bibby*, 32 Beav. 221; and see *Browne* v. *Cross*, 14 Beav. 105; *Payne* v. *Evens*, 18 L. R. Eq. 356; *Re M'Kenna*, 13 Ir. Ch. Rep. 239; *Marquis of Clanricarde* v. *Henning*, 30 Beav. 175. But see *Knight* v. *Bowyer*, 2 De G. & J. 443; [*Thomson* v. *Eastwood*, 2 App. Cas. 215.]

(*c*) *Hanchett* v. *Briscoe*, 22 Beav. 496.

[(*d*) *Re Jackson*, 44 L. T. N.S. 467.]

(*e*) *Farrant* v. *Blanchford*, 11 W. R. 178; [*Re Cross*, 20 Ch. Div. 109.]

(*f*) *Knight* v. *Bowyer*, 2 De G. & J. 421, see 443.

(*g*) *Thompson* v. *Finch*, 22 Beav. 325–327; 6 De G. M. & G. 560; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 73.

(*h*) *Zambaco* v. *Cassavetti*, 11 L. R. Eq. 439.

(*i*) See *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh N. S. 92; *Re Chertsey Market*, 6 Price, 280, 284; *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 105, 108; *Attorney-General* v. *Scott*, 1 Ves. 415; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 150.

(*j*) See *ante*, pp. 549, 991.

Satisfaction in part for a breach of trust.

6. A *cestui que trust* who, knowing that his trustee has committed a breach of trust, gets what he can from the wreck of the property, and with that view receives from the trustee *part* of the relief to which he is entitled, does not thereby *waive his right to the full* relief to which he is entitled (*a*).

[Creditor's right not affected by not pressing for payment.]

[7. A creditor who merely abstains from calling upon the executors to realize the testator's estate for the purpose of paying his debt is not thereby deprived of his right to sue the executor's for *devastavit*. To deprive him of his right, he must, either by his conduct or by express authority, have misled the executors into parting with the assets available for payment of his claim (*b*).]

Acquiescence by reversioner.

8. As to acquiescence by a *cestui que trust* while his interest is *reversionary*, L. J. Turner observed: "Length of time, where it does not operate as a statutory or positive bar, operates simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not distinct propositions. They constitute but one proposition, and that proposition is that *the cestui que trust assented to the breach of trust*. A *cestui que trust* whose interest is reversionary is not bound to *assert his title* until it comes into possession; but the mere circumstance that he is not bound to assert his title does not seem to me to bear upon the question of his *assent to a breach of trust*. He is not, so far as I can see, less capable of giving such assent when his interest is in reversion than when it is in possession. Whether he has done so or not is a question to be determined on the facts of each particular case" (*c*). But he afterwards added that he was not prepared to say that, where the trust was definite and clear, a breach of trust could be held to have been sanctioned or concerned in by the *mere knowledge and non-interference* of the *cestui que trust* before his interest had come into possession (*d*). The above doctrines were approved by L. C. Campbell, with the further remark that it was easy to conceive cases in which, from great lapse of time, the facts from which the consent of the *cestuis que trust* was to be inferred might and ought to be presumed (*e*).

(*a*) *Thompson* v. *Finch*, 22 Beav. 316; 8 De G. M. & G. 560; [*Re Cross*, 20 Ch. Div. 109, 122].

[(*b*) *Re Birch*, 27 Ch. D. 622.]

(*c*) *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 72.

(*d*) *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 74.

(*e*) Ib. 77; and see *Taylor* v. *Cartwright*, 14 L. R. Eq. 176.

III. *Of Release and Confirmation.*

Release and confirmation by *cestui que trust.*

1. Lastly, a *cestui que trust* may preclude himself from his remedy against the trustee by executing a formal *release* of the breach of trust, or giving validity to the transaction by an express *confirmation* (*a*). And if the *cestui que trust* release the principal in a breach of trust or fraud, he cannot afterwards proceed against the other parties who would have been secondarily liable (*b*).

[Release in respect of a void transaction invalid.]

[But a release in respect of a transaction which a Court of equity would hold to be not merely voidable but *void*, will not bind the *cestui que trust* executing the release. Thus where on the footing of a supposed illegitimacy the title of the *cestui que trust* to a legacy was disputed and denied by the trustee, and the *cestui que trust* was thereby induced to accept from the trustee a smaller sum than that to which he was entitled, and by deed to release the trustee from the payment of the legacy, it was held, that the question of the legitimacy of the *cestui que trust* being entirely irrelevant, the transaction was absolutely unmeaning and void, and the release was set aside and relief granted after a long lapse of time (*c*).]

Waiver.

2. Under the head of release, we may notice the subject of *waiver*. "As to *waiver*," said Sir W. Grant, "it is difficult to say precisely what is meant by that term. With reference to the legal effect, a *waiver* is nothing unless it amounts to a release. It is by a release, or something equivalent only, that an equitable demand can be given away. A mere *waiver* signifies nothing more than an expression of intention not to insist upon the right, which in *equity* will not without consideration bar the right any more than at *law* an accord without satisfaction would be a plea. If there be a consideration, however slight, I do not know that the Court would not consider it a sufficient foundation for a release, or what is equivalent to a release" (*d*).

It would seem, therefore, that waiver is some positive act which, if supported by valuable consideration, though slight, will be taken in equity to constitute a release; but, if it be merely an expression of intention not to insist on the right, and

(*a*) *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 459; *French* v. *Hobson*, 9 Ves. 103; *Wilkinson* v. *Parry*, 4 Russ. 272; *Aylwin* v. *Bray*, cited in *Small* v. *Attwood*, 2 Y. & J. 517; *Cresswell* v. *Dewell*, 4 Giff. 465, *per Cur.*

(*b*) *Thompson* v. *Harrison*, 2 B. C. C. 164; see *Blackwood* v. *Borrowes*, 2 Conn. & Laws. 478.

[(*c*) *Thomson* v. *Eastwood*, 2 App. Cas. 215.]

(*d*) *Stackhouse* v. *Barnston*, 10 Ves. 466.

there is an absence of consideration, it is no waiver in the sense of a release (*a*).

Requisites for valid acquiescence, release, or confirmation.

Acquiescence, and release and confirmation, to have the effect we have mentioned, must be understood to be accompanied with the following conditions:—

a. As in the case of concurrence, the *cestui que trust* must be *sui juris*, and not a *feme covert* or infant; and, as regards infants, the Court continues its protection even after they have attained twenty-one till such time as they have acquired all proper information (*b*); and infants on coming of age must, in the case of a formal release being executed by them, *where it is required*, have *proper legal advice* (*c*). However, a *feme covert* is clearly *sui juris* as regards property settled to her *separate use*, [or belonging to her as her separate property under the Married Women's Property Acts,] where there is *no restraint against anticipation* (*d*). But where a *feme covert* is entitled to separate estate *with a clause against anticipation* it is difficult to see how she can be affected by acquiescence (*e*). In a late case (*f*), however, Lord Justice Turner intimated his leaning to be in favour of the affirmative; but the language of Lord Justice Knight Bruce, in the case alluded to, was more guarded. The restraint on anticipation can impose no fetter as respects *income accrued due before the acts of acquiescence* relied upon (*g*). If a suit be instituted for relief against a breach of trust, the *Court* has jurisdiction to *sanction a compromise* on behalf of a married woman even though her interest be *reversionary* (*h*).

β. The *cestui que trust* must be fully cognizant of all the facts

(*a*) See *Farrant* v. *Blanchford*, 11 W. R. 178.

(*b*) See *Walker* v. *Symonds*, 3 Sw. 69; *Hicks* v. *Hicks*, 3 Atk. 274; *Osmond* v. *Fitzroy*, 3 P. W. 131; *Hylton* v. *Hylton*, 2 Ves. 547; *Kilbee* v. *Sneyd*, 2 Moll. 233; *March* v. *Russell*, 3 M. & Cr. 42, 44; *Bateman* v. *Davis*, 3 Mad. 98; *Wedderburn* v. *Wedderburn*, 2 Keen, 722, 4 M. & Cr. 41; *Kay* v. *Smith*, 21 Beav. 522; *Aveline* v. *Melhuish*, 2 De G. J. & S. 288; *Chambers* v. *Crabbe*, 34 Beav. 457; *Sercombe* v. *Sanders*, 34 Beav. 382; *Kempson* v. *Ashbee*, 10 L. R. Ch. App. 15.

(*c*) *Lloyd* v. *Attwood*, 3 De G. & J. 615.

(*d*) See *ante*, 856; and *Jones* v. *Higgins* 2 L. R. Eq. 538; *Taylor* v. *Cartwright*, 14 L. R. Eq. 175. The dictum of Lord Hardwicke in *Smith* v. *French*, 2 Atk. 245, and the view of Sir J. Romilly, M. R., in *Davies* v. *Hodgson*, 25 Beav. 187, are opposed to the current of authority.

[(*e*) Though she may be by a consent in writing under sect. 6 of the Trustee Act, 1888; see *ante*, p. 1044.]

(*f*) *Derbishire* v. *Home*, 3 De G. M. & G. 80; and see *Wilton* v. *Hill*, 25 L. J. N.S. Ch. 156; *Davies* v. *Hodgson*, 25 Beav. 186, 187; *Clive* v. *Carew*, 1 J. & H. 205; [*Heath* v. *Wickham*, 3 L. R. Ir. 376, 390, where the *dictum* of L. J. Turner was doubted.]

(*g*) *Rowley* v. *Unwin*, 2 K. & J. 138.

(*h*) *Wall* v. *Rogers*, 9 L. R. Eq. 58.

and circumstances of the case (*a*); [and if the release is executed by the *cestui que trust* in ignorance of his rights, it may be set aside after the death of the trustee and after a long interval, as for instance twenty years (*b*).]

γ. The *cestui que trust* must not only be acquainted with the *facts*, but also to a certain extent apprised of the *law*, or how those facts would be dealt with if brought before a Court of equity (*c*).

δ. The release must not be wrung from the *cestui que trust* by distress or terror (*d*).

SECTION IV.

OF THE MODE AND EXTENT OF REDRESS IN BREACHES OF TRUST COMMITTED BY TRUSTEES OF CHARITIES.

I. Of the *mode* of redress.

1. The regular and ordinary course of proceeding is by way of *information* (1) in the name of the Attorney-General: the Queen is *parens patriæ*, and it is the duty of the Crown officer,

Ordinary mode of redress in breach of trust by charitable trustees.

(*a*) *Adams* v. *Clifton*, 1 Russ. 297; *Walker* v. *Symonds*, 3 Sw. 1; *Randall* v. *Errington*, 10 Ves. 423; *Buckeridge* v. *Glasse*, Cr. & Ph. 126; *Bennett* v. *Colley*, 2 M. & K. 232, *per* Lord Brougham; *Vyvyan* v. *Vyvyan*, 30 Beav. 65; *Eaves* v. *Hickson*, 30 Beav. 142; *Farrant* v. *Blanchford*, 11 W. R. 178, 1 De G. J. & S. 119; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 74; *Strange* v. *Fooks*, 4 Giff. 408; and see *Earl of Chesterfield* v. *Janssen*, 2 Ves. 146, 149, 152, 158; *Roche* v. *O'Brien*, 1 B. & B. 339, and the cases there cited; *Bowes* v. *East London Water Works Company*, 3 Mad. 375; *M'Carthy* v. *Decaix*, 2 R. & M. 615; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41; *Munch* v. *Cockerell*, 9 Sim. 339; 5 M. & Cr. 179; *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16; *Downes* v. *Bullock*, 25 Beav. 62; *Lloyd* v. *Attwood*, 3 De G. & J. 650.

[(*b*) *Re Garnett*, 31 Ch. Div. 1.]

(*c*) *Cockerell* v. *Cholmeley*, 1 R. & M. 425, *per* Sir J. Leach; *M'Carthy* v. *Decaix*, 2 R. & M. 615; *Marker* v. *Marker*, 9 Hare, 16; *Burrows* v. *Walls*, 5 De G. M. & G. 254: *Re Saxon Life Assurance Society*, 2 J. & H. 412; *Strange* v. *Fooks*, 4 Giff. 408; *Kempson* v. *Ashbee*, 10 L. R. Ch. App. 15; but see *Stafford* v. *Stafford*, 1 De G. & J. 202, and the observations at p. 548, *supra*.

(*d*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 209, see 226; and see *Earl of Chesterfield* v. *Janssen*, 2 Ves. 149, 158.

(1) Where the management of no charity *revenue* is concerned, as in a suit instituted by parishioners for the mere purpose of setting aside the nomination of a clerk to the bishop by the trustees of the advowson, the Attorney General need not be a party; it is the simple case of *cestuis que trust* calling upon the trustees to exercise the legal right; and [under the old practice] the suit was not by information, but by bill: see *Attorney-General* v. *Parker*, 1 Ves. 43; *S. C.* 3 Atk. 576; *Attorney-General* v. *Foster*, 10 Ves. 335; *Attorney-General* v. *Newcombe*, 14 Ves. 1; *Davis* v. *Jenkins*, 3 V. & B. 151; *Inhabitants of Clapham* v. *Hewer*, 2 Vern. 387; *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 149; *Prestney* v. *Corporation of Colchester*, 21 Ch. D. 111.]

the Attorney-General, to see that justice is administered to every part of her Majesty's subjects. *Relators* need not be personally interested (*a*). They are required merely because the Attorney-General, prosecuting a suit in the name of the Crown, would not be liable to costs, and unless some person were made responsible, proceedings might be instituted very oppressive to individuals (*b*).

Statute of Charitable Uses.

2. In the reign of Elizabeth an Act was passed, commonly called the *Statute of Charitable Uses* (*c*), by which the Court of Chancery was empowered to issue commissions to certain persons, including the bishop of the diocese, who were authorized, after summoning a jury of the county where the property was situate, to enquire into any abuse or misapplication of the trust estate. Many of these proceedings were so little consonant with justice, and on appeal to the Lord Chancellor, were found at once so puzzling, and so far from accomplishing the object in view, that at length the practice of issuing commissions fell into disuse, and people again resorted to the original process by way of information (*d*).

52 Geo. 3. c. 101, called Romilly's Act.

3. After commissions had ceased to be issued, the legislature endeavoured to provide a remedy, not as before, by creating a new jurisdiction, but by giving liberty to proceed under the old jurisdiction of Chancery in a summary mode. The 52 Geo. 3. c. 101, commonly called *Sir Samuel Romilly's Act*, and intituled "An Act to provide a summary Remedy in Cases of Abuses of Trusts created for Charitable Purposes," declared that "in every case of a breach of any trust created for charitable purposes, or whenever the direction or order of a Court of equity should be deemed necessary for the administration of any trust for charitable purposes, it should be lawful for any two or more persons to present a *petition* to the Chancellor, Master of the Rolls, or the Court of Exchequer, praying such relief as the nature of the case might require, such petition to be heard in a summary way upon affidavits or such other evidence as should be produced, the order made thereon to be final and conclusive, unless appealed against to the House of Lords within two years from the entry thereof." And it was provided that "every petition should be signed by the persons preferring the same in the presence of

(*a*) *Attorney-General* v. *Vivian*, 1 Russ. 226.

(*b*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 48, *per* Lord Redesdale.

(*c*) 43 Eliz. c. 4, [repealed by 51 & 52 Vict. c. 42.]

(*d*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 61, 62, *per* Lord Redesdale.

and be attested by the *solicitor or attorney* concerned for the petitioners, and should be allowed by his Majesty's *Attorney or Solicitor General.*"

Strictures on the Act.

4. These enactments, though penned by a very able hand, have been strongly reprobated as very loosely and obscurely worded—as tending rather to increase than diminish the expense of the application—in short, as having produced more mischief than benefit. "It was a wise saying," observed Lord Redesdale, "that the farthest way about was often the nearest way home, and he believed that these summary proceedings would be not always the *nearest* or at least not the *best* way home" (*a*).

Construction of the Act.

5. Upon the construction of this statute the following points have been resolved:—

Interest.

a. Although the Act authorizes *any* two or more persons to present the petition, the words must be understood to mean any persons *having an interest* (*b*): and the Court is bound to see not only that the petitioners are possessed of a clear interest, but that they prove themselves to be possessed of the interest they allege in their petition (*c*).

Breach of trust.

β. It has been said that the body of the statute is to be governed by the preamble, and therefore that the Act will not authorize a petition for any other purpose than relief against a breach of trust (*d*). But this narrow construction gives no force to the words of the Act, "*or whenever the direction or order of a Court of equity shall be deemed necessary for the administration of any trust for charitable purposes;*" and the doctrine has since been called into question, and may be considered as overruled (*e*).

Plain and simple cases only within the Act.

γ. The provision extends only to *plain and simple* cases for the opinion or direction of the Court (*f*), not where a question is to be discussed adversely who are to be intrusted with the

(*a*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 49.

(*b*) *Re Bedford Charity*, 2 Sw. 518, *per* Lord Eldon.

(*c*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 91, *per* Lord Eldon.

(*d*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 66, 67, 81, *per* Lord Redesdale; and see *Re Clarke's Charity*, 8 Sim. 42.

(*e*) *Re Upton Warren*, 1 M. & K. 410; *Re Parke's Charity*, 12 Sim. 332; *Re Manchester New College*, 16 Beav. 610; *Re Hall's Charity*, 14 Beav. 115; and see *Re Slewringe's Charity*, 3 Mer. 707; *Ex parte Rees*, 3 V. & B. 12; *Re Clarke's Charity*, 8 Sim. 34; *Re Phillipott's Charity*, 8 Sim. 381; and cases in note to *Re Hall's Charity*, 14 Beav. 120.

(*f*) *Corporation of Ludlow* v. *Greenhouse*, 1 Mad. 92, reversed in D. P. 1 Bligh, N. S. 17, see 66, 81, 89; *Re Phillipott's Charity*, 8 Sim. 381; *Ex parte Brown*, G. Coop. 295; *Ex parte Skinner*, 2 Mer. 456, 457, *per* Lord Eldon; and see *Re Chertsey Market*, 6 Price, 277.

administration of the charity estate (*a*), or who are entitled to the benefit of it (*b*), or whether the trustees or governors of the charity have or not, by the constitution of it, a certain authority, as of removing a master (*c*), or where any stranger is interested (*d*) (for the right of a third person cannot be disposed of on petition (*e*)), or where the relief which is sought is directed against the *assets* of a deceased trustee (*f*), or where the object of the application is not to have the existing charity regulated, but to have the funds diverted to some other charitable purpose (*g*). The Court has jurisdiction, however, under the Act, to settle a scheme of the charity (*h*), or to alter a scheme previously settled by decree (*i*), or to appoint new trustees (*j*), or where parishes have been divided to apportion the charities amongst the districts (*k*), or to direct a sale of the charity estate in a proper case (*l*), and generally the Court, as between the trustees and *cestuis que trust* of the charity, exercises a discretion as to whether it can put in operation the powers given by the Act with benefit to the charity (*m*).

Allowance.

8. The allowance "by the Attorney or Solicitor-General" must be construed with reference to the previous law upon the subject, and must therefore be taken to mean, not by the Attorney or

(*a*) *Re West Retford Church and Poor-lands*, 10 Sim. 101; *Re Phillipott's Charity*, 8 Sim. 381.

(*b*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 66; *Re Manchester New College*, 16 Beav. 610; *Re Clarke's Charity*, 8 Sim. 34.

(*c*) *Attorney-General* v. *Corporation of Bristol*, 14 Sim. 648; and see *Re Manchester New College*, 16 Beav. 610; *Attorney-General* v. *East Retford Grammar School*, 17 L. J. N.S. Ch. 450; but see *Re Fremington School*, 10 Jur. 512; 11 Jur. 421; *Re Phillips's Charity*, 9 Jur. 959.

(*d*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 66, *per* Lord Redesdale; *Ex parte Rees*, 3 V. & B. 10; *Re Manchester New College*, 16 Beav. 610; but see *Re Upton Warren*, 1 M. & K. 410; [*Re Hospital for Incurables*, 13 L. R. Ir. 361, where the Court adjudicated on the conflicting claims of two charities arising under the same instrument.]

(*e*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 93, *per* Lord Eldon.

(*f*) *Ex parte Skinner*, Wils. 15, *per* Lord Eldon; *Re Saint Wenn's Charity*, 2 S. & S. 66.

(*g*) *Re Reading Dispensary*, 10 Sim. 118.

(*h*) *Re Royston Free Grammar School*, 2 Beav. 228; *Re Berkhampstead Free School*, 2 V. & B. 134; *Re Shrewsbury Grammar School*, 1 Mac. & G. 324; 1 Hall & Tw. 401.

(*i*) *Attorney-General* v. *Bishop of Worcester*, 9 Hare, 328.

(*j*) *Bignold* v. *Springfield*, 7 Cl. & Fin. 71.

(*k*) *Re West Ham Charities*, 2 De G. & Sm. 218.

(*l*) *Re Parke's Charity*, 12 Sim. 329; *Re Ashton Charity*, 22 Beav. 288; *Re Overseers of Ecclesall*, 16 Beav. 297; and see *Re Lyford's Charity*, Ib. note; *Re Alderman Newton's Charity*, 12 Jur. 1011 (the case of an exchange); *Re Sowerby's Charity*, Jan. 26, 1849, before the V. C. of England (the case of a willing purchaser); *Suir Island Female Charity School*, 3 Jon. & Lat. 171. As to the jurisdiction of the Court generally to sell charity lands, see *supra*, p. 594.

(*m*) *Re Manchester New College*, 16 Beav. 610.

Solicitor-General indifferently, but by the Attorney-General, when there is such an officer, and in the vacancy of that office by the Solicitor-General (*a*).

Want of signature.

ε. If the petition be not signed by the Attorney-General or Solicitor-General, or if, after signature, it be not duly served, an order made by the Court under the Act will be an absolute nullity (*b*), and the petition may be taken off the file for irregularity (*c*).

Caution in signature.

ζ. As the intention of the legislature was to guard the charity fund from abuse, and with that view to prevent proceedings from being instituted, as they frequently were before, for no other reason than because it was known that the costs would be paid out of the charity estate, the Attorney-General, or, in the vacancy of that office, the Solicitor-General, ought not to sanction the petition with his signature but upon as much deliberation as if the relief were sought by way of information (*d*).

Attorney-General must be a party.

η. The Attorney-General by his *allocatur*, or allowance, of the petition, is not *functus officio*, and precluded from all future control, but must be made a party to any subsequent proceedings under the petition, as he would have been to all proceedings by way of information (*e*).

May correct his judgment.

θ. The Attorney-General, as representing the person of the Queen in her character of *parens patriæ*, is bound to see justice done, not only to the plaintiff in the petition, but also to the trustees and other defendants, and therefore is not estopped by his *allocatur* of the petition from afterwards correcting his judgment, but may support or oppose the views of the petitioners, as in his discretion he may think fit (*f*).

Motion.

ι. When the *jurisdiction* of the Court has been once attracted by the petition, a subsequent order may be made upon motion without the expense of a further petition (*g*).

Acts appointing Commissioners of enquiry.

6. Under powers given by 58 Geo. 3. c. 91, and 59 Geo. 3. c. 81, certain *commissioners of enquiry into charities* were appointed,

(*a*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 51, 52, 82, *per* Lord Redesdale; *Ex parte Skinner*, 2 Mer. 456, *per* Lord Eldon.

(*b*) *Attorney-General* v. *Green*, 1 J. & W. 305.

(*c*) *Re Dovenby Hospital*, 1 M. & Cr. 279.

(*d*) *Ex parte Skinner*, 2 Mer. 456, *per* Lord Eldon.

(*e*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 51, 65, 82, 83, *per* Lord Redesdale; *Attorney-General* v. *Stamford*, 1 Ph. 737; and see *Re Chertsey Market*, 6 Price, 271; *Attorney-General* v. *Haberdashers' Company*, 15 Beav. 397.

(*f*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 43–52.

(*g*) *Re Slewringe's Charity*, 3 Mer. 707; *Ex parte Friendly Society*, 10 Ves. 287; *Re Chipping Sodbury School*, 5 Sim. 410.

and by 59 Geo. 3. c. 91, it was enacted, that when it appeared to such commissioners of enquiry that the directions or orders of a Court of equity were requisite for remedying any *neglect, breach of trust, fraud, abuse, or misconduct* in the management of any trust created for charitable purposes, &c., it should be lawful for the said commissioners to certify the particulars of such case to his Majesty's Attorney-General. The labours of these commissioners of enquiry proved very valuable, and many informations were filed in consequence of certificates made by them; but their powers, after being frequently continued, expired in 1837.

16 & 17 Vict. c. 137.

7. By the *Charitable Trusts Act*, 1853, great additional facilities have been afforded for detecting and remedying breaches of trust in charity matters.

Powers of enquiry.

Commissioners are thereby appointed (*a*), to whom are confided powers of enquiry (*b*) similar to those given to the commissioners appointed by the Acts of George 3, and also a similar power of certifying cases to the Attorney-General as fit for his interference (*c*).

New jurisdiction at chambers.

In cases of charities the incomes of which *exceed* 30*l. per annum*, the same jurisdiction is given in charity cases (after the *previous sanction of the Charity Commissioners*) to the Chancery Judges at *chambers* as was before the Act exercisable by the Court of Chancery, or the Lord Chancellor entrusted with the custody of lunatics, in a suit regularly constituted, or upon petition; but the Judge may direct a suit or petition to be instituted or presented (*d*). And the provisions of the Act in respect of charities whose incomes exceed 30*l.* per annum, are applicable to charities within the *city of London*, the income whereof is *less than* 30*l. per annum* (*e*).

Jurisdiction of Courts of Bankruptcy and County Courts.

Where the incomes of charities do *not exceed* 30*l.* (since extended to 50*l.* (*f*)) *per annum*, the *District Courts of Bankruptcy* and *County Courts*, with the *previous sanction of the Charity Commissioners*, are armed with the same jurisdiction as the Court of Chancery had (*g*); and with the permission of the Commissioners to be applied for within one month after the making of the order (*h*), an *appeal* was allowed to the Court of Chancery (*i*).

(*a*) 16 & 17 Vict. c. 137, s. 1.
(*b*) Ib. sects. 9 to 14.
(*c*) Ib. s. 20.
(*d*) Ib. s. 28. [On a summons under the section the Court has jurisdiction to decide whether or not the property is held on a charitable trust; *Re Norwich Town Close Estate Charity*, 40 Ch. Div. 298.]
(*e*) Ib. s. 30.
(*f*) 23 & 24 Vict. c. 136, s. 11.
(*g*) 16 & 17 Vict. c. 137, s. 32.
(*h*) Ib. s. 39.
(*i*) Ib. s. 40.

Necessity for previous consent of Charity Commissioners before taking proceedings.

The Act contains a special provision that no suit or proceeding (*a*) not being an application "*in any suit or matter actually pending,*" shall be commenced or taken without an authority previously obtained from the Charity Commissioners (*b*). It was at first held that where money had been paid into Court under the Trustee Relief Act, 10 & 11 Vict. c. 96 (*c*), or under a Railway Act (*d*), no such suit or matter was pending as to obviate the necessity of previously obtaining the concurrence of the Charity Commissioners. But it has since been decided *by the Court of Appeal*, that in such cases the previous sanction of the Charity Commissioners is unnecessary. The object of the provision was merely to stop the enormous abuses in reference to proceedings in charity matters, and the words *suit or matter actually pending* mean pending at the time of the *application*, and not at the passing of the Act (*e*). It has, however, been

[(*a*) The words suit or other proceeding do not include an action at law, or for the enforcement of any right, not relating to the administration of the trusts of the charity. Thus, the sanction of the Charity Commissioners was held not to be requisite, where the Governors of an Endowed School commenced an action against the master to restrain him from presenting himself at the school, or continuing to occupy the schoolhouse, on the ground that he had never been properly appointed to the mastership, was unfit to fulfil its duties, and had been removed by a resolution of the Governors, *Holme* v. *Guy*, 5 Ch. Div. 901; or where the master of a school brought an action to restrain the managers from dismissing him, and ejecting him from the school-house, and the question was raised whether the managers had been properly appointed, *Rendall* v. *Blair*, 45 Ch. Div. 139 (*per* Bowen and Fry, L.JJ., Cotton, L.J., dissenting and agreeing with Kay, J., *contra*); or where a schoolmaster claimed an injunction to restrain two of the trustees or managers from removing him from his office until after the holding of a meeting of the three trustees, and until he should have had an opportunity of being heard at such meeting in reply to any charges made against him, *Fisher* v. *Jackson*, (1891) 2 Ch. 84. But they include a mandamus to compel the rendering of proper accounts; *Attorney-General* v. *Dean and Canons of Manchester*, 18 Ch. D. 596. And as to what cases fall within the section, see *Brittain* v. *Overton*, 25 Ch. D. 41, n.; *Benthall* v. *Earl of Kilmorey*, 25 Ch. Div. 39.]

[(*b*) S. 17. But this provision does not apply to the Charities exempted from the Act by sect. 62; or to Places of Religious Worship falling under sect. 9 of 18 & 19 Vict. c. 81, *Glen* v. *Gregg*, 21 Ch. Div. 513; and see *Attorney-General* v. *Sidney Sussex College*, 15 W. R. 162, 21 Ch. Div. 514, note. The authority of the Commissioners must be given formally in the manner directed by the Act, and a letter signed by the secretary of the board stating that "they were prepared to issue their certificate authorizing the proceedings;" that "any difficulty in the application to the Court would probably be obviated by the production of the letter," and that "the certificate would be prepared and issued in due course," was held by Fry, J., in a pressing case of an application for an injunction to be insufficient; *Thomas* v. *Harford*, 48 L. T. N.S. 262.]

(*c*) *Re Markwell's Legacy*, 17 Beav. 618; *In re Skeetes*, 1 Jur. N. S. 1037.

(*d*) *Re London, Brighton and South Coast Railway Company*, 18 Beav. 608.

(*e*) *Re Lister's Hospital*, 6 De G. M. & G. 184; *Re St. Giles and St. George, Bloomsbury*, 25 Beav. 313; *Braund* v. *Earl of Devon*, 3 L. R. Ch. App. 800; [*Re William of Kyngeston Charity*, 30 W. R. 78.]

held *since the decision of the Court of Appeal*, that a petition for the appointment of new trustees under a scheme previously settled by the Court requires the sanction of the Commissioners (*a*).

The Act contains other provisions (*b*) of a *preventative* rather than a *remedial* kind.

Board authorized to give advice.

By the 16th section, for instance, the Board has power to entertain applications for their *opinion or advice*, and persons acting in accordance therewith are indemnified.

Provisions for vesting land, stock, &c.

By the 48th section, *lands* belonging to any charity may be vested in the secretary of the Board as a corporation sole by the name of the *Treasurer* of Public Charities; and by the 51st section, annuities, stocks, shares, or securities held for any charity may be vested in the *Official Trustees* of charitable funds; and by the 54th and following sections, the Board have power, when the ordinary jurisdiction is insufficient for the purpose, to approve provisionally of *new schemes* of charities, *varying from the original endowment*, but which are to be submitted annually to Parliament for its ratification.

Charitable Trusts Amendment Act.

8. By the *Amendment Act*, 18 & 19 Vict. c. 124, by the 15th section, the name of the Treasurer of Public Charities is abolished, and the secretary of the Board for the time being is styled the *Official Trustee* of charity *lands*, [who is empowered to take and hold all such interest in land as in pursuance of an order of the Board is conveyed to or vested in him by any deed or assurance or otherwise (*c*), and by the 18th section, and 50 & 51 Vict. c. 49, s. 4, *Official Trustees* of charitable *funds* are appointed, who are to have perpetual succession, and are to consist of such officers of the Board as the Board with the consent of the Treasury from time to time appoint.]

Charitable Trusts Act, 1860.

9. By "*The Charitable Trusts Act*, 1860" (23 & 24 Vict. c. 136), the Charity Commissioners are enabled by s. 2 to make such orders as may be made "by any Judge of the Court of Chancery sitting at *Chambers* (*d*), or by any *County Court* or *District Court of Bankruptcy* (*e*), for the appointment or removal of any schoolmaster or schoolmistress or other officer thereof, or for or relating to the assurance, transfer, or payment of any real

(*a*) *Re Jarvis's Charity*, 1 Dr. & Sm. 97; and see *Re Bingley School*, 2 Drew. 283; *Re Ford's Charity*, 3 Drew. 324; both, however, decided previously to the appeal decisions in p. 1065 note (*e*).

(*b*) See pp. 595, 602, *supra*, for powers of sale, leasing, &c., given by the Acts.

[(*c*) 50 & 51 Vict. c. 49, s. 5.]

(*d*) See 16 & 17 Vict. c. 137, s. 28.

(*e*) Ib. s. 32.

or personal estate" belonging to the charity, or for the establishment of any scheme. But, by sect. 4, no such order is to be made where the charity income exceeds 50*l.*, except on the application of the majority of the trustees; and no trustee is to be removed on the ground only of religious belief; and by sect. 5, the Commissioners are not to make orders in any case, which by reason of its contentious character or otherwise may be considered by them more fit to be heard by the judicial Courts (*a*).

II. Of the *extent* of redress.

What account will be directed of *mesne* rents and profits.

Under this head we propose to enquire only within what period of time the account of *mesne rents and profits* directed against *trustees* of charities guilty of a breach of trust will be restricted.

The account not affected by Statutes of Limitation.

1. It is clear that in informations against *trustees of charities* the old *Statutes of Limitation* opposed no bar to the account, because charities were held exempt from the purview of the Statutes, and the claim was by *cestui que trust* against an *express trustee* (*b*); and although it was at one time considered that the Statute might afford a good rule how far back to carry the account (*c*), this doctrine was afterwards overruled (*d*). And now, 3 & 4 W. 4. c. 27, though applicable to charities (*e*), does not limit the liability of express trustees to account (*f*); so that charity trustees must, [except so far as they may be protected by the provisions of the Trustee Act, 1888, already referred to (*g*),] as express trustees, account upon the same footing as before the Act.

Bar to the account from inconvenience of relief.

2. But the Court may set a limit to the account on the ground of *inconvenience*. "It is the constant practice of Courts of equity," said Sir Thomas Plumer, "to discourage stale demands; and this principle has often been acted upon in cases of charities. When there has been a long period, during which a party has, under an innocent mistake, misapplied a trust fund from the *laches* and neglect of others, that is, from no one of the public

(*a*) As to the effect of the 5th section, see *Re Hackney Charities*, 34 L. J. N.S. Ch. 169; *Re Burnham National Schools*, 17 L. R. Eq. 241.

(*b*) *Attorney-General* v. *Mayor of Exeter*, Jac. 448, *per* Sir T. Plumer; *Attorney-General* v. *Brewers' Company*, 1 Mer. 498, *per* Sir W. Grant; see *Incorporated Society* v. *Richards*, 1 Conn. & Laws. 58; 1 Dru. & War. 258.

(*c*) *Anon. Case*, 2 Eq. Ca. Ab. 12, pl. 20; *Love* v. *Eade*, Rep. *t.* Finch, 269.

(*d*) See cases in note (*b*).

(*e*) See p. 1006, *ante*.

[(*f*) *Hicks* v. *Sallitt*, 3 De G. M. & G. 816.

(*g*) 51 & 52 Vict. c. 59, s. 8; *ante*, p. 1008.]

setting him right, and when the accounts have, in consequence, become entangled, the Court, under its general discretion, considering the enormous expense of the enquiries, and the great hardship of calling upon representatives to refund what families, acting on the notion of its being their property, have spent, has been in the habit, while giving relief, of fixing a period to the account" (*a*).

Period to which account is carried back varies according to circumstances.

3. The period to which the account has been carried back has varied according to the circumstances presented to the consideration of the Court. Where no inconvenience can be objected, the Court will as a general rule carry back the account to the time of commencement of the misapplication.

Attorney-General v. Mayor of Exeter.

4. Thus in *Attorney-General* v. *The Mayor of Exeter* (*b*), where the defendants admitted possession of the charity estate for the last 200 years, and stated that they had *always been ready and willing to account for the rents*, Sir W. Grant ordered the defendants to account for the whole period, and this decision was affirmed by Sir T. Plumer on a rehearing, and by Lord Eldon on appeal.

Attorney-General v. Corporation of Stafford.

5. In *Attorney-General* v. *The Corporation of Stafford* (*c*), the trustees in their answer, filed in 1811, had furnished accounts of the trust estate from the year 1791, and Lord Gifford saw no inconvenience in decreeing the account as far back as the trustees themselves had stated it, but refused to extend it farther.

Attorney-General v. The Brewers' Company, &c.

6. In *Attorney-General* v. *The Brewers' Company* (*d*), Sir W. Grant directed the trustees to account from the date of a certain Act of Parliament, a period of about *thirty* years. In a more recent suit against a corporation the account was carried back to the last appointment of new trustees of the corporation, a period short of *ten* years. And in another contemporaneous suit against the same corporation, but where the legal estate was not in trustees, but in the corporation itself, the Court by analogy, and for want of another fixed point, ordered the account to commence at the date of the last appointment of new trustees in the first suit (*e*).

Various other periods adopted.

7. In other cases the account has been carried back to the period when the corporation was first informed of the misapplication

(*a*) *Attorney-General* v. *Mayor of Exeter*, Jac. 448.
(*b*) Jac. 443; 2 Russ. 362.
(*c*) 1 Russ. 547.
(*d*) 1 Mer. 495.
(*e*) *Attorney-General* v. *Mayor of Newbury*, 3 M. & K. 647.

(as by the publication of the Charity Commissioners' Report): in others it has been directed from the time of filing the information, and in others from the date of the decree (*a*).

Compromise with Attorney-General.

8. Occasionally, where the defendant has been in strictness accountable for a very long period, but the right, if enforced would impose great hardship, it has been referred to the Attorney-General, as representing the charity, to certify whether under the circumstances it might not be proper for the charity to accept a less sum (*b*).

Trustees acting from mistake.

9. Where the trustees have diverted the charity funds from their proper channel through *mistake*, it is now settled, that the Court will not call back any disbursements made before the commencement of the proceedings (*c*), or before the trustees had notice that the propriety of such application would be called into question (*d*). The Court holds a strict hand over trustees where there is any wilful misemployment; but where the Court sees nothing but mistake, while it gives directions for the better management in future, it refuses to visit with punishment what has been transacted in time past. To carry back the account to the very commencement of the misapplication would be the ruin of half the corporations in the kingdom (*e*); besides, to act on such a principle would be a great discouragement to undertake the office of trustees of charities (*f*).

Distinction between corporations and individuals.

10. If an individual make an annual payment for a particular purpose out of the profits of his estate, it is a reasonable presumption, from the strong interest which he has to resist an unfounded demand, that he has enquired into the origin of the claim, and he is therefore fixed with implied notice of all the circumstances that attend it; but the same presumption cannot be applied to corporations, because, having no immediate per-

(*a*) See *Attorney-General* v. *Drapers' Company*, 6 Beav. 390.

(*b*) *Attorney-General* v. *Mayor of Exeter*, 2 Russ. 370; and see *Attorney-General* v. *Corporation of Carlisle*, 4 Sim. 279; *Attorney-General* v. *Bretingham*, 3 Beav. 91; *Attorney-General* v. *Pretyman*, 4 Beav. 462.

(*c*) *Attorney-General* v. *Corporation of Exeter*, 2 Russ. 45; affirmed, 3 Russ. 395; *Attorney-General* v. *Dean of Christchurch*, Jac. 474, 637; *S. C.* 2 Russ. 321; *Attorney-General* v. *Rigby*, 3 P. W. 145; *Attorney-General* v. *Caius College*, 2 Keen, 150; *Attorney-General* v. *Drapers' Company*, 4 Beav. 67; *Attorney-General* v. *Christ's Hospital*, Ib. 73; [*Andrews* v. *M'Guffog*, 11 App. Cas. 311;] and see *Attorney-General* v. *Mayor of Newbury*, 3 M. & K. 650.

(*d*) *Attorney-General* v. *Burgesses of East Retford*, 2 M. & K. 35, see 37; and see *Attorney-General* v. *Corporation of Berwick-upon-Tweed*, Taml. 239; *Attorney-General* v. *Caius College*, 2 Keen, 150.

(*e*) *Attorney-General* v. *Burgesses of East Retford*, 2 M. & K. 37, *per* Sir J. Leach.

(*f*) *Attorney-General* v. *Corporation of Exeter*, 2 Russ. 54, *per* Lord Eldon.

sonal interest in the application of the profits of the corporate property, they may, without the imputation of culpable negligence, adopt and follow the practice of their predecessors (*a*).

Breach of trust by a parish.

11. Where the charity fund has been administered by a *parish* and misapplied, there, as a parish is a fluctuating body, and the present ratepayers ought not to pay for past defaults, no retrospective account can be ordered (*b*).

Mode of attaching the corporation property.

12. In the East Retford case (*c*), before Sir J. Leach, the Court, on proof of a breach of trust by the corporation, directed an enquiry by the Master of what property the corporation was possessed not devoted to special purposes, with the view that compensation might be made to the charity by an immediate *sale;* but the case upon that point was subsequently appealed against and reversed, as contrary to principle (*d*), and the plaintiff must now confine himself to a sequestration against the corporation in the ordinary course.

(*a*) *Attorney-General* v. *Burgesses of East Retford*, 2 M. & K. 38, *per* Sir J. Leach.

(*b*) *Ex parte Fowlser*, 1 J. & W. 70; and see cases cited Ib. 73, note (*a*).

(*c*) 2 M. & K. 35.

(*d*) 3 M. & Cr. 484; and see *Attorney-General* v. *Newark-upon-Trent*, 1 Hare, 395.

CHAPTER XXXI.

MAXIMS OF EQUITY FOR SUSTAINING THE TRUE CHARACTER OF THE TRUST ESTATE AGAINST THE LACHES OR TORT OF THE TRUSTEE.

BESIDES the several rights and remedies which have just been the subject of discussion, the Court, with the view of *keeping the trust estate in its regular channel, and sustaining its proper character, whether of realty or personalty, against the* laches *or other misbehaviour of the trustee,* has found it necessary to establish two maxims which we now proceed to examine: viz., *First,* What ought to be done should be considered as done (*a*); and, *Secondly,* The act of the trustee shall not alter the nature of the *cestui que trust's* estate (*b*).

SECTION I.

WHAT OUGHT TO BE DONE SHALL BE CONSIDERED AS DONE.

General principle.

1. "THE forbearance of the trustees," said Sir J. Jekyll, "in not doing what it was their office to have done, shall in no sort prejudice the *cestuis que trust,* since at that rate it would be in the power of trustees, either by doing or delaying to do their

(*a*) *Walker* v. *Denne,* 2 Ves. jun. 183, *per* Lord Loughborough; *Foone* v. *Blount,* Cowp. 467, *per* Lord Mansfield; *Holland* v. *Hughes,* 16 Ves. 114, *per* Sir W. Grant; *Gaskell* v. *Harman,* 11 Ves. 507, *per* Lord Eldon; *Stead* v. *Newdigate,* 2 Mer. 530, *per* Sir W. Grant; *Pulteney* v. *Darlington,* 1 B. C. C. 237, *per* Lord Thurlow; *Burgess* v. *Wheate,* 1 Eden, 186, *per* Sir T. Clarke; *Lechmere* v. *Earl of Carlisle,* 3 P. W. 215, *per* Sir J. Jekyll; *Fitzgerald* v. *Jervoise,* 5 Mad. 29, *per* Sir J. Leach; *Earl of Buckingham* v. *Drury,* 2 Eden, 65, *per* Lord Hardwicke; *Guidot* v. *Guidot,* 3 Atk. 256, *per* Lord Hardwicke; *Crabtree* v. *Bramble,* Ib. 687, *per eundem; Trafford* v. *Boehm,* Ib. 446, *per eundem; Astley* v. *Earl of Essex,* 6 L. R. Ch. App. 898; &c.

(*b*) *Philips* v. *Brydges,* 3 Ves. 127, *per* Lord Alvanley; *Earlom* v. *Saunders,* Amb. 242, *per* Lord Hardwicke; *Selby* v. *Alston,* 3 Ves. 341, *per* Sir R. P. Arden.

duty, to affect the right of other persons; which can never be maintained. Wherefore the rule in such cases is, that '*What ought to have been done shall be taken as done,*' and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money" (*a*). And Lord Macclesfield, in the case of a bequest to a trustee for purchasing lands, observed, "If the purchase had been made it must have gone to the heir, but if the trustee, by delaying the purchase, might alter the right, and give it to the executors, this would be to *make it the will of the trustee, and not the will of the testator, which would be very unreasonable and inconvenient*" (*b*).

Money to be laid out on land to be regarded as land.

2. Upon these grounds it is in equity a universal rule, that *money directed to be laid out in the purchase of land, or land directed to be sold and turned into money, shall be considered as that species of property into which it is directed to be converted*; and this, in whatever manner the direction is given, whether by will, by way of contract, by marriage articles, by settlement, or otherwise, and whether the money has been actually deposited in the hands of trustees for the purpose, or is only covenanted to be paid, and whether the land has been actually conveyed, or is only agreed to be conveyed (*c*).

Subject to curtesy.

3. Thus, if money be stipulated to be laid out in land to be settled on a *feme covert* in fee or in tail, the husband of the *feme* is entitled to his *curtesy*, though no purchase be actually made in the lifetime of the wife; and he will be decreed the interest of the money until a purchase can be found; and when the investment has been made, he will have a life estate in the lands (*d*).

Whether subject to dower.

4. Whether under similar circumstances a widow could, before the late Dower Act, have established her title to *dower*, was much questioned. It was admitted she was not dowable of a *mere trust estate* (*e*); but, where money was to be converted into land, and the interest was only prevented from being legal through the forbearance of the trustee, it was contended that the rights of parties ought not to be varied by the neglect of

(*a*) *Lechmere* v. *Earl of Carlisle*, 3 P. W. 215.

(*b*) *Scudamore* v. *Scudamore*, Pr. Ch. 543.

(*c*) *Fletcher* v. *Ashburner*, 1 B. C. C. 499; and see *Wheldale* v. *Partridge*, 5 Ves. 396.

(*d*) *Sweetapple* v. *Bindon*, 2 Vern. 536; *Cunningham* v. *Moody*, 1 Ves. 174; *Dodson* v. *Hay*, 3 B. C. C. 405.

(*e*) Altered by the late Act, 3 & 4 W. 4. c. 105.

the person who was merely the instrument for carrying out the settlor's wishes.

Lord Hardwicke's opinion.

The opinion of Lord Hardwicke was on more than one occasion expressed adversely to the wife's claim (*a*); but there are several authorities in favour of the right to dower (*b*).

Dower Act.

By the Dower Act (except where the marriage was celebrated on or before the 1st day of January, 1834), the Legislature has given dower out of every species of trust estate in possession; subject to be defeated, however, by any declaration of intention on the part of the husband (*c*).

[Letters of administration.]

[5. Money which has arisen from settled land sold under the Settled Estates Acts, and liable to be reinvested in land under those Acts, is not a proper subject for letters of administration, so as to give jurisdiction to the Court to grant such letters (*d*)].

Money to be laid out in land is not subject to escheat.

6. If money be articled, or directed, to be laid out in land to be settled on a person in fee, and the *cestui que trust* dies without heirs, there can, as a general rule, be no claim for an escheat by any one, since until the land is actually purchased it is uncertain who will fill the character of lord (*e*). Cases might no doubt occur free from this element of uncertainty, as where the trust is to lay out money in the purchase of lands in the parish of A., all the lands in which are held under the same lord; but even in such a case the lord would fail to establish his claim, for a lord by escheat comes under no head of equity—is entirely a stranger to the trust, claiming by title paramount of his own (*f*). The pretence for his claim would be, that the operation of the rule so absolutely converts the equitable into a legal estate, that all the incidents, that would have belonged to the legal, must be considered in equity as attaching to the equitable estate; but the rule was meant not to benefit third persons, but to protect the interests of *parties to the trust.*

How affected by the *cestui que trust's* will.

7. As money to be laid out in land is regarded as land, it could not, even before the Wills Act, have been devised by an infant, though of sufficient age to bequeath personal estate (*g*); and, for

(*a*) See *Cunningham* v. *Moody*, 1 Ves. 176; *Crabtree* v. *Bramble*, 3 Atk. 687.

(*b*) *Fletcher* v. *Robinson*, cited *Dudley* v. *Dudley*, Pr. Ch. 250; *S. C.* stated from R. L. in *Banks* v. *Sutton*, 2 P. W. 709; *Otway* v. *Hudson*, 2 Vern. 583; *Banks* v. *Sutton*, 2 P. W. 700; *Re Lord Lismore*, 1 Hog. 177; and see the arguments of Sir J. Jekyll in *Banks* v. *Sutton*, 2 P. W. pp. 704, 706.

(*c*) See p. 831, *supra.*

[(*d*) *Re Goods of Lloyd*, 9 P. D. 65.]

(*e*) This point escaped notice in *Walker* v. *Denne*, 2 Ves. jun. 170, and it seems to have been assumed that the *Crown* would be the lord.

(*f*) *Walker* v. *Denne*, 2 Ves. jun. 185, *per* Lord Loughborough; *Henchman* v. *Attorney-General*, 3 M. & K. 494, *per* Lord Brougham.

(*g*) *Carr* v. *Ellison*, 2 B. C. C. 56;

the same reason, it will pass by the *cestui que trust's* will under the general description of all the testator's *lands* (*a*), or of all his lands in the county of —— *or elsewhere* (*b*), though in the latter case it was very plausibly contended, that the testator could not have referred to money, but must have alluded to something that possessed a local character. [But where the money is subject to a general power of appointment by will, and *there is no intermediate interest* in any person who after the death of the donee of the power would have a right to call for its investment in land, and the donee has shown an intention in his lifetime to make the money personal estate so far as he can, it will pass under a general bequest by the donee of all his personal estate (*c*).]

Is subject to judgments.

8. So money to be converted into land was bound by a *judgment* (*d*), and was never accounted *personal assets*, and therefore was not until the Act of William IV. (*e*), liable to the payment of simple contract debts (*f*).

Orphanage share.

9. So a gift by a parent (a freeman of the city of London) to a child, of *money to be laid out in land* was considered a purchase by the father and a donation of the estate, and consequently, under the law existing before the Act 19 & 20 Vict. c. 94, the child was not bound, before receiving his orphanage share, to bring the purchase into hotchpot (*g*).

In what cases money to be laid out on land goes to the heir.

10. With respect to the *heir* of the person upon whom the lands, when purchased, are directed or agreed to be settled, it is necessary, for ascertaining his rights, to distinguish between the cases where the real representative claims as against a *stranger*, and where he claims as against the *executor of his own ancestor*.

Case of the heir claiming against a stranger.

It appears to be perfectly established that the heir is entitled

Earlom v. *Saunders*, Amb. 241. By the Wills Act, 7 W. 4. & 1 Vict. c. 26, an infant cannot make a will even of personal estate.

(*a*) *Guidot* v. *Guidot*, 3 Atk. 256, *per* Lord Hardwicke; *Rashleigh* v. *Master*, 1 Ves. jun. 201; *S. C.* 3 B. C. C. 99; *Green* v. *Stephens*, 17 Ves. 77; *Biddulph* v. *Biddulph*, 12 Ves. 161; [*Chandler* v. *Pocock*, 15 Ch. D. 491; *Re Greaves' Settlement Trusts*, 23 Ch. D. 313.]

(*b*) *Lingen* v. *Sowray*, 1 P. W. 172; *Guidot* v. *Guidot*, 3 Atk. 254.

[(*c*) *Chandler* v. *Pocock*, 15 Ch. D. 491; 16 Ch. Div. 648; and see *Re Greaves' Settlement Trusts*, 23 Ch. D. 313.]

(*d*) *Frederick* v. *Aynscombe*, 1 Atk. 392.

(*e*) 3 & 4 W. 4. c. 104.

(*f*) *Whitwick* v. *Jermin*, cited *Baden* v. *Earl of Pembroke*, 2 Vern. 58; *Lawrence* v. *Beverly*, cited Ib. 55; *S. C.* 2 Keb. 841; *Fulham* v. *Jones*, cited *Pulteney* v. *Darlington*, 7 B. P. C. 550; *Foone* v. *Blount*, Cowp. 467, *per* Lord Mansfield. Money to be laid out on a purchase of land is not land for the purposes of the Stamp Acts, but pays legacy duty; *Re De Lancey*, 4 L. R. Ex. 345; 5 L. R. Ex. 102.

(*g*) *Hume* v. *Edwards*, 3 Atk. 450; *Annand* v. *Honeywood*, 1 Vern. 345.

to the money as land, if he seek to enforce his equity against a *stranger*. Thus, 1. If a sum of money be *bequeathed* to be laid out in a purchase of lands to be settled to the use of A. and his heirs, and A. dies before a purchase has been obtained, the money is the property, not of the executor, but of the heir of A. (*a*). 2. If on the marriage of A. money be *actually deposited* in the hands of trustees, either by A. himself or by a stranger, to be laid out in a purchase of lands to be settled to the use of A. for life, remainder to his wife for life, remainder to the issue in tail, remainder to A. in fee, and A. dies without issue, his heir, and not his executor is entitled (*b*). 3. If on the marriage of A. there be a *covenant* on the part of B. to lay out money in a purchase of lands to the above uses, and A. dies without issue, his heir takes the benefit of the covenant (*c*).

Case of the heir claiming against the executor of his own ancestor.

11. But if the heir have to enforce his claim, not against a stranger, but against the *personal representative of his own ancestor*, as if A. on his marriage covenant to lay out money in a purchase of lands to be settled to the use of himself for life, remainder to his wife for life, remainder to the issue in tail, remainder to his own right heirs, in this instance the question whether the heir can call upon the executor for the money must depend upon this further distinction :—

The heir has a right, if any person has an equitable interest.

a. If at the death of A. there be an equitable interest in the fund outstanding in another, as a life estate in the wife, [or a right in a jointress to have a rent-charge (*d*),] or an estate tail in the issue, then the real quality of the money is sustained and continued by that right, and the heir of A. is entitled to call upon A.'s executor to pay the money (*e*); and if there be such an outstanding claim at the death of the ancestor, the circum-

(*a*) *Scudamore* v. *Scudamore*, Pr. Ch. 543. *Abbot* v. *Lee*, 2 Vern. 284, at first sight appears *contra*, but it seems from the Registrar's book that the direction for conversion was not imperative, but to be at the discretion of the testator's executors. Had the money been absolutely converted into *land*, the ultimate remainder would, by failure of issue of the surviving daughter, have resulted as personal estate of the *testator* (see p. 160, *ante*); but being *money* absolutely bequeathed, subject to a discretion to lay out on land which was not exercised, it belonged to the administrator of the legatee, as was decreed. The case is stated from Reg. Lib. in Appendix No. II. to 3rd edition of this Treatise.

(*b*) *Disher* v. *Disher*, 1 P. W. 204; *Chaplin* v. *Horner*, Ib. 483; *Edwards* v. *Countess of Warwick*, 2 P. W. 171; and see *Lechmere* v. *Lechmere*, Cas. *t.* Talb. 90.

(*c*) *Knights* v. *Atkyns*, 2 Vern. 20.

[(*d*) *Walrond* v. *Rosslyn*, 11 Ch. D. 640. *Semble*, it would be otherwise if the only right were that of portionists to have their portions raised, *S. C.*]

(*e*) *Kettleby* v. *Atwood*, 1 Vern. 298; re-heard, Ib. 471; *Lancy* v. *Fairechild*, 2 Vern. 101; *Chaplin* v. *Horner*, 1 P. W. 483; *Lechmere* v. *Earl of Carlisle*, 3 P. W. 211; affirmed Cas. *t.* Talbot, 89; *Oldham* v. *Hughes*, 2 Atk. 452.

stance that the heir institutes his suit during the subsistence of that claim, or after its determination, seems to be immaterial (*a*).

Walker v. Denne.

In *Walker* v. *Denne* (*b*), Lord Loughborough expressed some doubt upon this doctrine. "Between the heir and personal representative," he said, "their rights are pure legal rights: chance decides what shall be real, what personal; neither has a *scintilla* of equity to make the property that which it is not in fact." To this reasoning of Lord Loughborough it may be replied, that, when it is said there is no equity between the real and personal representatives, the meaning is no more than this—that what is real estate at the death of the ancestor will go to the heir, and what is personal estate at the death of the testator will go to the executor; but, for the purpose of determining what *is* real and what *is* personal estate, the Court is guided, not by the *legal* nature of the property at the death of the owner, but, as appears in numerous instances, by the stamp and character impressed upon it in consideration of a Court of equity. Thus if a *mortgagee in fee* died, the mortgage being regarded as a mere security for part of the mortgagee's personal estate, the executor might call upon the heir for a conveyance of the land (*c*). So, if the *mortgagor* die, the heir of the mortgagor might until Locke King's Act have called on the executor to discharge the incumbrance out of the personal assets. So if a person contracted for the sale of an estate (*d*), and died before the completion of the sale, the legal fee descended upon the heir (*e*), but the purchase-money passes to the executor; and on the other hand, if a person contract for the purchase of an estate, and die, the executor must [until the recent Act, have paid] the money, but the heir was entitled to the purchase (*f*). Thus, in the words of Lord Talbot,

[Contract for sale effects conversion.]

(*a*) See *Chaplin* v. *Horner*, 1 P. W. 483; *Lechmere* v. *Lechmere*, Cas. *t.* Talb. 80.

(*b*) 2 Ves. jun. 175, 176, 183; and see *Oxenden* v. *Lord Compton*, Ib. 70; *Lord Compton* v. *Oxenden*, Ib. 265.

[(*c*) Now by 44 & 45 Vict. c. 41, s. 30, where the death has occurred since the 31st December, 1881, the land devolves upon the executor.]

[(*d*) But this is to be understood only of a *binding* contract; and where the *title* is bad, and is not accepted by the purchaser, and the contract is rescinded, there is no conversion; *Re Thomas*, 34 Ch. D. 166; and see *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506, 507, 515, and *supra*, p. 246.]

[(*e*) Now by 44 & 45 Vict. c. 41, s. 4, where the death has occurred since the 31st December, 1881, if the contract is enforceable against the heir or devisee of the vendor, his personal representatives can convey the land for the purpose of giving effect to the contract; and see also sect. 30, and as to copyholds, 50 & 51 Vict. c. 73, s. 45.]

[(*f*) But since the recent Act the estate in the hands of the heir (or, if leasehold, the legatee) will be subject to the repayment to the executor of the purchase-money paid by him; 40 & 41 Vict. c. 34; *Re Cockcroft*, 24 Ch. D. 94; *Re Kershaw*, 37 Ch. D. 674.]

"Where the dispute is between the two representatives of the deceased, the one of his real, the other of his personal estate, the heir's being but a volunteer in regard to his ancestor will not exclude him from the aid of the Court, for though the question is between two volunteers, the Court will determine which way the right is, and will decree accordingly" (*a*). "I am disposed," said Lord Eldon, "to say, notwithstanding the opinion of Lord Rosslyn in *Walker* v. *Denne*, and some other modern authorities, that if the instrument be taken to impress a fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly and plainly impressed with real uses as land, and one of those uses being for the benefit of the heir, it will remain for his benefit, and it is not correct to say the Court does not interpose between volunteers, if they give to the executor that money which the instrument has given to the heir" (*b*). And Sir W. Grant to the same effect observed, "There is no weight in the circumstance that the property is found in the shape of money or land, *for the character is to be found in the deed.* The opinion of Lord Rosslyn that property was to be taken as it happened to be at the death of the party from whom the representatives claimed, was much doubted by Lord Eldon, who held, *in which I perfectly concur,* that it must be considered as being in the state in which it *ought to be.* Lord Rosslyn's rule was new, and not according to prior cases" (*c*).

Heir has no right where the money is "at home."

β. But if A. die, leaving neither wife nor issue, so that, to use the technical expression, the money is "at home," that is A. at the time of his death is the absolute and exclusive owner, and there is no outstanding right in another person, in this case the real quality of the money has become merged and extinguished, and on the death of A. the heir has no equity to call upon the executor. To keep on foot the *notional* conversion of money into land, it is evident there must be a right in some one to insist upon the *actual* conversion; but if A. be in possession of 20,000*l.* upon trust to lay out in a purchase of lands to be settled to the use of himself and his heirs, the right and the thing both centering in the same person, there is nobody to sue, and it follows that the action is extinguished (*d*).

(*a*) *Lechmere* v. *Lechmere,* Cas. *t.* Talb. 90.
(*b*) *Wheldale* v. *Partridge,* 8 Ves. 235.
(*c*) *Thornton* v. *Hawley,* 10 Ves. 138; *Kirkman* v. *Miles,* 13 Ves. 339.
(*d*) See *Pulteney* v. *Darlington,* 1 B. C. C. 237.

Chichester *v.* Bickerstaff.

The decision in the much litigated case of *Chichester* v. *Bickerstaff* (*a*), amounted probably to no more than this (*b*).

Actual receipt of the money makes it "at home."

12. Of course the money will be "at home" where the person absolutely entitled to the fund receives it from the trustee the depositary of it, and that, whether the payment was made with the sanction of the Court, or by the voluntary act of the trustee himself (*c*).

Voluntary covenant to lay out money on land.

13. Lord Macclesfield advanced the position, that if a person *voluntarily and without consideration* covenanted to lay out money in a purchase of land to be settled on himself and his heirs, the Court would compel the execution of such a contract, though merely voluntary; for in all cases where it was a measuring cast between an executor and an heir, the latter should in equity have the preference (*d*). But the proposition that the heir is more favoured than the executor, though often repeated (*e*), and arising perhaps from the leaning of the Court towards the heir *in respect of lands of which the ancestor was seised*, does not appear to be founded on any intelligible principle, and the opinion expressed by Lord Macclesfield may be questioned.

Conversion must be absolute or imperative, not optional.

14. In the preceding observations it is assumed that the direction or agreement for conversion is by the terms of the instrument made *absolute and imperative;* for where a mere *option* is given, the original character of the property continues until the discretion has been exercised, and the conversion actually effected; as, if the direction or agreement be to lay out money in "lands *or* securities" (*f*), in "freeholds *or* leaseholds" (*g*), or if by any other mode of expression an intention be manifested of not converting the property at all events (*h*).

[But the conversion may be imperative although the trustees have an option as to the *time* of sale.]

[But a direction to trustees to sell "so soon as they shall see

(*a*) 2 Vern. 295; *S. C.* cited *Pulteney* v. *Darlington*, 7 B. P. C. 554.

[(*b*) The author's reasons for taking this view will be found stated at length in the last edition of this work, at pp. 944–946. To the principle under consideration must be referred the case of *Pulteney* v. *Darlington*, 1 B. C. C. 223; affirmed in D. P.; see *Wheldale* v. *Partridge*, 8 Ves. 235; and see 3rd ed. p. 803.]

(*c*) See *Pulteney* v. *Darlington*, 1 B. C. C. 236; *Bowes* v. *Earl of Shaftesbury*, 5 B. P. C. 144; *Chaplin* v. *Horner*, 1 P. W. 483, as to the 1350*l.*

(*d*) *Edwards* v. *Countess of Warwick*, 2 P. W. 176; and see *Lechmere* v. *Lechmere*, Cas. *t.* Talb. 90, 91.

(*e*) See *Crabtree* v. *Bramble*, 3 Atk. 689; *Scudamore* v. *Scudamore*, Pr. Ch. 544; *Haytor* v. *Rod*, 1 P. W. 364; *Wilson* v. *Beddard*, 12 Sim. 32.

(*f*) *Curling* v. *May*, cited *Guidot* v. *Guidot*, 3 Atk. 255; *Amler* v. *Amler*, 3 Ves. 583; [*Evans* v. *Ball*, 30 W. R. 899; 47 L. T. N.S. 165;] and see *Van* v. *Barnett*, 19 Ves. 102.

(*g*) *Walker* v. *Denne*, 2 Ves. jun. 170; *Davies* v. *Goodhew*, 6 Sim. 585.

(*h*) *Wheldale* v. *Partridge*, 5 Ves. 388; *S. C.* 8 Ves. 227; and see *Abbot* v. *Lee*, 2 Vern. 284; *Davies* v. *Goodhew*, 6 Sim. 585; *Polley* v. *Seymour*, 2 Y. & C. 708; *Clissold* v. *Cook*, 27 L. T. N.S. 143; 20 W. R. 796; [*Re Hotchkys*, 32 Ch. Div. 408.]

necessary for the benefit of the *cestuis que trust*" (*a*), or "whenever it shall appear to their satisfaction that such sale will be for the benefit of the *cestuis que trust*" (*b*), amounts to an imperative direction to convert.]

Of conversion, apparently optional, but where the uses declared are exclusively applicable to real estate.

15. Where *the uses declared are exclusively applicable to real estate*, the direction or agreement will be construed to be imperative, though the direction or agreement be to lay out the money in "*freeholds, leaseholds*, or *copyholds*" (*c*), or the instrument contains an authority to invest the money upon securities until a purchase can be found (*d*), or the fund being already out upon security, a power is inserted to call it in, and lay it out upon other securities (*e*), or even though the direction or agreement be to lay out the money on lands *or* securities, the intention in the last case apparently being, that the money shall be invested upon security until a suitable purchase can be found, and that the interest and dividends in the meantime shall be paid to the person who would be entitled to the rents (*f*).

Conversion at "the request" or "with the consent" of a party.

16. And, where the uses are thus exclusively applicable to real estate, the direction or agreement will be regarded as imperative though the settlement require the purchase to be made at the *request* of a person (*g*), for the insertion of such a clause has been taken to mean, not that a conversion may not be effected *before* but that it shall certainly be effected *after* request (*h*). And the construction is the same, though the purchase be directed to be made with a person's *consent* and *approbation* (*i*); for upon a convenient purchase being proposed, the Court, said Sir J. Jekyll, will take upon itself to judge thereof, and, without some reasonable objection made, will order the money to be laid out in it, so that such a proviso seems to be immaterial, and as if omitted (*j*). But of course the instru-

[(*a*) *Doughty* v. *Bull*, 2 P. Wms. 320.]

[(*b*) *Re Raw*, 26 Ch. D. 601; *Robinson* v. *Robinson*, 19 Beav. 494.]

(*c*) *Hereford* v. *Ravenhill*, 5 Beav. 51; *Re Whitty's Trust*, 9 Ir. R. Eq. 41.

(*d*) *Edwards* v. *Countess of Warwick*, 2 P. W. 171; *Earlom* v. *Saunders*, Amb. 241; and see *Davies* v. *Goodhew*, 6 Sim. 585.

(*e*) *Thornton* v. *Hawley*, 10 Ves. 129; and see *Triquet* v. *Thornton*, 13 Ves. 345.

(*f*) *Earlom* v. *Saunders*, Amb. 241; *Cowley* v. *Hartstonge*, 1 Dow, 361; *Johnson* v. *Arnold*, 1 Ves. 169; *Cookson* v. *Reay*, 5 Beav. 22; 12 Cl. & Fin. 121; but see *Atwell* v. *Atwell*, 13 L. R. Eq. 23; [and see *Evans* v. *Ball*, 30 W. R. 899; 47 L. T. N.S. 165.]

(*g*) *Thornton* v. *Hawley*, 10 Ves. 129; *Johnson* v. *Arnold*, 1 Ves. 169.

(*h*) 10 Ves. 137; but see *Stead* v. *Newdigate*, 2 Mer. 530.

(*i*) *Thornton* v. *Hawley*, 10 Ves. 129; [*Batteste* v. *Maunsell*, 10 I. R. Eq. 97, 314.] In *Symons* v. *Rutter*, 2 Vern. 227, Sir G. Hutchins was right, according to Sir J. Jekyll, *Lechmere* v. *Earl of Carlisle*, 3 P. W. 220, and Lord Thurlow, *Pulteney* v. *Darlington*, 1 B. C. C. 238; but see *Stead* v. *Newdigate*, 2 Mer. 530.

(*j*) *Lechmere* v. *Earl of Carlisle*, 3

ment may be so strongly expressed as to show the intention of the parties, that the request or consent of a particular person should be a substantial ingredient, and that no conversion should take place unless it is given (*a*).

[In all these cases the real question is whether it appears from the whole tenor of the instrument that the intention was that the personalty should be converted into realty, and where such an intention appears a trust for conversion may be implied (*b*). But a mere gift of personalty with limitations appropriate to real estate, a great part of which limitations must necessarily fail as soon as the personalty vests in any one who, if it had been real estate, would have taken an estate tail, does not raise an implied trust for conversion into realty (*c*).]

Land to be converted into money is regarded as money.

17. As money to be converted into land is considered as land, so *land to be converted into money is, upon the same principle, invested with all the properties of money* (*d*). Thus, if an estate be directed or agreed to be sold, and the proceeds be made payable to A., the property, though unconverted at A.'s decease, will pass by a general bequest of all his *personal estate* (*e*); and upon A.'s death, will vest in his *personal representatives* (*f*), and will be liable to *probate* (*g*), and *legacy duty* (*h*). And the result will be the same though the conversion is by the terms of the instrument of trust not to take place until after A.'s death (*i*). [And a will made by a married woman in exercise of a power and appointing the property is entitled to probate, though the property was unconverted at her death (*j*).]

As to rents before conversion.

18. But it has been held as a rule of convenience that if a

P. W. 220, *per* Sir J. Jekyll; and see *Costello* v. *O'Rorke*, 3 Ir. R. Eq. 172.

(*a*) *Davies* v. *Goodhew*, 6 Sim. 585; and see *Re Taylor's Trust*, 9 Hare, 596; *Sykes* v. *Sheard*, 33 Beav. 114.

[(*b*) *Evans* v. *Ball*, 30 W. R. 899; 47 L. T. N.S. 165.]

[(*c*) *Evans* v. *Ball*, *ubi supra*.]

(*d*) But a settlement of land so circumstanced is not a settlement of a "definite" sum of money within the meaning of the Stamp Act; *Re Stucley's Settlement*, 5 L. R. Ex. 85. [See 54 & 55 Vict. c. 39, sched.]

(*e*) *Stead* v. *Newdigate*, 2 Mer. 521.

(*f*) *Ashby* v. *Palmer*, 1 Mer. 296; *Biggs* v. *Andrews*, 5 Sim. 424; *Bayden* v. *Watson*, 7 Jur. 245; *Burton* v. *Hodsoll*, 2 Sim. 24; *Grieveson* v. *Kirsopp*, 2 Keen, 653; *Griffith* v. *Ricketts*, 7 Hare, 299; *Hardey* v. *Hawkshaw*, 12 Beav. 552; *Simpson* v. *Blackburn*, W. N. 1875, p. 157.

(*g*) *Attorney-General* v. *Brunning*, 4 H. & N. 94; reversed on appeal, 8 H. L. Cas. 243; *Attorney-General* v. *Lomas*, 9 L. R. Ex. 29; [*Attorney-General* v. *Hubbuck*, 10 Q. B. D. 488; 13 Q. B. Div. 275; *In the Goods of Gunn*, 9 P. D. 242; *Attorney-General* v. *Marquess of Ailesbury*, 14 Q. B. D 895; 16 Q. B. Div. 408; 12 App. Cas. 672;] and see *Matson* v. *Swift*, 8 Beav. 368; *Custance* v. *Bradshaw*, 4 Hare, 324.

(*h*) *Forbes* v. *Steven*, 10 L. R. Eq. 178; [*Stokes* v. *Ducroz*, 38 W. R. 535.]

(*i*) *Clarke* v. *Franklin*, 4 K. & J. 257.

[(*j*) *In the Goods of Gunn*, 9 P. D. 242.]

testator direct his real estate to be sold, and the proceeds laid out and invested in trust for A. for life with remainders over, the tenant for life is entitled to the *rents* only of the estate from the testator's decease (*a*); and so, if the sale be directed on the death of a particular person the tenant for life is entitled only to the *rents* from the death of that person (*b*). But a tenant for life without impeachment of waste of the estate to be *purchased*, though entitled to the rents and profits of the estate to be *sold*, may not, as part of such profits cut timber on the estate to be sold, for this would give him double waste (*c*).

Next of kin have no right where land is *at home*.

19. The doctrine already explained with reference to the exclusion of the claim of the heir where the money is *at home* must, it is conceived, equally apply as against *next of kin* and *residuary legatees* in cases where the *land* may be said to be at home. Thus, if A., being entitled to land, *covenant* on the occasion of his marriage to convey it to trustees, who are to sell and stand possessed of the proceeds upon trusts for the benefit of A. and his wife and the children of the marriage, with an ultimate trust for A. absolutely, here, if in A.'s lifetime and before any conveyance, the wife dies without children, both the land and the benefit of the ultimate trust are united in A., and the *land* is *at home*, and upon A.'s death, no claim can, it is conceived, be sustained by those entitled to his personal estate. But of course the case would be different, if land had been actually *conveyed* to the trustees upon trust for sale, since this would be analogous to a deposit in the hands of trustees, as above supposed, of money to be laid out in land (*d*); and consequently there would be a complete conversion, of which those entitled to the personal estate of A. would reap the benefit.

Alien may take proceeds of sale.

20. If the proceeds of sale of real estate be given to an *alien*, the doctrine of conversion applies in his favour. He was always capable of taking for his own benefit, and the Crown was excluded (*e*).

Proceeds forfeitable for felony if land in fact sold, but not otherwise.

21. [Prior to the recent Act abolishing forfeitures for felony it

(*a*) *Casamajor* v. *Strode*, cited *Walker* v. *Shore*, 19 Ves. 390; *Hutchin* v. *Mannington*, 1 Ves. jun. 367, *per Cur.*

(*b*) *Fitzgerald* v. *Jervoise*, 5 Mad. 25, the marginal note of which does not exactly accord with the report itself.

(*c*) *Plymouth* v. *Archer*, 1 B. C. C. 159; and see *Burges* v. *Lamb*, 16 Ves. 180.

(*d*) See p. 1075, *supra*.

(*e*) *Du Hourmelin* v. *Sheldon*, 1 Beav. 79; 4 M. & Cr. 525; *Sharp* v. *St. Sauveur*, 17 W. R. 1002; 20 L. T. N.S. 799, but overruled on another ground, 7 L. R. Ch. App. 343. See now as to aliens, 33 Vict. c. 14, and *supra*, p. 25.

was held that] if a share of proceeds was given to a *felon*, and the time of sale had arrived, and the sale had been actually made before the felon had worked out his punishment, the Crown was entitled (*a*). But if the felon had worked out his punishment before the time of sale had arrived, there, as the Crown had no equity to compel the conversion, the discharged felon and not the Crown was entitled (*b*). Money paid into Court as representing land taken under the provisions of an Act of Parliament and liable to be laid out again in the purchase of land, retained, as against the Crown, its character of real estate, and was therefore not forfeitable on conviction for felony (*c*).

Proceeds cannot be bequeathed to a charity.

22. It was at one time held that if real estate was stamped with a trust for conversion, and a portion of the proceeds of sale was given to A., and A. died having by his will given his *personal estate* to charity, his interest in the proceeds of sale was to be regarded as pure personal estate, and the bequest was good (*d*); but this doctrine has since been overruled (*e*). And where a testator gave to A. a legacy of 3000*l.*, payable out of the testator's personal estate, and the proceeds from the sale of his real estate, and A. bequeathed the 3000*l.* to a charity, it was ruled that the whole bequest was void, and that the charity was not entitled to claim so much of the 3000*l.* as on an apportionment of the original testator's real and personal estate would be found payable out of the pure personalty (*f*); [but in a subsequent case, where a testator gave a share of his residuary personal estate to charity, and the residuary estate consisted of pure personalty, and of a legacy from another testator payable out of the proceeds of his real and personal estate, an apportionment was directed, and the bequest was held to fail only so far as it arose from the portion of the legacy attributable to the realty, or to the personalty savouring of realty, of the testator who bequeathed the legacy (*g*).

(*a*) *Re Thompson's Trusts*, 22 Beav. 506.

(*b*) Ibid. See now as to felons, 33 & 34 Vict. c. 23; and *supra*, p. 25.

(*c*) *Re Harrop's Estate*, 3 Drew. 726.

(*d*) *Marsh* v. *Attorney-General*, 2 J. & H. 61; *Attorney-General* v. *Harley*, 5 Mad. 321; *Shadbolt* v. *Thornton*, 17 Sim. 49.

(*e*) *Brook* v. *Badley*, 4 L. R. Eq. 106; *S. C.* 3 L. R. Ch. App. 672; *Lucas* v. *Jones*, 4 L. R. Eq. 73 [*Ashworth* v. *Munn*, 15 Ch. Div. 363.]

(*f*) *Brook* v. *Badley*, 3 L. R. Ch. App. 672; [approved *Re Watts*, 29 Ch. Div. 947, affirming *S. C.* 27 Ch. D. 318; and see *Ashworth* v. *Munn*, 15 Ch. Div. 363.]

[(*g*) *Re Hill's Trusts*, 16 Ch. D. 173.]

Now by the Mortmain and Charitable Uses Act, 1891 (*a*), land as defined in the Mortmain and Charitable Uses Act, 1888 (*b*) is not to include money secured on land or other personal estate arising from or connected with land, and it is provided (*c*) that land may be *assured by will* to or for the benefit of any charitable use, and (*d*), that any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land; but (*e*), the Act is only to apply to the will of a testator dying after the passing of the Act, viz. the 5th of August, 1891. As regards such wills, therefore, the restrictions imposed by the repealed statutes of Mortmain, and continued by the Act of 1888, in reference to testamentary gifts of land and impure personalty to charities will cease to operate.]

Locke King's Act.

23. A share of the proceeds to arise from a sale under a trust for conversion is not an interest in land within *Locke King's Act*, and therefore though such share be subject to a mortgage of it made by the testator, a legatee of the share can call for a discharge of the mortgage out of the general personal estate (*f*).

The conversion must be imperative.

24. If real and personal estate be given to trustees upon trust for a class, with a *discretionary* and not an *imperative* power to convert the whole into personal estate, and if the trustees make a total or partial conversion, the objects of the trust will take the property as real or personal estate, according to the actual condition in which it is found (*g*). [But if the power be discretionary, and an order is made in an administration action directing a sale absolutely, the property is converted as from the date of the order (*h*).

A mere declaration in a will that the residuary real estate shall for the purpose of transmission be impressed with the quality of personal estate from the time of the testator's death,

[(*a*) 54 & 55 Vict. c. 73.]

[(*b*) 51 & 52 Vict. c. 42; see *ante*, pp. 604, 971.]

[(*c*) 54 & 55 Vict. c. 73, s. 5; see *ante*, p. 971.]

[(*d*) Sect. 7.]

[(*e*) Sect. 9.]

(*f*) *Lewis* v. *Lewis*, 13 L. R. Eq. 218.

(*g*) *Walter* v. *Maunde*, 19 Ves. 424; *Atwell* v. *Atwell*, 13 L. R. Eq. 23; *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441; *Re Beaumont's Trusts*, 32 Beav. 191; *Polley* v. *Seymour*, 2 Y. & C. 708; *Edwards* v. *Tuck*, 23 Beav. 268; *Re Whitty's Trust*, 9 Ir. R. Eq. 41; and see *Yates* v. *Yates*, 28 Beav. 637; *Cowley* v. *Hartstonge*, 1 Dow. 378; *Bourne* v. *Bourne*, 2 Hare, 35; *Lucas* v. *Brandreth* (No. 1), 28 Beav. 273; *Beecroft* v. *Wilkin*, W. N. 1867, p. 117; *Re Ibbitson's Estate*, 7 L. R. Eq. 226; *Miller* v. *Miller*, 13 L. R. Eq. 263. Otherwise, where the power is imperative, *Grieveson* v. *Kirsopp*, 2 Keen, 653.

[(*h*) *Hyett* v. *Mekin*, 25 Ch. D. 735.]

does not amount to a conversion of the real estate into personalty, but the property will, notwithstanding the direction, devolve as realty (*a*).]

Case of a sale by mortgagee.

25. So if a *mortgage* deed contain a power of sale with a direction that the surplus proceeds shall be paid to the mortgagor, his heirs, executors, administrators, and assigns, and the property is sold by the mortgagee, the surplus will be personal or real estate of the mortgagor, according as the sale takes place before or after his death (*b*). But where an option to purchase has been given to a lessee, and the option is exercised after the lessor's death, such exercise has been held to effect a retrospective conversion (*c*). The difference is, that in the case of a mortgage the mortgagor or his heir can redeem at any time, and therefore the real character of the property continues until the time of actual sale, when the proceeds become the personal estate of the person then entitled to the equity of redemption; but in the option given to a lessee, the lessor has parted with all control over the property and placed it in the power of another to change the nature of it, and if the power be exercised the conversion operates retrospectively and it becomes personal estate as between all who claim under the lessor. [But where the lessee dies without having exercised the option, the beneficial interest in the lease with the benefit of the option goes as part of his personal estate, and no subsequent exercise of the option will work a retrospective conversion as between the persons entitled to his realty and personalty respectively (*d*).]

Case of option of purchasing.

Where the mortgagee is a trustee for sale.

26. If, instead of executing a mortgage, the debtor convey the estate to the creditor upon *trust* to sell and pay himself and hand over the balance to the debtor, his executors and administrators, and a declaration is inserted in the deed that it is not

[(*a*) *Hyett* v. *Mekin*, 25 Ch. D. 735.]

(*b*) *Wright* v. *Rose*, 2 Sim. & St. 323; and see *Clarke* v. *Franklin*, 4 K. & J. 260; *Bourne* v. *Bourne*, 2 Hare, 35; *Re Cooper's Trust*, 4 De G. M. & G. 768.

(*c*) *Lawes* v. *Bennett*, 1 Cox, 167; *Collingwood* v. *Row*, 4 Jur. N. S. 785; *Weeding* v. *Weeding*, 1 J. & H. 424; *Whitmore* v. *Douglas*, cited *Ripley* v. *Waterworth*, 7 Ves. 436; *Townley* v. *Bedwell*, 14 Ves. 590; [*Re Adams and the Kensington Vestry*, 27 Ch. Div. 394;] but see *Drant* v. *Vause*, 1 Y. & C. C. C. 580; *Emuss* v. *Smith*, 2 De G. & Sm. 722. [This retrospective conversion is, however, implied only as between the real and personal representatives of the person giving the option, and does not apply as between the vendor and the purchaser, *e.g.*, so as to enable a tenant, after the premises have been burnt down, to exercise an option to purchase, and claim the insurance money as part of his purchase; *Edwards* v. *West*, 7 Ch. D. 858.]

[(*d*) *Re Adams and the Kensington Vestry*, 24 Ch. D. 199; 27 Ch. Div. 394.]

to be considered as in the nature of a mortgage, but as a conveyance to become absolute, in equity as well as at law, immediately after default in payment, here, though the sale is not made in the debtor's lifetime, yet the property is converted into personalty, and belongs, subject to the charge, to the debtor's personal representative (*a*).

[If a number of persons be associated together for the purposes of an undertaking, and they agree among themselves that land shall be bought and vested in trustees upon trusts which shall give the members no equitable interest in the lands, but only an interest in profits to be made by the use of them, the members will have no equitable interest in the land so purchased, but only an interest of the nature of personalty in the profits of the undertaking, and will not thereby acquire the right to the county franchise (*b*).]

Neither heir nor next of kin can claim under the will of an ancestor by virtue of the doctrine of conversion.

27. In the above discussion of the doctrine of conversion, it may be taken to be generally immaterial whether the instrument which directs the money to be laid out in land or the land to be converted into money, is a deed, or writing, or will. But it may be useful to point out, in reference to claims by an *heir at law* or by *next of kin*, that where the instrument effecting the conversion is a *will*, neither the *testator's* heir at law *as such*, nor his next of kin *as claiming under the intestacy*, can establish any right by virtue of the doctrine of conversion (*c*). The conversion directed is a conversion *for the purposes of the will only*, and so far as the trusts declared by the will respecting the property directed to be converted may fail, the property devolves, according to its original character of realty or personalty, in conformity with the principles established by the decisions respecting resulting trusts (*d*).

But heir or next of kin may claim as *persona designata*.

28. But of course either the heir at law or next of kin may claim as *persona designata*. Thus, where a testator bequeathed a sum of money to be laid out on lands to be settled to certain uses, with the ultimate remainder to his *own right heirs*, and the prior limitations failed, the heir, on a bill filed against the executor of his ancestor, was held entitled to the money (*e*); but

(*a*) *Re Underwood*, 3 K. & J. 745.

[(*b*) *Per* Lord Coleridge, C.J., Grove and Cave, JJ., *Watson* v. *Black*, 16 Q. B. D. 270.]

(*c*) This point seems to have escaped Lord Loughborough's notice in *Walker* v. *Denne*, 2 Ves. jun. 170, though the cases upon resulting trusts were cited; see Ib. p. 173.

(*d*) See p. 156 *et seq.*, *ante*.

(*e*) *Robinson* v. *Knight*, 2 Eden, 155.

here the title of the heir was not as *heir*, but as *purchaser* under the will.

Election.

In connection with the subject of conversion, it is to be observed that where land is to be converted into money, or money is to be converted into land, the notional conversion will subsist only until some *cestui que trust*, who is competent to *elect*, intimates his intention to take the property in its original character (*a*). The Court will not compel a conversion against the will of the absolute owner; for should the conversion be made, he would immediately reconvert it, and equity will do nothing in vain (*b*).

Upon this subject we shall consider:—I. What persons are capable of electing; and, II. How the act of the election may be manifested.

Who may elect.

I. Who may elect.

Infants, lunatics.

1. In respect of *personal incapacity*, an infant (*c*), or lunatic (*d*), has no power to make election.

Power of *feme covert* over money-land.

2. A *feme covert*, although [as regards property not settled to her separate use, or belonging to her as separate property by statute], she has no power to elect by act *in pais* (*e*) like a person who is *sui juris*, yet may, by exercise of the powers of disposition given her by law over money to be laid out in land, or land directed to be turned into money, alter the nature of the property, and so effect an election.

How *feme covert* might elect to take money-land under the old law.

3. "Although," said Lord Hardwicke, "a *feme covert* cannot alter the nature of money to be laid out in land by contract or deed, yet if the money be invested in land (and sometimes sham purchases have been made for the purpose (*f*)), she may then levy a fine on the land, and give it to her husband, or anybody else. There is a way, also, of doing this without laying the

(*a*) *Harcourt* v. *Seymour*, 2 Sim. N. S. 45; *Cookson* v. *Reay*, 5 Beav. 22; 12 Cl. & Fin. 121; *Dixon* v. *Gayfere*, 17 Beav. 433.

(*b*) *Seely* v. *Jago*, 1 P. W. 389.

(*c*) *Carr* v. *Ellison*, 2 B. C. C. 56; *Earlom* v. *Saunders*, Amb. 241; *Thornton* v. *Hawley*, 10 Ves. 129, 139; *Van* v. *Barnett*, 19 Ves. 102; *Seeley* v. *Jago*, 1 P. W. 389; *Re Harrop's Estate*, 3 Drew. 734; and see *Ashby* v. *Palmer*, 1 Ner. 301.

(*d*) *Ashby* v. *Palmer*, 1 Mer. 296.

(*e*) The election here treated of must not be confounded with that which a *feme covert* is *bound to make* under the general doctrine of election; as to which, see *Barrow* v. *Barrow*, 4 K. & J. 415, 419; *Griggs* v. *Gibson*, 1 L. R. Eq. 685; *Cooper* v. *Cooper*, 7 L. R. H. L. 53; [*Smith* v. *Lucas*, 18 Ch. D. 531; *Wilder* v. *Pigott*, 22 Ch. D. 263; *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, 28 Ch. D. 124.]

(*f*) See *Henley* v. *Webb*, 5 Mad. 407.

money out in land, and that is, by coming into a Court of equity, and consenting to take the money as personal estate; for upon her being present in Court, and being examined (as a *feme covert* upon fine is), her consent binds the money articled to be laid out in land as much as a fine at law would the land, and she may dispose of it to the husband or anybody else. And the reason of it is, that at law, money so articled to be laid out in land is considered barely as money until an actual investment, and the equity of this Court alone views it in the light of real estate; and, therefore, this Court can act upon its own creature, and do what a fine at common law can upon land" (*a*). And, at a later date, Lord Hardwicke's views were ratified by express decision; for where money was devised to be laid out in land, for a *feme covert* in tail with reversion to her in fee, and a bill was filed by her, it was declared that she was entitled to the money, and a commission was ordered to be issued to examine her separate and apart from her husband, touching the disposition thereof (*b*). [So in a recent case, money in Court which had arisen from a sale under the Partition Acts, and to shares in which married women were entitled, was, upon their being separately examined and consenting, distributed as personal estate (*c*); and where the share of the married woman is less than 200*l.* the Court will dispense with her separate examination (*d*). But an election by a *feme covert* to confirm a marriage settlement cannot be inferred from the mere fact of her concurring in an appointment of new trustees thereof under the usual power (*e*).]

How she might elect to take land directed to be sold.

4. Previously to the Fines and Recoveries Act, if a *feme covert* was entitled to the proceeds of land directed to be *sold*, she and her husband might have made a title to the proceeds of sale by fine (*f*); and by the same method, as it would seem, might have made themselves absolute owners, and have called for a conveyance, and by this means have elected to take the land.

Fines and Recoveries Act.

5. By 3 & 4 W. 4. c. 74, ss. 40, 71, 77 (*g*), a married woman is enabled, with the concurrence of her husband, and with the

(*a*) *Oldham* v. *Hughes*, 2 Atk. 453.

(*b*) *Binford* v. *Bawden*, 1 Ves. jun. 512; [and from a subsequent report of this case, 2 Ves. 38, it appears that the *feme covert* on being examined elected to have the money paid to her husband; and see *Standering* v. *Hall*, 11 Ch. D. 652.]

[(*c*) *Standering* v. *Hall*, 11 Ch. D. 652; see *ante*, p. 846.]

[(*d*) *Wallace* v. *Greenwood*, 16 Ch. D. 362; but see *Re Shaw*, 49 L. J. N.S. Ch. 213.]

[(*e*) *Haywood* v. *Tidy*, 63 L. T. N.S. 679.]

(*f*) *May* v. *Roper*, 4 Sm. 360; *Forbes* v. *Adams*, 9 Sim. 462.

(*g*) Extended to contingent interests by 8 & 9 Vict. c. 106, s. 6.

formalities required by the Act, to dispose of any estate at law or in equity, or any interest, charge, lien, or incumbrance in or upon lands, or money to be laid out in a purchase of lands, or to relinquish or release any power over the same, as if she were a *feme sole;* so that in the case of money liable to be laid out in land, a *feme covert* can, through the medium of the power of disposition conferred by the Act, virtually elect to take the money.

Special power of married women under Fines and Recoveries Act, over money which is an *interest in land.*

6. And the Act enables a married woman not only to dispose of property which, though personal estate in fact, is real estate in equity, but also of property which is in equity *personal estate,* provided only it be *an interest in land;* and this, although according to the ordinary doctrines of the Court the married woman would, by reason of her interest being *reversionary,* have no such power of disposition. Thus, where real estate is devised upon trust for sale in terms amounting to a conversion out and out, and a married woman takes a share of the proceeds, she can, under the statute, dispose of her share, even though reversionary, as being an interest in land (*a*). And it is conceived that the same principle must apply to the case of a reversionary *money legacy raisable out of land,* notwithstanding the doubts entertained by Lord Justice (then Vice-Chancellor) Knight Bruce, in the case of *Hobby* v. *Collins* (*b*). But the Fines and Recoveries Act ceases to apply when the money has been actually raised (*c*).

[Power of married woman to elect as to separate property.]

[As a married woman has an absolute power of disposition over property settled to her separate use, or belonging to her as her separate property under the recent Act (*d*), she can elect to take it either as land or money as if she were *sui juris* (*e*).]

A person may elect, subject to a charge.

7. If A. convey an estate to a trustee in trust to sell and pay to the trustee a certain amount, and to pay the balance to A., his executors, administrators, and assigns as personalty, it is competent to A., as the person entitled subject to the *charge,* to elect to take it as realty; and if he do so, and the trustee sells after A.'s decease, the *heir* of A. will take the surplus (*f*).

Remaindermen.

8. How far a *remainderman* may elect, has not been definitely settled. It seems clear, so far, that the remainderman may elect

(*a*) *Briggs* v. *Chamberlain*, 11 Hare, 69; *Tuer* v. *Turner*, 20 Beav. 560; *Bowyer* v. *Woodman*, 3 L. R. Eq. 313; [*Re Jakeman's Trusts*, 23 Ch. D. 344;] and see *Franks* v. *Bollans*, 3 L. R. Ch. App. 717.

(*b*) 4 De G. & Sm. 289; and see observations of Lord St. Leonards in his essay on the Real Property Statutes, 240.

(*c*) *Re Alge*, 2 Ir. R. Eq. 485.

[(*d*) 45 & 46 Vict. c. 75.]

[(*e*) *Re Davidson*, 11 Ch. Div. 341.]

(*f*) *Re Gardiner's Trust*, 1 Eq. Rep. 57; *Mutlow* v. *Bigg*, 1 Ch. Div. 385; [*Meek* v. *Devenish*, 6 Ch. D. 566.]

for the purposes of disposition; that is, being absolutely entitled to the interest in remainder, he may deal with it by act *inter vivos*, or by will, by any denomination that he pleases; and if, therefore, in the case of money impressed with the character of land, he chooses to call it personal estate, it will pass by his will under the description of personal estate (*a*). But should the remainderman declare an intention of taking the money as personalty, and then die, in the lifetime of the tenant for life, *intestate*, will the money devolve, as between the real and personal representative, as realty or personalty? If the tenant for life call for a conversion, and the money is actually laid out on a purchase of land, it is of course too late then for the remainderman to elect to take it as money; for, as the property is now in the shape of land, the policy of the law will not allow him to impress upon it the character of personalty. Supposing the remainderman to elect to take the property as money, *before the actual conversion*, and then to die intestate, and after his death the tenant for life calls for a conversion, and the money is laid out in a purchase of land accordingly, it is conceived, that, as the election was made subject to another's right to call for a conversion, which right was exercised, the act of election is defeated, and the property will devolve as land (*b*). Should the remainderman elect to take the money as such, and then die intestate, and the tenant for life *never calls for a conversion*, it may be argued, that, as the remainderman is absolutely entitled, subject to another's right to require conversion which was never exercised, the money, being still found in that shape, should be discharged from the impress of realty, and be deemed to have that character in which the remainderman was desirous of taking it (*c*). Such a doctrine, however, is open to the objection that during the life of the tenant for life the nature of the remainderman's interest, whether real or personal, would be uncertain, and dependent on the option of the tenant for life; and the principle acted upon in a recent case appears to be, that there can be no election by a person whose interest is a limited one or contingent at the time (*d*).

(*a*) *Lingen* v. *Sowray*, 1 P. Wms. 172; *Harcourt* v. *Seymour*, 2 Sim. N. S. 12; *Re Skeggs*, 2 De G. J. & S. 533.

(*b*) *Holloway* v. *Radcliffe*, 23 Beav. 163. This was the case of an undivided share, but the principle was the same. But see *Re Gardiner's Trust*, 1 Eq. Rep. 57.

(*c*) See *Re Skeggs*, 2 De G. J. & Sm. 533; *Stead* v. *Newdigate*, 2 Mer. 531; *Gillies* v. *Longlands*, 4 De G. & Sm. 379; *Re Pedder's Settlement*, 5 De G. M. & G. 890; *Re Stewart*, 1 Sm. & G. 32.

(*d*) *Sisson* v. *Giles*, 3 De G. J. & S. 614; [and see *Walrond* v. *Rosslyn*, 11 Ch. D. 640.]

[A person contingently entitled may elect.]

[9. But in a more recent case, where real estate was devised to trustees upon trusts for sale, and the proceeds were, subject to a charge, given in a contingent event to the testator's son absolutely, it was held that the son, pending the contingency, was competent to make an election, which would be operative in the event of the contingency happening before or upon his death, to take the estate as realty (*a*).]

Election where an estate is to be sold or money is to be laid out on land, and several parties are interested.

10. Where an estate is directed to be sold, the proceeds to be divided amongst *several persons*, no one *singly* can elect that his own undivided share shall not be disposed of but shall remain realty (*b*), for the other undivided shares will not sell so beneficially in proportion as if the estate were entire (*c*); but if money be directed to be laid out in lands to be settled on A. B. and C., as tenants in common, any one of them may elect to take his own third as money, for two-thirds may be invested just as advantageously as the whole sum (*d*).

Tenant in tail may elect.

11. Sound principle would require that a *tenant in tail* of lands to be purchased should not be allowed to elect, because the interests of the issue and the remainderman, who both take by title paramount, would otherwise be prejudiced. But the old rule appears to have been, that a tenant in tail might in *every case* have elected, and on filing a bill would have been entitled to the money (*e*); and the principle upon which the practice was grounded was said to be, that equity will do nothing in vain, and it were useless to direct an actual purchase and settlement when the tenant in tail the next moment might dispose of the fee simple. Lord Cowper, however, in the case of *Colwal* v. *Shadwell* (*f*), took the distinction, that where the *remainder in fee* was not vested in the tenant in tail himself, but was limited over to a stranger, there, as the absolute fee could only be acquired by a *recovery*, which was a thing of time, and could not be suffered in *vacation*, the remainderman should not lose his chance; and as in that case the tenant in tail did actually die before the recovery was suffered, it showed the remainderman's interest in so glaring a light, that it established the precedent

[(*a*) *Meek* v. *Devenish*, 6 Ch. D. 566.]

(*b*) *Holloway* v. *Radcliffe*, 23 Beav. 163; *Fletcher* v. *Ashburner*, 1 B. C. C. 500, *per* Sir T. Sewell; *Deeth* v. *Hale*, 2 Moll. 317; and see *Smith* v. *Claxton*, 4 Mad. 494.

(*c*) *Chalmer* v. *Bradley*, 1 J. & W. 59; *Holloway* v. *Radcliffe*, 23 Beav. 163; and see *Trower* v. *Knightley*, 6 Mad. 134.

(*d*) *Seeley* v. *Jago*, 1 P. W. 389; *Walker* v. *Denne*, 2 Ves. jun. 182, *per* Lord Loughborough.

(*e*) *Cunningham* v. *Moody*, 1 Ves. 176, *per* Lord Hardwicke.

(*f*) Cited *Chaplin* v. *Horner*, 1 P. W. 485.

ever afterwards (*a*). But even then the money would have been decreed to the tenant in tail, provided the remainderman had waived his right and consented to the payment (*b*).

Lord Chancellor King's doubt.

12. In *Eyre's case* (*c*), Lord Chancellor King was for extending the same protection to the *issue*. "I cannot see," he said, "why I should not have the like regard to the *issue* in tail as for the *remainderman*. It is possible the tenant in tail, before he can light on a purchase and settle it, may die, leaving issue, and this is a chance of which I would not deprive such issue." And in *Speaker Onslow's case* (*d*), he declared his adherence to the same opinion. But the rule which had been established before his time (*e*) of paying the fund to the tenant in tail where the uses might be barred by fine, but not where they could only be barred by recovery, appears, notwithstanding his Lordship's authority, to have been revived by his successors (*f*).

Tenant in tail may elect without suit.

13. And the election of the tenant in tail need not necessarily have been made in a suit, but might have been expressed by act *in pais*, as if tenant in tail with remainder to himself had received the money of the trustee, or if tenant in tail with remainder to a stranger had received it of the trustee with the consent of the remainderman (*g*).

Observation of Lord Thurlow.

Lord Thurlow, indeed, once said, "If the fund be outstanding in trustees, and it is necessary to come hither in order to obtain it, the money, when obtained, will be personal property; and so it would also, if the trustees pay it without suit. That is, supposing the estate, when purchased, would be a fee simple, for *it would be otherwise in case of its being an estate tail*" (*h*). But the concluding remark must have been intended (as Mr. Serjeant Hill, in a note on the passage, has justly observed (*i*)) to apply, not to every tenant in tail, as, not to tenant in tail with remainder to himself in fee, but only to tenant in tail, with remainder to a stranger; for in a subsequent case, where the tenant in tail had executed an assignment of two sums of money directed to be laid

(*a*) See *Cunningham* v. *Moody*, 1 Ves. 176; *Talbot* v. *Whitfield*, Bunb. 204.

(*b*) See *Trafford* v. *Boehm*, 3 Atk. 440, and the cases cited under note (*c*), p. 1093.

(*c*) 3 P. W. 13.

(*d*) 3 P. W. 14, note (G).

(*e*) See *Benson* v. *Benson*, 1 P. W. 130, note (1).

(*f*) *Trafford* v. *Boehm*, 3 Atk. 447, *per* Lord Hardwicke; *Cunningham* v. *Moody*, 1 Ves. 176, *per eundem*; *Binford* v. *Bawden*, 1 Ves. jun. 512; *Holdernesse* v. *Carmarthen*, 1 B. C. C. 382, *per* Lord Thurlow; and see the preamble of 39 & 40 G. 3. c. 56.

(*g*) *Trafford* v. *Boehm*, 3 Atk. 448; and see *Earl of Bath* v. *Earl of Bradford*, 2 Ves. 590; but see *Pearson* v. *Lane*, 17 Ves. 106.

(*h*) *Pulteney* v. *Darlington*, 1 B. C. C. 236.

(*i*) Ib. note (*a*), Lord Henley's edit.

out in lands, his Lordship said, "As to the 500*l.*, the assignor was tenant in tail, remainder to a stranger, remainder to himself in fee; as to the 1000*l.* he was tenant in tail, with remainder in fee to himself. I am clear, that in regard to the 1000*l.* he had the absolute dominion over it, having the immediate remainder in fee; but as to the 500*l.* I am equally clear the other way, because of the intermediate remainder" (*a*).

39 & 40 G. 3. c. 56.

14. By 39 & 40 G. 3. c. 56 (*b*), the inability of the tenant in tail with remainders over of money to be laid out in the purchase of land to obtain possession of the money, except through the medium of a fictitious purchase (*c*), was removed; and the Court was empowered, on the petition of the first tenant in tail of such money-land, and of the parties (if any) having antecedent estates therein (with a provision for the separate examination of married women), to order the money to be paid to the petitioners or as they should appoint (*d*); so that a kind of statutory power of election was thus conferred on tenants in tail.

Fines and Recoveries Act.

15. By the Act for the abolition of Fines and Recoveries (*e*), a tenant in tail may, with the consent of the protector of the settlement, if any, dispose absolutely of the lands entailed *at any time, whether in term or vacation,* and by the 71st section of the statute it is enacted, that "money to be invested in the purchase of lands to be settled so that any person, if the lands were purchased, would have an estate tail therein, shall be treated as the lands to be purchased, and the previous clauses of the Act shall apply to such money, as if it were directed to be laid out in the purchase of *freehold* lands, and such lands were actually purchased and settled."

Whether tenant in tail of money liable to be laid out in land may still elect to take the money.

16. With respect to this enactment, a doubt suggests itself whether, even at the present day, a tenant in tail, *with remainder to himself in fee,* may not elect to take in its original character money which is liable to be laid out in the purchase of lands, and declare such election either by the institution of a suit or by act *in pais.* It is true that under the 71st clause of the Act, the tenant in tail may at any time defeat his issue and the remaindermen by a deed executed with the proper formalities; but what is there to prevent him from exercising a power

(*a*) *Holdernesse* v. *Carmarthen*, 1 B. C. C. 382.

(*b*) Repealed and extended by 7 G. 4. c. 45, which in its turn was repealed by 3 & 4 W. 4. c. 74, s. 70.

(*c*) See *Henley* v. *Webb*, 5 Mad. 407.

(*d*) See 5 Ves. 12, note (8), as to the qualification introduced by the Court in making orders for payment under this Act.

(*e*) 3 & 4 W. 4. c. 74, s. 71.

founded upon principles independent of the statute, and so acquiring the fee simple by the mere act of election? It may be said that the old rule, which made election a bar to the issue, might have been grounded on this—that, because no fine or recovery could have been levied or suffered of money (*a*), the Court, on that account, held election to have the effect of a bar, lest the tenant in tail should lose the power, which the law intended him, of defeating the settlement, but that, since by the Fines and Recoveries Act a tenant in tail of money may bar his issue and the remainderman by the same formalities as if the lands were actually purchased and settled, the same indulgence ought not now to be shown. But to this it may be answered, that the tenant in tail was allowed to elect, not because the tenant in tail of money had a right to exercise the same powers of ownership as a tenant in tail of lands, but for the purpose of avoiding circuity. Had the former been the principle, the tenant in tail might equally have barred the remainderman as the issue; but for the destruction of remainders an actual settlement was necessary, and a sham purchase was often resorted to for the purpose (*b*).

Practice of the Court as to monies paid in by railway companies.

17. The practice of the Court in dealing with sums paid in by railway companies as compensation for portions of entailed land taken by them, went beyond any rule previously established, for the Court was in the habit of ordering the money to be paid to the tenant in tail without the execution of a disentailing deed, and without inquiring who was entitled in remainder (*c*). But in a recent case Lord Selborne, sitting for M. R., refused to order payment out of Court except on production of a disentailing deed in the ordinary way (*d*).

(*a*) See *Benson* v. *Benson*, 1 P. W. 130; *Edwards* v. *Countess of Warwick*, 2 P. W. 174; *Maynwaring* v. *Maynwaring*, 3 Atk. 413.

(*b*) See —— v. *Marsh*, cited *Chaplin* v. *Horner*, 1 P. W. 485, note (†)); *Maynwaring* v. *Maynwaring*, 3 Atk. 413; *Henley* v. *Webb*, 5 Mad. 407.

(*c*) *Sowry* v. *Sowry*, 6 Jur. N. S. 337; *Re South Eastern Railway Company*, 30 Beav. 215; *Re Tyler's Estate*, 8 W. R. 540; *Nottley* v. *Palmer*, 1 L. R. Eq. 241; *Re Row*, 17 L. R. Eq. 300; *Re Holden*, 1 H. & M. 445 (where the amount of the fund in question was 1394*l.* Consols); *Re Watson*, 10 Jur. N. S. 1011 (in which case the Lords Justices said they could not understand how the Court could have first come to the conclusion in the face of the statute that the money could be paid out without the execution and inrolment of a disentailing deed, but the practice was useful and convenient, and saved expense). *Ex parte Maunsell*, 2 Ir. Rep. Eq. 32; *Re Wood's Settled Estates*, 20 L. R. Eq. 372.

(*d*) *Re Butler's Will*, 16 L. R. 479; and see *Re Broadwood's Settled Estates*, 1 Ch. D. 438; *Limerick and Ennis Railway Company, Ex parte Smyth*, 10 Ir. R. Eq. 66; [*Re Reynolds*, 3 Ch. Div. 61.]

II. How election may be manifested.

How election may be made.

1. The *act* of election may either be *presumed* by the Court or be *expressly declared.*

Presumption.

2. The *presumption* may arise from slight circumstances of conduct (*a*). Thus it will be sufficient, where land is to be converted into money, if the *cestui que trust,* enter into possession and take the title deeds into his own custody, for the trustees cannot recover the deeds from the *cestui que trust,* and they cannot sell without them (*b*); or if the *cestui que trust* merely keep the estate for a length of time unsold (*c*) (but in one case a period of two years was considered not to be sufficient indication of such an intention (*d*)); or, where money is to be turned into land, if the *cestui que trust* receive the money from the trustee (*e*); but not if he merely receive the annual income though for a considerable length of time (*f*). [And the mere fact of keeping the property unsold for a long time will not be sufficient if there was a good reason for not attempting to sell, as, for instance, the existence of an over-riding right of pre-emption in a lessee (*g*).]

Possession of the land.

Receipt of the money.

[Where good reason for not selling.]

Change of securities and trust declared for the "executors."

3. It was determined by Lord Harcourt that a *cestui que trust* had divested money of its real quality by causing the securities to be changed, and the trust to be declared to himself and his *executors*; for this, he observed, was tantamount to saying the money should *not* go to the heir (*h*); and *vice versâ,* where land was to be converted into money, it was held by Lord Hardwicke, that a lease by the *cestui que trust,* reserving a rent to her *heirs* and assigns, was evidence of an intention to continue the property as real estate (*i*).

Grant of a lease and reservation of rent to the "heirs."

What knowledge required for election.

4. To constitute an act of election it is not necessary that the

(*a*) See *Pulteney* v. *Darlington,* 1 B. C. C. 238; *Van* v. *Barnett,* 19 Ves. 109; *Bradish* v. *Gee,* Amb. 229; *Dixon* v. *Gayfere,* 17 Beav. 433; *Re Gordon,* 6 Ch. D. 531.]

(*b*) *Davies* v. *Ashford,* 15 Sim. 42; and see *Padbury* v. *Clark,* 2 Mac. & G. 298.

(*c*) See *Ashby* v. *Palmer,* 1 Mer. 301; *Dixon* v. *Gayfere,* 17 Beav. 433; *Griesbach* v. *Fremantle,* 17 Beav. 314; *Mutlow* v. *Bigg,* 1 Ch. Div. 385; [*Re Gordon,* 6 Ch. D. 531; *Re Davidson,* 11 Ch. Div. 341; *Potter* v. *Dudeney,* 56 L. T. N.S. 395.]

(*d*) *Kirkman* v. *Miles,* 13 Ves. 338; *Cookson* v. *Cookson,* 12 Cl. & Fin. 121; and see *Brown* v. *Brown,* 33 Beav. 399; *Parker* v. *Williams,* 15 W. R. 1006; but see *Crabtree* v. *Bramble,* 3 Atk. 688; *Inwood* v. *Twyne,* 2 Eden, 148.

(*e*) *Pulteney* v. *Lord Darlington,* 1 B. C. C. 238, *per* Lord Thurlow; *Trafford* v. *Boehm,* 3 Atk. 440; and see *Rook* v. *Worth,* 1 Ves. 461.

(*f*) *Gillies* v. *Longlands,* 4 De G. & Sm. 372; and see *Re Pedder's Settlement,* 5 De G. M. & G. 890.

[(*g*) *Re Lewis,* 30 Ch. D. 654.]

(*h*) *Lingen* v. *Sowray,* 1 P. W. 172 and see *Cookson* v. *Cookson,* 12 Cl. & Fin. 121; *Harcourt* v. *Seymour,* 2 Sim. N. S. 12.

(*i*) *Crabtree* v. *Bramble,* 3 Atk. 680, see 688, 689; and see *Griesbach* v. *Freemantle,* 17 Beav. 314.

person entitled, as for instance to money to be laid out in land, should know that but for the act of election it would pass as land, but it is sufficient if the Court can collect the intention that with or without such knowledge he meant the money to be dealt with and treated as money (*a*).

Election expressed.

5. A person may *express* his election, even by parol. This, at least, was the opinion of Lord Macclesfield (*b*), and apparently was actually decided in the case of *Chaloner* v. *Butcher* (*c*), in which the husband having *declared* that the money should not be laid out in land, the Court held, that, if the question concerned the right of a third person, the declarations of the husband ought not to be admitted, but, as it was between his personal and real representative, they should be read. And both Lord Thurlow (*d*), and Lord Eldon (*e*), seem to have lent their sanction to the same doctrine, so that an *obiter dictum* of Lord Hardwicke to the contrary (*f*), though supported by so illustrious a name, must be considered as over-ruled.

Parol declaration when admissible.

How money to be turned into land affected by *cestui que trust's* will.

6. Where money bore the notional impress of realty, the *cestui que trust* might, until the Wills Act, have bequeathed it as so much money to be laid out in land, and the money would have passed, though the will was not attested according to the Statute of Frauds (*g*); for the will operated first by way of election, and then by way of bequest; but now by the Wills Act (*h*) the same formalities are required for the testamentary disposition of personal as of real estate.

SECTION II.

THE ACT OF THE TRUSTEE SHALL NOT ALTER THE NATURE OF THE CESTUI QUE TRUST'S ESTATE.

Power of the trustee at law and in equity.

1. AT *law* the trustee is the absolute owner of the land or fund, and therefore may exercise any control or dominion over it—may convert realty into personalty, or personalty into realty:

(*a*) *Harcourt* v. *Seymour*, 2 Sim. N. S. 12, see p. 46.

(*b*) *Edwards* v. *Countess of Warwick*, 2 P. W. 174.

(*c*) Cited *Crabtree* v. *Bramble*, 3 Atk. 685.

(*d*) *Pulteney* v. *Darlington*, 1 B. C. C. 237.

(*e*) *Wheldale* v. *Partridge*, 8 Ves. 236.

(*f*) *Bradish* v. *Gee*, Amb. 229.

(*g*) See the cases cited, *Lechmere* v. *Earl of Carlisle*, 3 P. W. 221, note (C); and see *Pulteney* v. *Darlington*, 1 B. C. C. 235, 236; *Sharp* v. *St. Sauveur*, 7 L. R. Ch. App. 343.

(*h*) 7 W. 4. & 1 Vict. c. 26.

but *equity*, which regards the trustee as a mere instrument for the execution of the trust, will not permit the interest of the *cestui que trust* to be affected by any act of misconduct, but, as often as any wrongful conversion is made, will transfer to the new interest the quality and character of the old—will treat real estate as personal, and personal as real, as the circumstances of the case may require.

Where the *cestui que trust* is *sui juris*.

2. But although every such change in the nature of the property as is not made either in pursuance of the trust or by the authority of the beneficial owner, must in general be considered a misfeasance, the dealings of the Court (under the respective jurisdictions of *lunacy* and *chancery*), and of committees, guardians, and trustees, with the property of *lunatics* and *infants*, require particular notice.

Power of the trustee where the *cestui que trust* is a lunatic.

3. It has been laid down as a general rule in *lunacy*, that the Court will not alter the condition of the lunatic's property to the prejudice of his successors; but the maxim must be received with the qualification, *except it be for the benefit of the lunatic himself* (*a*). The Chancellor takes the advice and assistance of the presumptive next of kin and presumptive heir at law in the care and management of the property (*b*); but through all the cases runs this prevailing principle—that the object of attention is exclusively and entirely the interest of the lunatic, without any regard to those who may have eventual rights of succession (*c*). If the Court considered how the representatives would be affected, there would always be among them an emulation of each other, and their speculations, if the administrator were to engage in them, would mislead his attention as to the interest of the only person he was bound to protect; there would be a continued running account between the personal and real estates; the Chancellor would be perpetually looking to the right or left, and the interest of the lunatic would be committed in favour of those who have no immediate interest, and whose contingent interests are left to the ordinary course of events (*d*).

The interest of the lunatic the exclusive object.

Timber cut on an estate *ex parte paternâ* applied to relief of an estate *ex parte maternâ*.

4. Upon this principle, where a lunatic was seised *ex parte*

(*a*) *Ex parte Grimstone*, cited *Oxenden* v. *Lord Compton*, 4 B. C. C. 235, note, *per* Lord Apsley.

(*b*) *Ex parte Phillips*, 19 Ves. 123, *per* Lord Eldon.

(*c*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 72; and *S. C.* 4 B. C. C. 233, *per* Lord Thurlow; and see *Ex parte Bromfield*, 1 Ves. jun. 462; *Ex parte Grimstone*, Amb. 708; *S. C.* cited 2 Ves. jun. 75, note (*x*), and 4 B. C. C. 235, note; *Ex parte Phillips*, 19 Ves. 123; *Dormer's case*, 2 P. W. 265; *Ex parte Chumley*, 1 Ves. jun. 297; *Ex parte Baker*, 6 Ves. 8.

(*d*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 72, 73; *S. C.* 4 B. C. C. 233, 234, *per* Lord Loughborough.

paternâ of estate A., and *ex parte maternâ* of estate B., and the latter was subject to a mortgage, the money arising from a fall of timber upon A. was directed to be applied in discharge of the mortgage upon B.; and upon a question between the respective heirs it was held, that the representative who succeeded to A. was not entitled to any recompense from the representative who inherited B. (*a*).

Sale of lunatic's real estate.

5. So, if the lunatic be considerably indebted, and it appears that his maintenance would be better provided for, and his advantage promoted, by the sale of a real estate inconvenient and ill-conditioned, instead of exhausting the personalty, the Court, on a proper representation of the case, would have no difficulty in making an order to that effect (*b*).

[Getting in money directed to be laid out in land.]

[6. And where a lunatic became absolutely entitled to funds which were vested in trustees upon trust to lay them out in the purchase of land, but which were actually invested on mortgage, and the mortgage money was got in pursuant to an order in the lunacy expressing that it was for the benefit of the lunatic to call it in, and was thereafter dealt with in the lunacy with other monies admittedly personalty, it was held that the fund had been reconverted into personalty (*c*).]

Fall of timber.

7. So, timber which *ought to be cut* on a lunatic's estate may be felled by the direction of the Court, and the proceeds may either be applied to the redemption of the land-tax, or payment of debts (*d*), or to any other purpose which the true interest of the lunatic may require; or if not wanted for *any* particular purpose, will go to the next of kin as personalty, and not to the heir as part of the realty (*e*).

Action of trespass.

8. So, if it be necessary for the interest of the real estate to bring an action of trespass, resort may be had with that object to the lunatic's personal fund (*f*).

Improvements.

9. By the same rule the money of the lunatic may be laid out in improvements (*g*); and the Chancellor, acting *tanquam bonus*

(*a*) *Ex parte Phillips*, 19 Ves. 123, *per* Lord Eldon; but see *Re Leeming*, 3 De G. F. & J. 43.

(*b*) *Ex parte Phillips*, 19 Ves. 124, *per* Lord Eldon.

[(*c*) *M'Donogh* v. *Nolan*, 9 L. R. Ir. 262.]

(*d*) *Ex parte Phillips*, 19 Ves. 119; *Bevan's case*, cited *Ex parte Bromfield*, 1 Ves. jun. 455, 457; *Re Mary Smith* (*a lunatic*), 10 L. R. Ch. App. 84, *per* L. J. James.

(*e*) *Ex parte Bromfield*, 1 Ves. jun., 453; *S. C.* 3 B. C. C. 510; *Oxenden* v. *Compton*, 2 Ves. jun. 69; *S. C.* 4 B. C. C. 231; *Shelley's case*, cited 1 Ves. jun. 457; *Ex parte Phillips*, 19 Ves. 124, *per* Lord Eldon. The *dictum* in *Marquis of Anandale* v. *Marchioness of Anandale*, 2 Ves. 384, must be considered as overruled.

(*f*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 72; *per* Lord Loughborough.

(*g*) *Sergeson* v. *Sealey*, 2 Atk. 414,

pater-familias, may take every opportunity of ameliorating the estate by fair and ordinary means, such as draining, inclosure, &c. (*a*), erecting a steam engine for the purpose of working a coal mine (*b*), but must not engage in risks and dangerous adventures (*c*). And of course the personalty may be drawn upon for *necessary expenses*, as repairs (*d*), fines for renewal of leases, or admission to copyholds (*e*). But where the committees of a lunatic, who were entitled to the estate themselves after his death, laid out a sum in *purchasing* timber for repairs, when they ought to have cut timber on the estate, Lord Hardwicke said, that, having done so merely to serve their own interest they should make good the disbursement to the lunatic's next of kin (*f*).

Necessary expenses of real estate.

10. In the preceding cases the conversion has been for the clear benefit of the lunatic, but in general the Court will not lightly change the condition of the property, but will only act on pressing and urgent occasions (*g*): it will interefere with great caution, and do nothing that is unnecessary or uncalled for (*h*). The Court will not *buy and sell* for the lunatic (*i*); and, therefore, if the committee of a lunatic wantonly, and of his own head, lay out money upon land, or turn land into money, the Court will not suffer such fraudulent management to affect the rights of the representatives (*j*), but will transfer to the heir what ought to have remained real estate, and to the next of kin what ought to have remained personal estate (*k*). [So,

Conversion not allowed, except where it is clearly for the lunatic's benefit.

per Lord Hardwicke; *Dormer's case*, 2 P. W. 262; [*Re Gist*, 5 Ch. Div. 881.]

(*a*) See Justice De Grey's argument in *Ex parte Grimstone*, cited *Oxenden* v. *Lord Compton*, 2 Ves. jun. 75, note.

(*b*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 73.

(*c*) Ib. *per* Lord Loughborough.

(*d*) *Sergeson* v. *Sealey*, 2 Atk. 414, *per* Lord Hardwicke; *Ex parte Grimstone*, Amb. 708; *S. C.* cited *Oxenden* v. *Lord Compton*, 4 B. C. C. 237, note, *per* Lord Apsley; 2 Ves. jun. 72, *per* Lord Loughborough; *Newport's case*, cited Ib.; [*Re Gist*, 5 Ch. Div. 881;] *Re Badcock*, 4 M. & Cr. 440. But it was said in the last case, that "if the money were laid out in a purchase of land, or, what was the same thing, in building a farm house, it would be right that the sum so laid out should retain its character of personalty."

(*e*) Justice De Grey's argument in *Ex parte Grimstone, ubi supra*; but see *Degg's case*, cited *Oxenden* v. *Lord Compton*, 4 B. C. C. 235, note.

(*f*) *Ex parte Ludlow*, 3 Atk. 407.

(*g*) *Ex parte Bromfield*, 1 Ves. jun. 463, and 3 B. C. C. 515, *per* Lord Thurlow; and see *Re Mary Smith* (*a lunatic*), 10 L. R. Ch. App. 79.

(*h*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 76, and 4 B. C. C. 238, *per* Lord Loughborough.

(*i*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 73, *per* Lord Loughborough; *Ex parte Grimstone*, cited in *Oxenden* v. *Lord Compton*, 4 B. C. C. 235, note, *per* Lord Apsley; *Sergeson* v. *Sealey*, 2 Atk. 414, *per* Lord Hardwicke.

(*j*) See *Ex parte Bromfield*, 1 Ves. jun. 462.

(*k*) *Anon. case*, 2 Freem. 114; *Awdley* v. *Awdley*, 2 Vern. 292; *Marquis of Anandale* v. *Marchioness of Anandale*, 2 Ves. 384, *per* Lord Hardwicke; and see *Re Badcock*, 4 M. & Cr. 440.

where a lunatic was tenant in tail in possession of large estates, upon which it was desirable to expend a considerable sum for repairs and improvements, and he was also entitled to a fund in Court sufficient for the required outlay, it was held that the expenses of the repairs and improvements on the settled estates ought to be raised by mortgage or charge of those estates, and that the fund in Court ought not to be applied for the purpose (*a*).] So, where a mortgage upon the lands of a lunatic is discharged out of his personal estate, though it was formerly held that the next of kin after the lunatic's decease had no *lien* upon the real estate for the amount expended (*b*), it has since been ruled that the personal estate after the lunatic's death shall be recouped the amount expended in exonerating the real estate (*c*). [And where a mortgage of a lunatic's real or leasehold property is paid off out of his personal estate the mortgage should not be re-conveyed to the lunatic, but should be kept on foot by transferring it to the committee, to be disposed of as the Court may direct, so as to leave open the question how the mortgage debt should ultimately be borne (*d*).] However, if timber be cut down, not by a committee in breach of his duty, but by a stranger tortiously, then, as there is no abuse of confidence, the heir has no equity, and the property of the timber, like a windfall, will belong to the executor (*e*).

Personal estate applied to relief of real estate.

[Transfer of mortgage should be taken.]

[11. Where a copyhold estate, as to which the rules of descent were different from those of freeholds, was enfranchised, the Court inserted a declaration in the order sanctioning the enfranchisement, carrying over the equitable interest in the enfranchised property, in the event of the lunatic dying intestate, to the persons who would have taken it if it had not been enfranchised (*f*).

[Right of customary heir preserved in equity on enfranchisement.]

12. So where, under an order made in lunacy, part of the personal estate of a lunatic was laid out in the purchase of real estate as a convenient mode of investment, and a declaration was inserted in the conveyance in conformity with the terms of the order, that the premises granted were "to all intents and purposes to be considered as part of the personal estate of the lunatic;" it was held that the value of the lands was part of

[Money of lunatic invested in land.]

[(*a*) *Re Gist*, 5 Ch. Div. 881.]
(*b*) *Ex parte Grimstone*, Amb. 786; *S. C.* cited *Oxenden* v. *Compton*, 4 B. C. C. 235, and *Weld* v. *Tew*, Beat. 272.
(*c*) *Weld* v. *Tew*, Beat. 266; *Re Leeming*, 3 De G. F. & J. 43.
[(*d*) *Re Melly*, 49 L. T. N.S. 429.]
(*e*) *Anon. case*, cited *Ex parte Bromfield*, 1 Ves. jun. 462, and 3 B. C. C. 515, *per* Lord Thurlow.
[(*f*) *Re H. D. Ryder*, 20 Ch. Div. 514.]

the personal estate of the lunatic at his death, and consequently liable to probate duty (*a*).

[Out of what fund lunatic to be maintained.]

13. Where property is vested in trustees in trust to apply the income for the maintenance of a lunatic during his life, and any surplus income not required is to be *accumulated as capital*, and the lunatic is absolutely entitled to other property, the Court will apply the life interest, in the first place, towards his maintenance, unless the trustees of the settled property have an absolute discretion whether they will apply the whole or any part of the income for the lunatic's benefit, in which case the exercise of such discretion will not be interfered with (*b*).]

Next as to *infants*.

Infants distinguished from lunatics.

1. Lord Thurlow, on one occasion, but without having examined the authorities, said he could not distinguish between lunatics and infants (*c*); but, when the matter came on again, and he had maturely considered the subject, he never once hinted at the existence of such a doctrine (*d*); and, indeed, until the Wills Act there was a very broad distinction between the two cases; for, if a *lunatic* recovered, which in contemplation of law is always possible, he had precisely the same power of disposition, though by different modes, over one species of property as over the other (*e*); but an *infant*, while he could have bequeathed personal estate under the age of twenty-one, could not have devised a freehold until he had attained that age (*f*). The Court, therefore, would not allow an infant's estate to be converted from one species of property into another, not from any tenderness to the rights of the representatives, but from a regard to the circumstances and capacity of the infant himself. Should his money have been turned into land, he would have lost a power of disposition which the law permitted him to exercise: should land have been turned into money, he would indirectly have gained a power which the policy of the law had forbidden him (*g*).

[(*a*) *Attorney-General* v. *Marquis of Ailesbury*, 12 App. Cas. 672, reversing the decision of C. A., 16 Q. B. Div. 408; and restoring decision of Q. B. D., 14 Q. B. D. 895.]

[(*b*) *Re Weaver*, 21 Ch. Div. 615.]

(*c*) *Ex parte Bromfield*, 1 Ves. jun. 461; *S. C.* 3 B. C. C. 515.

(*d*) *Oxenden* v. *Lord Compton*, 2 Ves. jun. 69; *S. C.* 4 B. C. C. 231.

(*e*) See *Ex parte Phillips*, 19 Ves. 123.

(*f*) See *Earl of Winchelsea* v. *Norcliffe*, 1 Vern. 437, in which case the distinction appears first to have been noticed.

(*g*) *Ware* v. *Polhill*, 11 Ves. 278, and *Ex parte Phillips*, 19 Ves. 122, *per* Lord Eldon; *Ashburton* v. *Ashburton*, 6 Ves. 6; *Sergeson* v. *Sealey*, 2 Atk. 413; *Rook* v. *Worth*, 1 Ves. 461, *per* Lord Hardwicke; *Witter* v. *Witter*, 3 P. W. 99; but see *Earl of Winchelsea* v. *Norcliffe*, 1 Vern. 435; *Inwood* v. *Twyne*, 2 Eden, 152; *Ex parte Bromfield*, 1 Ves. jun. 461; [and see *Warnicker* v. *Bretnall*, 23 Ch. D. 188.]

Timber cut on an infant's estate.

2. Upon the same principle, had timber been cut on an infant's estate, the proceeds, and, it seems, the accumulation of the proceeds (*a*), would have continued part of the realty, and have descended to the heir (*b*). But a distinction was taken in *Mason* v. *Mason* (*c*), (and Sir Thomas Clarke said he allowed it (*d*),) between the case of an infant tenant in fee and an infant tenant in tail: that in the former case the proceeds of the timber should be taken as realty, inasmuch as the infant was thus at all events absolutely entitled; but in the latter case, as the proceeds might, if impressed with the character of realty, become vested in the remainderman, the Court would treat the fund as personalty, and give it to the infant's executors.

Exoneration of infant's real estate out of his personal estate.

3. Again, if an infant's money had been applied to pay off a charge, or redeem a mortgage affecting his real estate, it was the better opinion (though some old authorities were against it), that the sum so invested would still be looked upon as part of the personalty (*e*).

Necessary expenses.

4. But *necessary expenses*, though affecting the infant's *lands*, were allowed to be thrown upon the personal fund, as disbursements for repairs (*f*), for keeping up a house, &c. (*g*).

Vernon *v.* Vernon.

5. So, in *Vernon* v. *Vernon* (*h*), where an estate was devised to an infant in consideration of his paying the sum which the original purchase had cost, it was held, that the amount, being a *necessary* outlay, had properly fallen upon the personalty, and the next of kin were not entitled to compensation.

Exceptions from the general rule.

6. There were some cases to which the reason for preserving the original character of the property did not apply. Thus, if an infant was seised of a lease for lives *ex parte maternâ*, and the guardian procured a new lease to be granted to the infant and his heirs, whereby the old lease was merged, the substituted lease

(*a*) See *Ex parte Bromfield*, 1 Ves. jun. 454.

(*b*) *Tullet* v. *Tullet*, 1 Dick. 322; *S. C.* Amb. 370; *Mason* v. *Mason*, cited Ib. 371; *Ex parte Phillips*, 19 Ves. 124, *per* Lord Eldon; and see *Rook* v. *Warth*, 1 Ves. 461; but see *Ex parte Bromfield*, 3 B. C. C. 516.

(*c*) *Ubi supra.*

(*d*) *Tullet* v. *Tullet*, Amb. 371; and see *Dyer* v. *Dyer*, 34 Beav. 504.

(*e*) *Ex parte Bromfield*, 3 B. C. C. 516, *per* Lord Thurlow; *Tullet* v. *Tullet*, 1 Dick. 323, *per* Sir T. Clarke; *Seys* v. *Price*, 9 Mod. 220, *per* Lord Hardwicke; *Dowling* v. *Belton*, 1 Flan. & Kelly, 462; but see 2 Freem. 114, c. 126; *Ex parte Grimstone*, Amb. 708; *Palmes* v. *Danby*, Pr. Ch. 137; *Zoach* v. *Lloyd*, cited *Awdley* v. *Awdley*, 2 Vern. 192; as to *Dennis* v. *Badd*, cited Ib. 193, see *Earl of Winchelsea* v. *Norcliffe*, 1 Vern. 436; [and see *Warnicker* v. *Bretnall*, 23 Ch. D. 188.]

(*f*) *Ex parte Grimstone*, cited *Oxenden* v. *Lord Compton*, 4 B. C. C. 235, note, *per* Lord Apsley.

(*g*) *Ex parte Grimstone*, Amb. 708, *per eundem.*

(*h*) Cited in *Ex parte Bromfield*, 1 Ves. jun. 456.

would not descend in the maternal line, but, as a new acquisition, would go to the heirs on the part of the father (*a*); for it being perfectly immaterial to the infant himself whether the *seisin* was in the paternal or maternal line, the representative *ex parte maternâ* had no equity against the representative *ex parte paternâ*.

[Repairs.] [7. Where repairs are absolutely necessary for the protection of an infant's property the Court has jurisdiction to direct the raising of the necessary funds by mortgage or sale of part of the infant's property (*b*). But the jurisdiction should be jealously exercised and only in cases which amount to actual salvage (*c*).]

Effect of Wills Act. 8. By the Wills Act (*d*), an infant has no greater testamentary power over personal than over real estate; and it remains to be seen how far the removal of the ground, so frequently relied upon, against permitting the conversion of the personal estate of an infant into realty, can be treated as having diminished the rights of the next of kin, or as authorizing the applications of the decisions in lunacy to the administration of the property of infants.

Dyer *v.* Dyer. 9. The leaning of the Courts would appear to be to simplify the law by assimilating the case of infants to that of lunatics. Thus in a late case (*e*) an estate was devised to an infant, his heirs and assigns, with a limitation over on his dying under twenty-one, and timber was cut on the estate during the infancy with the sanction of the Court. The infant died without attaining his age, and the question was whether the proceeds belonged to the infant's personal representative, or should go with the estate to the person entitled under the limitation over, and Sir J. Romilly, M.R., held it to be personalty, and evidently made no distinction between infancy and lunacy.

(*a*) *Mason* v. *Day*, Pr. Ch. 319; *Pierson* v. *Shore*, 1 Atk. 480.

[(*b*) *Re Jackson*, 21 Ch. D. 786; *Glover* v. *Barlow*, 21 Ch. D. 788, note; and see *Conway* v. *Fenton*, 40 Ch. D. 512, 517.]

[(*c*) *Per* Kay, J., *Re Jackson*, *ubi supra*.]

(*d*) 7 W. 4. & 1 Vict. c. 26.

(*e*) *Dyer* v. *Dyer*, 34 Beav. 504. But if an estate be settled upon A. for life only, with remainders over, and the Court cuts the timber for the benefit of all parties interested, the proceeds will go along with the estate; *Field* v. *Brown*, 27 Beav. 90; unless the order be made upon the application of a remainderman entitled in fee-simple, subject to the prior estate; *Phillips* v. *Daycock*, W. N. 1867, p. 54.

PART IV.

PRACTICE.

CHAPTER XXXII.

In this chapter we propose to consider such parts only of the practice of the Court as most materially affect trustees and their *cestuis que trust*, and are capable of being compressed within reasonable limits, viz.—*First*, Distringas; *Secondly*, Production of documents; *Thirdly*, Compulsory payment into Court; *Fourthly*, Receivership; and *Fifthly*, Costs of suit (*a*).

SECTION I.

OF DISTRINGAS.

Danger to which stock, &c., exposed in consequence of legal title only being recognized.

1. In the case of stock transferable in the books of the Bank of England, and also in the case of the stocks and shares of many other public companies, no obligation exists on the part of the bank or public company to look beyond the title of the legal holder. The modern form of legislative enactment on the subject is usually to the effect that the company "shall not be bound to see to the execution of any trust, whether express, implied, or constructive" (*b*). Where, therefore, property of this

[(*a*) In the sixth and earlier editions of this work, the subject of parties to suits relating to trusts, and of the order and manner in which trustees and *cestuis que trust* ought to sue or be sued were considered at some length, but in referring to those editions the recent changes in the practice of the Court must be borne in mind.]

(*b*) 8 Vict. c. 16, s. 20; and see 25 & 26 Vict. c. 89, s. 30, and *supra*, p. 793.

description is held upon trust, the interests of the *cestui que trust* are peculiarly liable to be endangered by the dishonesty of the trustee; and, indeed, but for the means of protection now about to be explained, would be almost entirely at his mercy.

Origin of the writ of distringas.

2. The *distringas* was originally a process of the equity side (afterwards abolished) of the Court of Exchequer for compelling the appearance of a corporation to a bill filed, but formerly it was a common practice, more particularly in any emergency, to issue a subpœna before the bill was actually on the file. When, therefore, a party sought to restrain a transfer of stock, before he filed the bill against the holder of the stock and the bank (which was then a necessary party), to prevent any mischief in the interim, he served process immediately on the secretary of the bank to appear to the bill. But as the form of *distringas* gave no information as to the stock to be restrained, the *distringas* was accompanied with a notice in writing, which specified the stock, and required the bank not to permit the transfer. The effect of this was, that if the holder of the stock applied to the bank to make a transfer, the bank immediately forwarded a notice to the party issuing the *distringas*, that unless he actually filed a bill, and obtained and served an injunction before a certain day, they should permit the transfer to be made.

Practice continued notwithstanding 4 Anne, c. 16, and 39 & 40 G. 3. c. 36.

3. The 4 Anne, c. 16, s. 22, declared that no *subpœna* or other process for appearance should issue until after the bill was filed; and the 39 & 40 G. 3. c. 36, enabled suitors to obtain an injunction against the bank, without making the bank a party. However, in practice the *distringas* still continued to be served on the bank, and the same attention was paid to it in not allowing a transfer.

Process transferred to Chancery on the abolition of the equity Exchequer.

4. The convenience of the *distringas* was so sensibly felt, from the frequent necessity of laying an embargo upon stock at a moment's notice, that when 5 Vict. c. 5, abolished the equity side of the Exchequer, it was thought expedient to transfer the process to the Court of Chancery, and enlarge the remedy.

Additional remedy given by 5 Vict. c. 5, s. 4.

5. Accordingly, by section 4 of the Act referred to, it was by way of additional remedy enacted, that "it should be lawful for the Court of Chancery, upon the application *of any party interested* by *motion or petition*, in a summary way, *without bill filed*, to restrain the Bank of England or other company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or *any stock or shares in any public company*, or from paying any dividend or dividends due or to become due

thereon; and every order of the Court upon such motion or petition should specify the *amount of the stock*, or the particular shares to be affected thereby, and the *name or names of the person or persons, body politic or corporate, in which the same should be standing.*"

Practice under the 4th section.

6. An application to the Court under this section must be founded upon an affidavit verifying the special grounds upon which it proceeds (*a*). And when the order has been made, as it was not the intention of the Legislature to do more than protect the stock until the party could assert his right in the ordinary way, if the opposite party move to dissolve the injunction, and the Court sees that there has been great neglect on the part of the person who obtained the order, and that any extension of time would be oppressive to the party restrained, it will not as of course give further time for instituting proceedings (*b*). Under the former practice, when a bill had been filed, and an answer put in, and the defendant moved to discharge the restraining order, the plaintiff was allowed to file affidavits in opposition to the answer, and was not confined to the merits disclosed in the answer (*c*).

Transfer of the old writ of distringas.

7. By section 5 of the Act it is thus enacted: "In the place and stead of the Writ of Distringas, as the same has been heretofore issued from the Court of Exchequer, a Writ of Distringas in the form set out in the schedule to the Act shall be issuable from the Court of Chancery, and shall be sealed at the subpœna office, and the force and effect of such writ, and the practice under or relating to the same, shall be such as is now in force in the said Court of Exchequer: Provided, nevertheless, that such writ, and the practice under or relating to the same, and the fees and allowances in respect thereof, shall be subject to such orders and regulations as may, under the provisions of this Act, or of any other Act now in force, or under the general authority of the Court of Chancery, be made with reference to the proceedings and practice of the Court of Chancery."

Form of new writ.

In the Schedule to the Act, the form of the writ is as follows: "Victoria, &c., to the Sheriffs of London greeting. We command you that you omit not, by reason of any liberty, but that you enter the same, and distrain the *Governor and Company of the*

(*a*) *Ex parte Field*, 1 Y. & C. C. C. 1; *Re Marquis of Hertford*, 1 Hare, 586; *Re Locke and others*, 18 W. R. 275, *Re East of England Bank*, 6 N.R. 81.

(*b*) *Re Marquis of Hertford*, 1 Hare, 584; see same case, 1 Ph. 203.

(*c*) Ib. 1 Ph. 203; and see 15 & 16 Vict. c. 86, s. 59.

Bank of England, by all their lands and chattels in your baliwick, so that they, or any of them, do not intermeddle therewith until We otherwise command you; and that you answer us the issue of the said lands, *so that they do appear before us in our High Court of Chancery on the day of , to answer a certain bill of complaint lately exhibited against them and other defendants before us in our said Court of Chancery by complainant;* and, further, to do and receive what our said Court shall then and there order in the premises, and that you then leave there this writ. Witness," &c.

Orders of Court regulating practice.

8. The Act, as we have seen, empowered the Court to regulate the practice of the *distringas*, and orders [were accordingly issued with that object (*a*); but the writ of *distringas* has now been superseded (*b*), and a notice substituted in its place, which is made to apply, not only to the Bank of England, but to all companies, whether incorporated or not, and the practice in relation to such notices is now regulated by Order 46, rules 2—10, of the Rules of the Supreme Court, 1883.

[Notice substituted for the writ.]

[Present practice as to obtaining and serving the notice in lieu of *distringas*.]

9. The present course is as follows:—The party seeking the benefit of the Act prepares a notice, and makes an affidavit in the forms prescribed by the general order. The notice and affidavit are then filed in the Central Office, and an office copy of the affidavit and a duplicate of the notice, authenticated by the seal of the Central Office, are obtained and served on the bank or company; and such service has the same force and effect against the bank or company, as a writ of *distringas* duly issued under the 5th section of the Act previously had.

The notice may be withdrawn by the person by whom or on whose behalf it was given, on a written request signed by him, or its operation may be made to cease by an order made upon notice on the application of any other person claiming to be interested.

If, while the notice continues in force, the bank or company receive from the person in whose name the stock is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred, or to pay the dividends thereon, the bank or company is not by force or in consequence of the service of the notice, authorized without the order of the Court or a judge to refuse to permit the transfer

(*a*) XXVII. Cons. Ord. 1860. See Orders, 17 Nov. 1841, 3 Beav. xxxiii.; and 10 Dec. 1841, 3 Beav. xxxviii.

[(*b*) See Rules of the Supreme Court, 1883, Ord. 46, superseding the similar Rules of April, 1880.]

to be made, or to withhold the payment of the dividends, for more than eight days after the date of the request.] The result is, that when the holder of the stock requests a transfer of the stock or payment of the dividends, the bank [or company] immediately forwards a notice to the party who served the notice, that unless he bring an action, and obtain and serve an injunction within eight days from the date of such request, the transfer or payment will be made. The party must, of course, be then upon the alert to take proceedings and obtain and serve the injunction before the eight days have expired (*a*).

Distinction between remedies under the 4th & 5th sections of the Act.

10. [Until the issuing of the Order of April, 1880, it was considered that while the 4th section of the Act applied,] not merely to stock in the funds, but to stock and shares of *public companies*, whether incorporated or not, the 5th section was by the joint effect of the schedule to the Act of Parliament and of the orders of Court before referred to (*b*), confined to stock transferable at the *Bank of England*, [but this distinction between cases under the 4th and 5th sections has been superseded, and by the recent Order, rule 3, the notice is applicable to any public company, whether incorporated or not, and may affect shares, securities, and money, as well as stock. The distinction, however, still remains that notice] under the 5th section may be, and is in fact, frequently obtained, not from any fear of immediate danger, but as a general safeguard merely (*c*); whereas a special case must be made in order to obtain a restraining order under the 4th section (*d*).

Remedies when concurrent.

11. The [notice in lieu of] *distringas* under the 5th section, and the restraining order under the 4th section, may both occasionally be resorted to should circumstances require it; for the adoption of either remedy is not an election of the one to the exclusion of the other (*e*). "The 4th clause," said Sir J. Wigram, "was intended for interim purposes,—to protect stock until the party claiming it should have an opportunity of asserting his rights by bill in the ordinary way,—an opportunity often wanting from the facility with which that species of property is transferred from hand to hand, and which the

[(*a*) The proper course is to obtain an interim order, *ex parte*, over the next motion day, which must be served on the legal owners of the stock; *Re Blaksley's Trusts*, 23 Ch. D. 549.]

[(*b*) See note (*a*), p. 1106.]

(*c*) See *Etty* v. *Bridges*, 1 Y. & C. C. C. 486; [*Hobbs* v. *Wayet*, 36 Ch. D. 256, 260, where it was held that a legatee by putting a *distringas* on shares forming part of the testator's estate does not accept them so that he cannot afterwards disclaim.]

(*d*) Note (*a*), p. 1105, *supra*.

(*e*) *Re Marquis of Hertford*, 1 Hare, 584; 1 Ph. 129.

common *distringas*, preserved by the 5th section, does not in all cases afford (*a*). A *distringas* remains (*b*) only at the discretion of the bank. The restraining order, which the 4th section enables the Court to grant, is imperative; it continues so long as the Court sees fit to direct, and can only be discharged in the meantime upon the application of the parties interested." "Cases might arise," he added, "in which, from the discovery of new matter, after a *distringas* had issued, or from the bank peremptorily but erroneously refusing to notice a *distringas*, or perhaps from other causes, the party who obtained that writ might, notwithstanding, upon a full disclosure of the facts in a case of merits and urgency, entitle himself to a restraining order under the 4th section" (*c*).

SECTION II.

OF PRODUCTION.

General rule.

1. ALL documents held by the trustee in that character must be produced by him to the *cestuis que trust*, who in equity are the true owners (*d*). And if the trustee has submitted cases to counsel and taken opinions, not for the purpose of defence in any litigation between himself and his *cestuis que trust*, but for his guidance as trustee, he is bound to produce them to the *cestuis que trust*, who pay the expense so incurred by the trustee (*e*). [So, in a suit by *cestuis que trust* against their trustees to compel them to make good a breach of trust, the trustees are bound to produce letters and copies of letters between them and their solicitors in relation to the matters in question in the action *ante litem motam* (*f*); and a trustee cannot claim privilege for communications passing between him and his co-trustee employed as his solicitor (*g*).] But as all the *cestuis que trust* have an interest in the documents, they must

Cases for opinion.

Parties.

(*a*) And see *Société Générale de Paris* v. *Tramways Union Company*, 14 Q. B. D. 453, 454; *S. C.* in D. P. 11 App. Cas. 20, *nom. Société Générale de Paris* v. *Walford*.

(*b*) *Sic. qu.* "restrains."

(*c*) *Re Marquis of Hertford*, 1 Hare, 590; [*Re Corvin*, 33 Ch. D. 179.]

(*d*) *Simpson* v. *Bathurst*, 5 L. R. Ch. App. 202, *per* Lord Hatherley.

(*e*) *Wynne* v. *Humberston*, 27 Beav. 421; *Devaynes* v. *Robinson*, 20 Beav. 42; *Talbot* v. *Marshfield*, 2 Dr. & Sm. 285, 549; [*Re Postlethwaite*, 35 Ch. D. 722.]

[(*f*) *Re Mason*, 22 Ch. D. 609.]

[(*g*) *Re Postlethwaite*, 35 Ch. D. 722, *per* North, J.]

all be represented, directly or indirectly, in the suit before the documents can be finally dealt with (*a*). If the trust documents include mortgages upon which the trust fund has been invested, the production cannot be objected to on the ground that the mortgagors, or persons entitled to the equity of redemption, are not parties (*b*).

Trust must be established.

2. The privilege of requiring production can be asserted by a *cestui que trust* only when the relationship of trustee and *cestui que trust* has been established; for, so long as the claim is disputed, the would-be *cestui que trust* is regarded as a stranger (*c*).

Accounts.

3. An executor and trustee is bound to keep clear and distinct accounts, and if he enter the accounts of the trust in his private books, he is bound to produce them (*d*); and if an executor or trustee, being a partner, be allowed to enter the trust accounts in the partnership books, the Court will not allow the partners to withhold the inspection (*e*); but if an agent be employed to manage an estate, and he keeps the accounts in the same books in which the accounts relating to the estates of other persons are kept, the production, in the absence of those other persons, has been refused (*f*).

Privileged communications.

4. Where litigation is pending or is contemplated between the trustee and his *cestui que trust*, and the trustee submits a case to counsel for his opinion, for the protection of the trustee himself adversely to the *cestui que trust*, the case and opinion are communications within the general rule, and privileged from production (*g*).

Persons bound by notice of the trust.

5. The right of the *cestui que trust* is enforced not only as against the trustee personally, but as against all claiming under him, and though for value, if with notice of the trust (*h*).

(*a*) *Bugden* v. *Tylee*, 21 Beav. 545.
(*b*) *Gough* v. *Offley*, 5 De G. & Sm. 653.
(*c*) *Wynne* v. *Humberston*, 27 Beav. 421.
(*d*) *Freeman* v. *Fairlie*, 3 Mer. 43, *per* Lord Eldon; [and see *Thompson* v. *Dunn*, 5 L. R. Ch. 573; *St. George* v. *St. George*, 19 L. R. Ir. 225; *Re Sutcliffe*, 44 L. T. N.S. 547.]
(*e*) *Freeman* v. *Fairlie*, *ubi supra*.
(*f*) *Airey* v. *Hall*, 12 Jur. 1043.
(*g*) *Talbot* v. *Marshfield*, 2 Dr. & Sm. 285, 549; *Brown* v. *Oakshott*, 12 Beav. 252; *Devaynes* v. *Robinson*, 20 Beav. 42; *Bacon* v. *Bacon*, W. N. 1876, p. 96; [see *Re Mason*, 22 Ch. D. 609; *Mayor and Corporation of Bristol* v. *Cox*, 26 Ch. D. 678.]
(*h*) *Smith* v. *Barnes*, 1 L. R. Eq. 65.

SECTION III.

OF COMPULSORY PAYMENT INTO COURT.

General rule.

1. THE general rule as laid down by Lord Eldon, and which has ever since been acquiesced in, is, that to call for payment of money into Court, "the plaintiff must either be *solely entitled* to the fund or *have acquired in the whole of the fund such an interest, together with others, as entitles him on his own behalf, and the behalf of those others, to have the fund secured in Court*" (*a*). It is not indispensable that the plaintiff should be the person exclusively interested; for if he have a partial or contingent interest (*b*), it is enough, provided all the other persons interested in the fund are before the Court (*c*); and occasionally the Court will make orders for payment into Court, although some of the persons interested in the money are not before it (*d*), or the defendant does not *admit* that all are before it (*e*). Where the other persons interested are not necessary parties to the suit, payment into Court, if consistent with the relief sought in the suit, may be obtained without service on them of the notice of motion (*f*); but where *cestuis que trust* had been served with the copy of a bill which prayed the appointment of new trustees, and a transfer of the fund not into Court but *to the new trustees*, the Court held that the parties served with a copy of the bill must be served with notice of the motion to transfer the fund into Court (*g*).

Plaintiff may move upon a possible title.

2. If the defendant admits himself to be a trustee for some one, but it remains to be ascertained whether he is a trustee for the plaintiff or for other parties, the plaintiff may move upon his possible title, where all persons are before the Court among whom there will be found some one who is entitled (*h*). "In a contest as to the title to any particular property," said Lord

(*a*) *Freeman* v. *Fairlie*, 3 Mer. 29; and see *Dubless* v. *Flint*, 4 M. & Cr. 502; *M'Hardy* v. *Hitchcock*, 11 Beav. 77.

(*b*) *Ross* v. *Ross*, 12 Beav. 89.

(*c*) *Whitmarsh* v. *Robertson*, 4 Beav. 26; *Bartlett* v. *Bartlett*, 4 Hare, 631.

(*d*) *Wilton* v. *Hill*, 2 De G. M. & G. 807; *Hamond* v. *Walker*, 3 Jur. N.S. 686.

(*e*) *Symonds* v. *Jenkins*, 34 L. T. N.S. 277; 24 W. R. 512.

(*f*) *Marryatt* v. *Marryatt*, 23 L. J. N.S. Ch. 876.

(*g*) *Lewellin* v. *Cobbold*, 1 Sm. & G. 572.

(*h*) See *Dolder* v. *Bank of England*, 10 Ves. 355; *Whitmore* v. *Turquand*, 1 J. & H. 296; but see *Dubless* v. *Flint*, 4 M. & Cr. 502; *M'Hardy* v. *Hitchcock*, 11 Beav. 73.

Cottenham, "the Court will, in some cases, take possession of the subject-matter of the contest for security until it adjudicates upon the right. Such cases generally arise when the property is in the hands of stakeholders, factors, or trustees who do not themselves claim any title to it. In ordering money into Court under such circumstances, the Court does not disturb the possession of any party claiming title, or direct a payment before the liability to pay is established" (*a*).

Payment of a share.

3. Occasionally, where the fund is clear, and is divisible between the plaintiff and defendant in certain proportions, the Court has ordered the defendant to pay into Court the share only of the plaintiff (*b*).

Motion formerly must have been founded on admission in defendant's answer.

4. [It was formerly the rule of the Court that where the motion was made before decree, the merits upon which it was] founded must be admitted by the defendant's answer, and that no evidence as to merits could be adduced *aliunde* (*c*). Thus if money was standing in the joint names of several persons, as of three trustees, it would not be ordered into Court on the admission of the specific sum by one, though the others admitted that a sum was standing in their joint names, and the plaintiff offered to read affidavits sworn by them from which the amount of the sum would appear (*d*). [But in a recent case (*e*) the Court of Appeal intimated an opinion that any admission, whether direct or implied, would be sufficient to enable the Court to act; and in a subsequent case, where a motion was made in an administration action, after the defendant's appearance but before any pleadings had been delivered, for payment into Court of sums of money alleged to be in the defendant's hands, and the motion was supported by the affidavit of the plaintiff, but the defendant, though served with notice of the motion, did not appear, it was held by the late M. R. that the defendant

[But now any admission direct or implied sufficient.]

(*a*) *Richardson* v. *Bank of England*, 4 M. & Cr. 171.

(*b*) *Rogers* v. *Rogers*, 1 Anst. 174; *Hamond* v. *Walker*, 3 Jur. N.S. 686; see *Score* v. *Ford*, 7 Beav. 336.

(*c*) *Beaumont* v. *Meredith*, 3 V. & B. 181, *per* Lord Eldon; *Richardson* v. *Bank of England*, 4 M. & Cr. 171, 175, *per* Lord Cottenham; *Dubless* v. *Flint*, 4 M. & Cr. 502; *Black* v. *Creighton*, 2 Moll. 554, *per* Sir A. Hart; and see *Green* v. *Pledger*, 3 Hare, 171; *Hagell* v. *Currie*, 2 L. R. Ch. App. 452. [However in *Jervis* v. *White*, 6 Ves. 738, Lord Eldon took the affidavit of the plaintiff charging the defendant with having a sum of money in his hands and an affidavit of the defendant before answer together as an admission, and ordered the money into Court.] The 59th sect. of 15 & 16 Vict. c. 86, directing the defendant's answer to be viewed merely as an affidavit in motions for injunction or receiver, &c., did not touch motions for payment into Court.

(*d*) *Boschetti* v. *Power*, 8 Beav. 98.

[(*e*) *London Syndicate* v. *Lord*, 8 Ch. Div. 84.]

must be taken to have admitted that he had received the money as he had not denied it, and he was ordered to pay the amount into Court (*a*); and admissions by a trustee in correspondence that he has received the money, and a recital to that effect in the settlement which was executed by him, are sufficient to found the order (*b*).

In a partnership action where an account of partnership dealings had been furnished by the defendant before action brought, the late Master of the Rolls, Sir G. Jessel, looked at the account, rejected certain items, turned the balance against the defendant, and ordered him to pay it into Court (*c*); and in general where an account has been rendered and the Court has before it the parties to the account and evidence as to the items in dispute, the Court will look into the facts of the case, and if "in the fair exercise of its judicial discretion" (*d*), it can arrive at a conclusion that a sum will be due to the plaintiff on the taking of the account, and what that sum will be, it will order payment by the defendant of that amount into Court (*e*).]

Old rule that answer should contain an admission of plaintiff's title.

5. And it would seem that [the old rule was that] not only must the plaintiff have been able to read from the answer an admission of the defendant's receipt of the money, but also an admission of his own title, or probable title, *e.g.* as next of kin, heir-at-law, &c., and that if the defendant ignored the plaintiff's title, the money would not have been ordered into Court (*f*). But in a suit to establish a constructive trust, the rights of the plaintiff might have appeared so clear upon the answer, that the Court, notwithstanding a formal denial by the defendant that he was a trustee, would have felt itself justified in ordering payment (*g*). [It is conceived that under the present practice any admission by the defendant of the plaintiff's title, whether expressed or implied from his conduct, would be sufficient to enable the Court to order money into Court (*h*).

[Present practice.]

[Payment in after decree.]

6. Where the motion is made after decree the Court will order

[(*a*) *Freeman* v. *Cox*, 8 Ch. D. 148; *Porrett* v. *White*, 31 Ch. Div. 52. In a recent case in Ireland, V. C. Chatterton declined to follow *Freeman* v. *Cox*; see *Nesbitt* v. *Baldwin*, 7 L. R. Ir. 134.]

[(*b*) *Hampden* v. *Wallis*, 27 Ch. D. 251; *Porrett* v. *White*, 31 Ch. Div. 52; and see *Wanklyn* v. *Wilson*, 35 Ch. D. 180.]

[(*c*) *Dunn* v. *Campbell*, 27 Ch. D. 254, note.]

[(*d*) *London Syndicate* v. *Lord*, 8 Ch. D. 90, *per* Jessel, M.R.]

[(*e*) *Wanklyn* v. *Wilson*, 35 Ch. D. 180, 186.]

(*f*) *Dubless* v. *Flint*, 4 M. & Cr. 502; *M'Hardy* v. *Hitchcock*, 11 Beav. 73; *Bank of Turkey* v. *Ottoman Company*, 2 L. R. Eq. 366.

(*g*) *Hagell* v. *Currie*, 2 L. R. Ch. App. 452, *per* L. J. Cairns.

[(*h*) See *Freeman* v. *Cox*, 8 Ch. D. 148; but see *Nesbitt* v. *Baldwin*, 7 L. R. Ir. 134.]

money into Court in any case where it is ascertained to its satisfaction, that the amount must in any event be ultimately payable by the defendant, and if the certificate of the chief clerk has not been made finding the amount due, the Court will in a proper case satisfy itself by an examination of the evidence as to the amount, and order payment of the amount so ascertained (*a*). And upon an originating summons trustees have been ordered to pay into Court monies which have been received and misapplied by them (*b*).]

Payment into Court must be upon the footing of an equity alleged by the plaintiff.

7. The plaintiff cannot ask for payment of money into Court upon the footing of an equity not alleged by him in his pleadings, but only stated by the answer [or statement of defence.] Thus, where the plaintiff filed a bill claiming one-fifth of the residuary estate of a testator and asking relief as in the case of an open account, and the defendant by his answer stated a deed amounting to a settlement of account under which he admitted a sum to be due from him, it was held that the plaintiff could not, without amending his bill, obtain payment into Court of the sum so admitted to be due (*c*).

Not necessary that fund should be actually in defendant's hands.

8. It is not necessary that the defendant should acknowledge the fund to be in his hands at the time of the answer; for if he admit that he once actually received it, and state that he afterwards applied it in a way not authorized by the trust, the Court will fasten upon the receipt, and not allow him to discharge himself by pleading a breach of duty; as, if a trustee admit that he once had a fund in his hands, but that he afterwards allowed it to be received by a co-trustee who misapplied it (*d*), or that he afterwards sold it out and did not re-invest it (*e*), or paid it away improperly (*f*), or lent it on personal (*g*) or other security (*h*) not within the terms of the trust. And no attention will be paid to the objection that the suit is for the very purpose of securing the fund, and therefore that the money ought not to be ordered into Court until decree (*i*).

[(*a*) *London Syndicate* v. *Lord*, 8 Ch. Div. 84.]

[(*b*) *Re Chapman*, 54 L. T. N.S. 13.]

(*c*) *Proudfoot* v. *Hume*, 4 Beav. 476.

(*d*) *Ingle* v. *Partridge*, 32 Beav. 661; *Symonds* v. *Jenkins*, 34 L. T. N.S. 277; 24 W. R. 512.

(*e*) *Wigleswortb* v. *Wigleswortb*, 16 Beav. 272; *Phillipo* v. *Munnings*, 2 M. & Cr. 309; and see *Meyer* v. *Montriou*, 4 Beav. 346; *Futter* v. *Jackson*, 6 Beav. 424.

(*f*) See *Scott* v. *Becher*, 4 Price, 350; *Meyer* v. *Montriou*, 4 Beav. 343; *Nokes* v. *Seppings*, 2 Ph. 19.

(*g*) *Vigrass* v. *Binfield*, 3 Mad. 62; *Collis* v. *Collis*, 2 Sim. 365; *Roy* v. *Gibbon*, 4 Hare, 65.

(*h*) *Wyatt* v. *Sharratt*, 3 Beav. 498; *Costeker* v. *Horrox*, 3 Y. & C. 530; *Hinde* v. *Blake*, 4 Beav. 597; *Bourne* v. *Mole*, 8 Beav. 177.

(*i*) See *Rothwell* v. *Rothwell*, 2 S. & S. 217; *Wyatt* v. *Sharratt*, 3 Beav. 498; *Collis* v. *Collis*, 2 Sim. 365.

Payments not specified in answer may be verified by affidavit.

9. But if an executor (and the rule must apply equally to a trustee) admits in his answer [or statement of defence] that he has received a specific sum, but adds that he has made payments, the amount whereof he does not specify, in respect of the testator's estate, the Court will allow him to verify by affidavit the amount of the payments properly made, and will order him to pay in the actual balance (*a*).

Payment of money into Court not ordered on a mere admission of circumstances showing a liability.

10. Payment of money into Court is, in general, confined to the cases of a defendant's admission of actual possession of the fund, or of a receipt not followed by any subsequent legal discharge, and is not ordered upon a mere admission of facts from which a liability may be inferred (*b*). Thus, if a defendant admit that he has had a fund in his hands from a certain time, and it clearly appears that he is liable and will be decreed at the hearing to pay interest; yet the Court will not order him to pay interest on motion (*c*), unless he also admit that he has actually made interest, which amounts to a receipt (*d*).

Rothwell *v.* Rothwell.

11. The case of *Rothwell* v. *Rothwell* (*e*) is no exception to this rule, for there the defendant had covenanted with the trustees of his marriage settlement to pay 850*l.* within twelve months from the marriage; and the covenant not having been performed, the children filed a bill against the covenantor and the trustees to have the money raised; and the defendant admitting "that the 850*l.* had not been got in, but that *it was still in his hands*," the Court ordered the payment into Court, not on the admission of the debt, but "that *it was still in his hands*."

Special case of a trustee who is a debtor to his trust estate.

12. However, in some cases the Court orders payment into Court upon motion of what is apparently a mere debt; as, where an executor or trustee admits himself to owe a debt to the estate he represents, for here the person to pay and the person to receive being the same, the Court assumes that what ought to have been done has been done, and orders the payment, not as of a debt by a debtor, but as of monies realized in the hands of the executor or trustee (*f*). Thus, where A., B., and C. were appointed *executors* of a will, of whom A. and C. alone proved,

(*a*) *Anon.* 4 Sim. 359; and see *Proudfoot* v. *Hume*, 4 Beav. 476; *Roy* v. *Gibbon*, 4 Hare, 65.

(*b*) See *Richardson* v. *Bank of England*, 4 M. & Cr. 174; *Peacham* v. *Daw*, 6 Mad. 98.

(*c*) *Wood* v. *Downes*, 1 V. & B. 50.

(*d*) *Freeman* v. *Fairlie*, 3 Mer. 43; see *Wood* v. *Downes*, 1 V. & B. 50.

(*e*) 2 S. & S. 217; see *Richardson* v. *Bank of England*, 4 M. & Cr. 174.

(*f*) *Richardson* v. *Bank of England*, 4 M. & Cr. 174, *per* Lord Cottenham.

and A. and B. were appointed *trustees*, and a bill was filed by A. for the administration of the trusts of the will, and B. by his answer admitted that he and his partner G. B. were indebted to the testatrix at the time of her decease, and that part of the assets had been lent to the partnership by C. and that the sum of 1137*l.* 7s. 10½d. was due from the partnership to the estate on the balance of accounts, and alleged that the debt owing from the partnership, and the monies received from C. the executor, had been treated as part of the assets, and applied partly in payment of testatrix's debts, and as to the residue upon the trusts of the will, the Court held, notwithstanding B.'s disclaimer of having acted, that he must be deemed to have acted as executor and trustee, and as such to have received the monies in question, and ordered him to pay the balance into Court (*a*).

Where trustees mean to apply the fund.

13. Trustees will not be ordered to pay into Court where they have a discretionary power over the fund, and it appears that they are intending *bonâ fide* to exercise it; for this would only lead to expense by occasioning the necessity of another application to have the fund paid out again (*b*).

Whether the order is matter of course.

14. Lord Langdale once said, that according to the old practice it was mere matter of course to order trust funds into Court, but that the question now was whether there existed any sufficient ground for the order, such as danger to the fund, &c. (*c*). V. C. Stuart subsequently declared his adherence to the old practice (*d*); [but in a recent case V. C. Hall was of opinion that the rule was not absolute, but a reasonable ground for the payment must be made out (*e*).]

Payment into Court at the hearing.

15. The Court will occasionally make an order for payment into Court at the hearing of the cause, "*ex debitio justitiæ*," though it might have hesitated to do so upon an interlocutory application by motion; as, where a plaintiff having only a remote contingent interest in a fund claims at the hearing to have the fund brought into Court (*f*). And an order for payment into Court will be made at the hearing, if proper, without notice of motion for that purpose (*g*).

Time allowed for payment into Court.

16. The time to be given for payment of money into Court will depend on the circumstances of the case. If it be money

(*a*) *White* v. *Barton*, 18 Beav. 192.
(*b*) *Talbot* v. *Marshfield*, 2 Dr. & Sm. 285.
(*c*) *Ross* v. *Ross*, 12 Beav. 89.
(*d*) *Robertson* v. *Scott*, 14 L. T. N.S. 187.
[(*e*) *Re Braithwaite*, 21 Ch. D. 121.]
(*f*) *Governesses' Institution* v. *Rusbridger*, 18 Beav. 467.
(*g*) *Isaacs* v. *Weatherstone*, 10 Hare, App. xxx.

in the defendant's hands, it will be ordered in forthwith, and an immediate transfer may be directed of stock standing in the defendant's name. When the defendant had improperly lent a sum on personal security, but no insolvency was suggested nor any danger as to the money, the Court ordered it to be paid in, on or before the first day of the following term (*a*). In another case, where the defendant had lent 820*l.* upon a mortgage not authorized by the trust, the Court allowed six weeks, with liberty to apply for further time if the circumstances should then warrant the indulgence (*b*).

Distringas.

17. Where a [notice in lieu of] *distringas* or injunction has been previously obtained against the transfer of the stock, the Court orders the transfer into Court to be made, "notwithstanding the notice or injunction."

SECTION IV.

OF RECEIVERSHIP.

Receiver will be appointed at the instance of all the *cestuis que trust.*

1. As the *cestuis qui trust* or parties beneficially interested in an estate are in equity the owners of it, should they concur in an application for a receiver and the trustee consents, the Court will at any time make the order (*c*). But the usual recognizances will not be dispensed with (*d*).

Also where trustee is guilty of misconduct, or is insolvent, bankrupt, &c.

2. And as each *cestui qui trust* is entitled to have the fund properly protected, a receiver will be granted at his instance if it can be shown that the trustee has been guilty of misconduct, waste, or improper disposition of the trust estate (*e*), or that he has an undue leaning or bias towards one of two conflicting parties (*f*), or that the fund is in danger from his being in insolvent circumstances (*g*), or being a bankrupt (*h*), or that one

(*a*) *Vigrass* v. *Binfield*, 3 Mad. 62; and see *Hinde* v. *Blake*, 4 Beav. 597; *Roy* v. *Gibbon*, 4 Hare, 65.

(*b*) *Wyatt* v. *Sharratt*, 3 Beav. 498; *Score* v. *Ford*, 7 Beav. 333.

(*c*) *Brodie* v. *Barry*, 3 Mer. 695; *Beaumont* v. *Beaumont*, cited Ib. 696; see *Browell* v. *Reed*, 1 Hare, 435.

(*d*) *Manners* v. *Furze*, 11 Beav. 30; *Tylee* v. *Tylee*, 17 Beav. 583.

(*e*) *Anon.* 12 Ves. 5, *per* Sir W. Grant; and see *Middleton* v. *Dodswell*, 13 Ves. 266; *Howard* v. *Papera*, 1 Mad. 142; *Richards* v. *Perkins*, 3 Y. & C. 299; *Evans* v. *Coventry*, 5 De G. M. & G. 911.

(*f*) *Earl Talbot* v. *Scott*, 4 K. & J. 139.

(*g*) *Scott* v. *Becher*, 4 Price, 346; *Mansfield* v. *Shaw*, 3 Mad. 100; and see *Anon.* 12 Ves. 4; *Middleton* v. *Dodswell*, 13 Ves. 266; *Havers* v. *Havers*, Barn. 23.

(*h*) *Gladdon* v. *Stoneman*, 1 Mad. 143, note; *Langley* v. *Hawk*, 5 Mad. 46; [*Re Hopkins*, 19 Ch. Div. 61.]

trustee has misconducted himself, the other consenting to the order (*a*), or that he is incapacitated from acting (*b*), or that the executor is a person of bad character, drunken habits, and great poverty (*c*). [But before judgment in a creditor's action a receiver will not be appointed unless a case is shown of the assets being wasted (*d*), nor merely because the executor will probably exercise his right of retainer to the prejudice of the other creditors (*e*).]

Where executrix a *feme covert*, and husband abroad.

3. And a receiver was appointed [in a case under the old law] where the executrix was a *feme covert*, and the husband, besides being in indifferent circumstances, was out of the jurisdiction, for in such a case, said the Court, if the executrix waste the assets or refuse payment, the party aggrieved has no remedy, as the husband must be joined in the action (*f*). [But now that the husband is not a necessary party to an action against the executors, and is not subject to liabilities by reason of any devastavit committed by his wife unless he has acted or intermeddled in the administration, it is conceived that his poverty or absence would be no ground for the appointment of a receiver (*g*).]

Receiver where trust estate unprotected.

4. And a receiver has been ordered where four trustees had been named in a will and one died, and another was abroad, and the third had scarcely interfered in the trust, and, the fourth submitted to a receiver by his answer (*h*). In another case three trustees had *disagreed*, and a receiver was appointed (*i*): the order was taken by arrangement between the parties, but the Court had previously expressed its opinion that unless the trustees chose to agree, a receiver *must* be appointed (*j*). Where two out of three trustees chose to act separately, and took securities in their own names omitting that of the dissentient trustee, a *cestui que trust* was held entitled to a receiver (*k*). And the Court will grant a receiver at the instance of the *cestui que trust*, when the single trustee is, or all the trustees are out of the jurisdiction (*l*).

(*a*) *Middleton* v. *Dodswell*, 13 Ves. 266.

(*b*) *Bainbrigge* v. *Blair*, 3 Beav. 421.

(*c*) *Everett* v. *Prytherch*, 12 Sim. 367, 368.

[(*d*) *Harris* v. *Harris*, 56 L. J. N.S. Ch. 754; 56 L. T. N.S. 507; following *Philips* v. *Jones*, 28 S. J. 360, and dissenting from the dictum of Jessel, M.R., in *Re Radcliffe*, 7 Ch. D. 733; *Re Wells*, 45 Ch. D. 569.]

[(*e*) *Re Wells*, 45 Ch. D. 569.]

(*f*) *Taylor* v. *Allen*, 2 Atk. 213.

[(*g*) 45 & 46 Vict. c. 75, ss. 18, 24.]

(*h*) *Tidd* v. *Lister*, 5 Mad. 429.

(*i*) *Day* v. *Croft*, May 2, 1839, M. R.

(*j*) See now *Hart* v. *Denham*, W. N. 1871, p. 2.

(*k*) *Swale* v. *Swale*, 22 Beav. 584.

(*l*) *Noad* v. *Backhouse*, 2 Y. & C. C. C. 529; *Smith* v. *Smith*, 10 Hare, App. lxxi.

Receiver not granted on slight grounds.

5. But the Court is not in the habit of granting a receiver, and so taking the administration out of the hands of the trustees, the natural curators of the estate, upon very slight grounds (*a*). Thus it is no sufficient cause for a receiver that one of several trustees has *disclaimed* (*b*), or is *inactive*, or *gone abroad* (*c*). Nor is it a sufficient cause that trustees are in *mean* (not insolvent) circumstances (*d*), or being trustees for sale have let the purchaser into possession before they received the purchase money, for the Court will not *necessarily* infer this to be misconduct (*e*).

Receiver not discharged at the mere instance of the party procuring his appointment.

6. When a receiver is appointed under the authority of the Court, he is appointed for the benefit of all parties interested, and therefore will not be discharged merely on the application of the party at whose instance the order was made (*f*).

An exception under special circumstances.

7. However, when a receiver had been appointed on the application of the plaintiff the tenant for life, on the ground of the misconduct of one of the trustees, and the incapacity of the other, and afterwards three new trustees were appointed by the Court, who, on a motion by the plaintiff to discharge the receiver, undertook to receive the rents and pass their accounts half-yearly before the Master in the same way as a receiver, the Court said it was not proposed to deprive any party of the protection of a receiver, but merely to substitute the trustees in his place; that the tenant for life ought not necessarily to be charged with the costs of a receiver; that it was not intended to put the tenant for life in possession; that if any objections were shown to the trustees the application would be refused, but in the absence of such objections it was a reasonable request: and the order for discharging the receiver was made (*g*).

Expense of receiver falls on life estate.

8. Where the Court appoints a receiver, the poundage and the expenses of passing his accounts fall upon the income of the tenant for life (*h*).

[Receiver's priority for his costs and remuneration.]

[9. Where property was realized in an action by debenture-

(*a*) See *Middleton* v. *Dodswell*, 13 Ves. 268; *Barkley* v. *Lord Reay*, 2 Hare, 306.

(*b*) *Browell* v. *Reed*, 1 Hare, 434; but see *Tait* v. *Jenkins*, 1 Y. & C. C. C. 492.

(*c*) *Browell* v. *Reed*, 1 Hare, 435, *per* Sir J. Wigram.

(*d*) *Anon. case*, 12 Ves. 4; *Howard* v. *Papera*, 1 Mad. 142; and see *Hathornthwaite* v. *Russel*, 2 Atk. 126. In *Havers* v. *Havers*, Barn. 23, the Court considered misapplication probable.

(*e*) *Browell* v. *Reed*, 1 Hare, 434.

(*f*) *Bainbrigge* v. *Blair*, 3 Beav. 423, *per* Lord Langdale.

(*g*) *Bainbrigge* v. *Blair*, 3 Beav. 421, 423, 424; and see *Poole* v. *Franks*, 1 Moll. 80.

(*h*) *Shore* v. *Shore*, 4 Drew. 510.

holders against their trustees to execute the trusts of the deed for securing the debentures, and a receiver and manager had also been appointed in the action, the receiver and manager was allowed the balance due to him, including his remuneration and his costs of the action, in priority to the costs, charges, and expenses of the trustees, and the costs of the plaintiffs other than the plaintiffs' costs of the realization of the property (*a*).]

SECTION V.

OF COSTS OF SUIT.

I. *As between strangers on the one hand, and trustees and* cestuis que trust *on the other.* Costs as between trustees and strangers.

1. In these cases, the trustee is on no better footing than any ordinary plaintiff or defendant, for the circumstances of the trust cannot be allowed to affect the interest of a third person (*b*). Thus, if a trustee fail in his application to the Court, he must pay the costs of it (*c*).

2. So, in a suit by a stranger for specific performance of a contract, the vendor being a trustee for sale must, if he cannot make a title, pay the costs of the suit agreeably to the general rule (*d*). Costs where trustees cannot make a title.

3. So, where trustees or executors are brought before the Court as necessary parties by a stranger, if the trustees or executors contest the claims of the plaintiff, and the plaintiff recover in the suit, they are not entitled to the costs (*e*). Trustee made a defendant as a necessary party.

4. If a plaintiff *fail* in his suit, but stands in so hard a case that he ought not to *pay* any costs, the Court will not oblige him to pay the costs of a defendant because the latter happens to sustain the character of a trustee (*f*). Plaintiff failing in his suit not necessarily bound to pay costs of a trustee.

5. In a foreclosure action against the mortgagor and his trustee to bar dower, the trustee is not entitled to his costs as against the mortgagee (*g*). Trustee to bar dower.

[(*a*) *Batten* v. *Wedgwood Coal and Iron Company*, 28 Ch. D. 317.]

(*b*) *Burgess* v. *Wheate*, 1 Eden, 251, *per* Lord Northington.

(*c*) *Ex parte Angerstein*, 9 L. R. Ch. App. 479; [*Pitts* v. *La Fontaine*, 6 App. Cas. 482.]

(*d*) *Edwards* v. *Harvey*, G. Coop. 40; and see *Hill* v. *Magan*, 2 Moll. 460; *Elsey* v. *Lutyens*, 8 Hare, 164.

(*e*) *Rashley* v. *Masters*, 1 Ves. jun. 201, see 205.

(*f*) *Brodie* v. *St. Paul*, 1 Ves. jun. 326, see 334.

(*g*) *Horrocks* v. *Ledsam*, 2 Coll. 208.

Trustee has costs as between party and party only.

6. Where an action by a stranger is dismissed with costs, a trustee, who is a defendant, will in general be allowed his costs only as between party and party (*a*). [But under the general discretionary power which the Court possesses in all matters of equitable jurisdiction, costs as between solicitor and client may be given under special circumstances (*b*).]

Trustee respondent to petition of *cestui que trust*.

7. Where money has been paid into Court by a railway company, and the *cestuis que trust* are petitioners and the trustee a respondent, the company must pay the costs of both, as the trustee is justified in appearing separately to inform the Court that the order is right (*c*).

Costs in creditor's suit.

8. If a creditor filed a bill against an executor for payment of a debt, the rule which [until the recent alteration in the practice of the Court] prevailed at *law* was not also the rule of *equity*, viz., that if the creditor recovered he should be entitled to his costs, *de bonis testatoris*, and if there were none, then *de bonis propriis* of the executor; for the consideration of costs in *equity* rested entirely in the discretion of the Court (*d*). As the law formerly stood, if the assets were not sufficient to cover both the plaintiff's debt and costs, the executor was not decreed in equity to pay costs personally (*e*), unless he had misconducted himself, as by having satisfied simple contract debts in preference to debts upon specialty (*f*); but he was not entitled to retain his own costs out of the assets in preference to the claims of the plaintiff (*g*). And if a bill had been filed by a specialty creditor, and the specialty debt had exhausted the personal assets, the executor could not have claimed to be reimbursed out of the real estate to the prejudice of the testator's heir (*h*): for the executor, it was said, should have considered the risk before he applied

Executor (though not so formerly) now held entitled to his costs in preference to the plaintiff.

(*a*) *Mohun* v. *Mohun*, 1 Sw. 201; *Saunders* v. *Saunders*, 3 Jur. N.S. 727.

[(*b*) *Andrews* v. *Barnes*, 39 Ch. Div. 133, in which case Kay, J., allowed costs as between solicitor and client to the trustees of a small charity fund, made defendants in an action unjustifiably brought to recover the fund from them.]

(*c*) *Ex parte Metropolitan Railway Company*, 16 W. R. 996; and see *Re English's Settlement*, 39 Ch. D. 556.

(*d*) *Twisleton* v. *Thelwel*, Hard. 165; *Uvedale* v. *Uvedale*, 3 Atk. 119; but see *Davy* v. *Seys*, Mos. 204. [Now by Rules of the Supreme Court, 1883, Order 65, R. 1, and the Judicature Act, 1890 (53 & 54 Vict. c. 44) s. 5, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, are in the discretion of the Court.]

(*e*) *Twisleton* v. *Thelwel*, Hard. 165; *Morony* v. *Vincent*, 2 Moll. 461.

(*f*) *Jefferies* v. *Harrison*, 1 Atk. 468; and see *Bennett* v. *Attkins*, 1 Y. & C. 247; *Wilkins* v. *Hunt*, 2 Atk. 151.

(*g*) *Humphrey* v. *Morse*, 2 Atk. 408; *Sandys* v. *Watson*, 2 Atk. 80; and see *Adair* v. *Shaw*, 1 Sch. & Lef. 280.

(*h*) *Uvedale* v. *Uvedale*, 3 Atk. 119; and see *Nash* v. *Dillon*, 1 Moll. 237.

for the probate (*a*). But now the practice is that the executor shall have his own costs in the first place, even as against the plaintiff, for the Court will not take the fund out of his hands until his costs are paid (*b*).

II. *Of costs as between trustees and* cestuis que trust, inter se. Trustee entitled to costs as a general rule.

1. The general rule is that a trustee shall have his costs of suit awarded to him at the hearing either out of the trust estate, or to be paid by his *cestui que trust* (*c*). And if there be a fund under the control of the Court he will have his costs as between solicitor and client (*d*). And if there be no fund, still if the *cestuis que trust* choose to bring the trustees before the Court for obtaining its directions as to the rights of the parties or the mode of administration, and the trustees are free from blame, the trustees are entitled to their costs as between solicitor and client as against the *cestuis que trust personally* (*e*). But if plaintiffs take proceedings *for the purpose of creating* a fund, of which the defendants *would be* trustees for the plaintiffs, if the plaintiffs succeeded, but the plaintiffs fail, the defendants are entitled as against the plaintiffs to costs only as between party and party (*f*).

2. If it appear upon the pleadings, or the Court be otherwise Charges and expenses.

(*a*) See *Uvedale* v. *Uvedale*, 3 Atk. 119; *Humphrey* v. *Morse*, 3 Atk. 408.

(*b*) *Bennet* v. *Going*, 1 Moll. 529; *Tipping* v. *Power*, 1 Hare, 405; *Ottley* v. *Gilby*, 8 Beav. 603; *Tanner* v. *Dancey*, 9 Beav. 339; [but not his costs of a probate action; *Re Pearse*, 56 L. T. N.S. 228; 35 W. R. 358.]

(*c*) 1 Eq. Ca. Ab. 125, note (*a*); *Hall* v. *Hallett*, 1 Cox, 141, *per* Lord Thurlow; *Attorney-General* v. *City of London*, 3 B. C. C. 171; *Norris* v. *Norris*, 1 Cox, 183; *Sammes* v. *Rickman*, 2 Ves. jun. 38, *per* Lord Chief Baron Eyre; *Rashley* v. *Masters*, 1 Ves. jun. 201; *Rocke* v. *Hart*, 11 Ves. 58; *Maplett* v. *Pocock*, Rep. *t.* Finch, 136; *Landen* v. *Green*, Barn. 389; *Taylor* v. *Glanville*, 3 Mad. 176, &c.; [*Re Knight's Will*, 26 Ch. Div. 82, 90; *Re Love*, 29 Ch. Div. 348. By Order 65, R. 1, of the Rules of the Supreme Court, 1883, the costs of all proceedings, including the administration of estates and trusts, are in the discretion of the Court, but this is not to deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules previously acted upon in the Chancery Division; see *Re Hodgson*, W. N. 1884, p. 117, where the action had been instituted before the order came into operation; *Re M'Clellan*, 29 Ch. D. 495. The right of trustees to their costs on an application by originating summons under O. lv. (*vide sup.*, pp. 388, *et seq.*, 698) is the same as in an action for administering the trust, *Re Medland*, 41 Ch. Div. 476, 492.]

(*d*) *Mohun* v. *Mohun*, 1 Sw. 201, *per* Sir T. Plumer; *Moore* v. *Frowd*, 3 M. & Cr. 49, *per* Lord Cottenham.

(*e*) *Attorney-General* v. *Cuming*, 2 Y. & C. C. C. 155; and see *Edenborough* v. *Archbishop of Canterbury*, 2 Rust. 112 [and *Andrews* v. *Barnes*, 39 Ch. Div. 133.]

(*f*) *Saunders* v. *Saunders*, 3 Jur. N.S. 727; *Mohun* v. *Mohun*, 1 Sw. 201.

satisfied, that the trustee has sustained charges and expenses beyond the costs of suit, the Court will order him his *costs, charges and expenses, properly incurred.* But an order made in a suit in this form will not comprise costs, charges and expenses, incurred in defending *other* suits, unless they be specially mentioned (*a*).

[Priority.]

[3. If the trust estate be insufficient for the payment of all the costs of the action, the trustee is entitled to have his costs, charges and expenses, paid in priority to the costs of the *cestuis que trust* (*b*). But the necessary costs of realizing the trust estate will have priority over the trustees' costs, charges and expenses, as will also the costs and remuneration of a receiver appointed in the suit (*c*).]

Professional charges.

4. If the trustee be a *solicitor*, he cannot make the usual professional charges, but the Court will not *declare* that the trustee shall have his *costs out of pocket* only, but will give him his costs as between solicitor and client in the usual way, and leave it to the taxing officer to deal with the effect of the order (*d*).

Practice in creditors' and legatees' suits where fund is deficient.

5. A singular application of the rules respecting costs as between trustees and third persons, and as between trustees and their *cestuis que trust inter se*, arises in the case of a deficient fund. If *a creditor* bring an action for administration and there is a surplus, he can only have costs as between party and party, for that is all that he is entitled to as against the residuary legatees with whom he has no privity; but if the estate be deficient, and is divisible amongst the creditors *pro ratâ*, the creditor is regarded in the light of a trustee for himself and the other creditors, and then as between him and his co-creditors he is allowed his costs as between solicitor and client. Thus the less the estate the larger the plaintiff's costs. The same principle applies, *mutatis mutandis*, [to an action by a creditor of a deceased partner where the estate is sufficient for payment of separate, but not of partnership, debts (*e*); to the case of a creditor who obtains the conduct of an action originally brought by a legatee or next of kin (*f*); to an action] by a *legatee* where the fund, *after payment of debts*, is not sufficient for discharge of the

(*a*) *Payne* v. *Little*, 27 Beav. 83.

[(*b*) *Dodds* v. *Tuke*, 25 Ch. D. 617; and see *Batten Proffitt & Scott* v. *Dartmouth Harbour Commissioners*, 45 Ch. 612, 621.]

[(*c*) *Batten* v. *Wedgwood Coal and Iron Company*, 28 Ch. D. 317.]

(*d*) *York* v. *Brown*, 1 Coll. 260.

[(*e*) *Re M'Rae*, 32 Ch. D. 613.]

[(*f*) *Re Richardson*, 14 Ch. D. 611.]

legacies in full (*a*); but otherwise if the fund be insufficient for payment of *debts* (*b*). Where the personalty had been exhausted, and a creditors' suit was instituted against the devisees of the *real* estate, which was also likely to prove deficient, the order was that the proceeds should be applied first in payment of the costs of plaintiffs and defendants as between party and party *pari passu*, and then in discharge of the debts, and if the fund were insufficient for the latter purpose, then as between the plaintiffs and the other creditors the plaintiffs should be paid their extra costs as between solicitor and client (*c*).

Trustee not appearing.

6. Where the trustee did not appear at the hearing, and a decree *nisi* was made against him, and the trustee set down the cause again, and prayed to have his costs of the suit upon his paying the costs of the day, Lord Kenyon said, "The payment of the costs of the day makes the trustee *rectum in curiâ;* and as he would most unquestionably have been entitled to his costs if he had appeared at the original hearing, so he now stands in the same situation, and is therefore entitled to his costs" (*d*).

Decree passed.

7. But if the decree has been *passed*, a trustee who has omitted to ask for his costs at the hearing cannot have the cause re-heard upon the subject of costs only, and cannot obtain an order for payment of his costs upon presenting a petition (*e*).

Disclaimer.

8. If a person named as trustee be made defendant to a suit, and by his defence disclaim the trust, the suit will be dismissed as against him with *costs* (*f*); but not with *costs as between solicitor and client*, for, having refused to accept the office, he stands in the position of an ordinary defendant (*g*); and if his defence be unnecessarily long, he will only be allowed the reasonable costs of a disclaimer (*h*).

(*a*) *Thomas* v. *Jones*, 1 Dr. & Sm. 134 and cases there cited; and see *Tardrew* v. *Howell*, 2 Giff. 530.

(*b*) *Weston* v. *Clowes*, 15 Sim. 610; *Newman* v. *Hatch*, Set. on Dec. p. 875, 4th ed.; *Wettenhall* v. *Davis*, 9 Jur. N.S. 1216; *S. C. nom. Wetenhall* v. *Dennis*, 33 Beav. 285; [and as to the application of a like principle to the case of an action to enforce a charge and declare priorities, so as to entitle the plaintiff to costs out of a fund so far as the other incumbrancers have had the benefit of the action in securing the fund to them, and ascertaining and determining their rights; see *Batten Proffitt and Scott* v. *Dartmouth Harbour Commissioners*, 45 Ch. D. 612; *Ford* v. *Earl of Chesterfield*, 21 Beav. 426; *Wright* v. *Kirby*, 23 Beav. 463.]

(*c*) *Henderson* v. *Dodds*, 2 L. R. Eq. 532.

(*d*) *Norris* v. *Norris*, 1 Cox, 183.

(*e*) *Colman* v. *Sarell*, 2 Cox, 206.

(*f*) *Hickson* v. *Fitzgerald*, 1 Moll. 14.

(*g*) *Norway* v. *Norway*, 2 M. & K. 278, overruling *Sherratt* v. *Bentley*, 1 R. & M. 655.

(*h*) *Martin* v. *Persse*, 1 Moll. 146.

Costs of trustee of a void deed.

9. If a person be a trustee of a deed void as against creditors, or on other grounds, the plaintiff by praying a *conveyance* by the trustee may elect to treat him in that character, so as to give him a claim to costs (*a*). Otherwise the *so-called* trustee is a trustee of a nullity, and he and his *cestui que trust* cannot have costs as against the true owner (*b*); more particularly if the deed to which the trustee is a party contain a false recital for the purpose only of misleading (*c*); and if the trustee's claim to the expenses of the so-called trust be the occasion of the suit, he will be ordered to pay costs (*d*). [So, where the trustee had prepared the settlement and had persuaded the settlor to execute it, he was ordered to pay the costs of the action to set it aside (*e*).] If a suit be instituted against trustees of an instrument, which is a nullity, for enforcing the void trusts, and the suit is dismissed, the *quasi* trustees will have their costs, but only as between party and party (*f*).

Suit originated by the trustee's misconduct.

10. If any particular instance of misconduct, or a general dereliction of duty in the trustee (*g*), or even his mere caprice and obstinacy (*h*), be the immediate cause why the suit was instituted, the trustee, on the charge being substantiated against him, must pay the costs of the proceedings which his own

(*a*) *Snow* v. *Hole*, V. C. of England, March 8, 1845; and see *Goldsmith* v. *Russell*, 5 De G. M. & G. 547, 556; *Daking* v. *Whimper*, 26 Beav. 571; *Ponsford* v. *Widnell*, W. N. 1869, p. 81; *Travis* v. *Illingworth*, W. N. 1868, p. 206; *Ex parte Tomlinson*, 3 De G. F. & J. 745; and see *ante*, p. 721.

(*b*) *Elsey* v. *Cox*, 26 Beav. 95; *Crossley* v. *Elworthy*, 12 L. R. Eq. 158.

(*c*) *Turquand* v. *Knight*, 14 Sim. 643.

(*d*) *Smith* v. *Dresser*, 1 L. R. Eq. 651; *S. C.* 35 Beav. 378.

[(*e*) *Dutton* v. *Thompson*, 23 Ch. Div. 278.]

(*f*) *Mohun* v. *Mohun*, 1 Sw. 201.

(*g*) *Springett* v. *Dashwood*, 2 Giff. 521; *Byrne* v. *Norcott*, 13 Beav. 346; *Attorney-General* v. *Hobert*, Rep. *t.* Finch, 259; *Earl Powlet* v. *Herbert*, 1 Ves. jun. 297; *Caffrey* v. *Darby*, 6 Ves. 488; *Littlehales* v. *Gascoyne*, 3 B. C. C. 73; *Ashburnham* v. *Thompson*, 13 Ves. 402; *Hide* v. *Haywood*, 2 Atk. 126; *Adams* v. *Clifton*, 1 Russ. 297; *Mosley* v. *Ward*, 11 Ves. 581; *Piety* v. *Stace*, 4 Ves. 620; *Seers* v. *Hind*, 1 Ves. jun. 294; *Fell* v. *Lutwidge*, Barn. 319, see 322; *Brown* v. *How*, Barn. 354, see 358; *Sheppard* v. *Smith*, 2 B. P. C. 372; *Haberdashers' Company* v. *Attorney-General*, 2 B. P. C. 370; *Franklin* v. *Frith*, 3 B. C. C. 433; *Whistler* v. *Newman*, 4 Ves. 129; *Stacpoole* v. *Stacpoole*, 4 Dow, 209; *Crackelt* v. *Bethune*, 1 J. & W. 586; *Baker* v. *Carter*, 1 Y. & C. 252, *per* Lord Abinger, C. B.; *Hide* v. *Haywood*, 2 Atk. 120; *Wilson* v. *Wilson*, 2 Keen, 249; *Attorney-General* v. *Wilson*, Cr. & Ph. 1; *Lyse* v. *Kingdon*, 1 Coll. 184; [*Thomson* v. *Eastwood*, 2 App. Cas. 215; *Heugh* v. *Scard*, 33 L. T. N.S. 659; 24 W. R. 51; *Re Weall*, 42 Ch. D. 674.]

(*h*) *Taylor* v. *Glanville*, 3 Mad. 178, *per* Sir J. Leach; *Smith* v. *Bolden*, 33 Beav. 262; *May* v. *Armstrong*, W. N. 1866, p. 233; *Jones* v. *Lewis*, 1 Cox, 199; *Earl of Scarborough* v. *Parker*, 1 Ves. jun. 267; *Kirby* v. *Mash*, 3 Y. & C. 295; *Thorby* v. *Yeats*, 1 Y. & C. C. C. 438; *Hampshire* v. *Bradley*, 2 Coll. 34; *Penfold* v. *Bouch*, 4 Hare, 271; and see *Burrows* v. *Greenwood*, 4 Y. & C. 251; *Hayhow* v. *George*, and *Southwell* v. *Martin*, 21 L. T. N.S. 135; [*Coppinger* v. *Shakleton*, 15 L. R. Ir. 461.]

improper behaviour occasioned; and of course if the trustee be decreed to pay the costs personally, he cannot afterwards deduct them from the trust fund in his hands (*a*). [So, if an executor or trustee improperly institute an action to administer the estate or execute the trust, the Court will not allow its process to be used as an instrument of oppression, but will make the plaintiff personally bear all the costs of the action (*b*); and under the new rules, if an administration action be rendered necessary solely by the neglect of the trustee to furnish accounts, the judgment should be so framed as to enable the Court to throw the whole costs of the action on the trustee (*c*). But the right of a trustee to his costs rests substantially upon contract, and can only be lost or curtailed by such inequitable conduct as amounts to a violation or culpable neglect of his duty under the contract (*d*), and his costs accordingly are not "by law left to the discretion of the Court;" and a trustee, if deprived of his costs, may, without the leave of the Court or judge making the order, appeal on the question of his costs only (*e*). Where, however, the settlement is itself set aside, the trustee has no claim to his costs as matter of right, as in that case there is no contract in existence, and accordingly he cannot appeal as to such costs (*f*).]

Where misconduct proved only in part.

11. But where a bill was filed charging the trustee with a breach of trust both as to realty and personalty, and the charge failed as to the former but succeeded as to the latter, the Court said, it was scarcely possible to suppose that the trustee should be permitted to *have* his costs, but it would be injustice to make him *pay the whole costs*, as one part of the bill had failed, and he was therefore ordered to pay the costs of that part of the bill which had succeeded (*g*).

[Costs of innocent trustee.]

[12. Where two trustees are jointly and severally liable for a breach of trust committed by one of them, the other trustee being innocent, the Court may order the guilty trustee to repay to the innocent trustee the costs of the action to repair the

(*a*) *Attorney-General* v. *Daugars*, 33 Beav. 621.

[(*b*) *Re Cabburn*, 46 L. T. N.S. 848.]

[(*c*) *Re Hayter*, 32 W. R. 26.]

[(*d*) *Turner* v. *Hancock*, 20 Ch. Div. 303; *Re Evans*, 26 Ch. Div. 58, 65.]

[(*e*) *Cotterell* v. *Stratton*, 8 L. R. Ch. App. 295; *Farrow* v. *Austin*, 18 Ch. D. 58; *Turner* v. *Hancock*, 20 Ch. Div. 303; *Re Sarah Knight's Will*, 26 Ch. Div. 82; *Re Love*, 29 Ch. Div. 348; but see *Taylor* v. *Dowlen*, 4 L. R. Ch. App. 697; *Re Hoskins' Trusts*, 6 Ch. Div. 281.]

[(*f*) *Dutton* v. *Thompson*, 23 Ch. Div. 278.]

(*g*) *Pocock* v. *Reddington*, 5 Ves. 800; [*Re Sarah Knight's Will*, 26 Ch. Div. 82.]

[Breach of trust repaired before judgment.]

breach of trust (*a*). Where a trustee acting honestly has invested the trust funds on improper securities but has made good the loss to the trust estate before judgment in an action to execute the trusts, he will be allowed his costs (*b*).]

Setting aside a purchase by trustees, and absence of fraud.

13. Trustees for sale had purchased in the name of a trustee at an undervalue, but *without any imputation of fraud, and by auction.* As to so much of the suit as related to calling upon the trustees to submit to a resale, and the directions consequential thereon, the Court gave relief against the trustees *with costs;* but as to accounts that must have been taken had the sale been unimpeachable, the trustees were allowed their costs (*c*).

Mistake or slight neglect of the trustee.

14. If the suit was occasioned by an innocent *mistake* of the trustee (such as an investment in good faith and without loss to the trust fund on a security not strictly correct (*d*)), the Court will content itself with *not giving* him costs (*e*), or will punish him with *payment of part* of the costs only (*f*), or will even allow him his costs (*g*); [but an official liquidator who is a paid agent is not entitled to the same latitude in the matter of costs as a gratuitous trustee (*h*).]

Administration suit mainly caused by a breach of trust.

15. Though, as a general rule, where a trustee commits a *breach of trust* he must pay the costs of a suit to repair it, yet he will be entitled to his subsequent costs relating to the ordinary taking of the accounts (*i*).

Misconduct of the trustee discovered in the progress of the suit.

16. If the suit did not originate from any necessity of enquiring into the conduct of the trustee, but, in the course of the proceedings instituted upon other grounds, it appears the trustee has in some particular instance been guilty of a breach of trust, the Court will not award against the trustee the costs of the *whole* suit, but only of so much of it as connects itself

[(*a*) *Price* v. *Price*, 42 L. T. N.S. 626; *Wilson* v. *Thomson*, 20 L. R. Eq. 459.]

[(*b*) *Peacock* v. *Colling*, 54 L. J. N.S. Ch. 743; 53 L. T. N.S. 620; 33 W. R. 528.]

(*c*) *Sanderson* v. *Walker*, 13 Ves. 601.

(*d*) *Fitzgerald* v. *Fitzgerald*, 6 Ir. Ch. Rep. 145.

(*e*) *O'Callaghan* v. *Cooper*, 5 Ves. 117; *Mousley* v. *Carr*, 4 Beav. 49; *Attorney-General* v. *Drapers' Company*, Ib. 71; *Devey* v. *Thornton*, 9 Hare, 222; [*Ryan* v. *Nesbitt*, W. N. 1879, p. 100.]

(*f*) *East* v. *Ryal*, 2 P. W. 284.

(*g*) *Taylor* v. *Tabrum*, 6 Sim. 281; *Flanagan* v. *Nolan*, 1 Moll. 84; *Travers* v. *Townsend*, Ib. 496; *Attorney-General* v. *Cains College*, 2 Keen, 150; *Bennett* v. *Atkins*, 1 Y. & C. 247; *Fitzgerald* v. *O'Flaherty*, 1 Moll. 347; *Attorney-General* v. *Drummond*, 2 Conn. & Laws. 98; *Royds* v. *Royds*, 14 Beav. 54.

[(*h*) *Re Silver Valley Mines*, 21 Ch. Div. 381.]

(*i*) *Hewett* v. *Foster*, 7 Beav. 348; and see *Bate* v. *Hooper*, 5 De G. M. & G. 345; *Re King*, 11 Jur. N.S. 899.

with his misconduct, and as to the rest of the suit will allow him his costs (*a*).

Clearance of default.

17. The Court never gives costs to a defaulting trustee while he continues in default, but the Court says, "when you have paid in the balance found due from you, then you shall have your costs" (*b*). But a bankrupt [formerly ceased] from the date of bankruptcy to be a debtor to the trust estate, and was therefore entitled to his costs from the date of the bankruptcy (*c*).

[Where defaulting trustee a bankrupt.]

[18. The liability of a trustee for his breaches of duty was, however, by the Bankruptcy Act, 1869, sect. 49, continued notwithstanding his discharge, and there has been some conflict of opinion as to the right of a bankrupt trustee since that Act to his costs as from the date of the bankruptcy, but the better opinion seems to be that he is not entitled to such costs until he has made good his default (*d*). By the Bankruptcy Act, 1883 (*e*), the liability of a trustee for a breach of trust (except in cases of fraudulent breaches) is released by the order of discharge, and it follows that under that Act, except in cases of fraud, a bankrupt trustee will, as from the date of his discharge, be entitled to his costs. But if the liability of the trustee does not arise from a breach of trust, but is a mere ordinary liability which ceases as from the date of the bankruptcy, the trustee is entitled to his costs as from that date (*f*).

[Apportioning costs in action against executor of defaulting executor.]

19. If an action be brought against the executor of a defaulting executor to administer the original testator's estate, the defendant's costs ought strictly to be borne, as to those incurred solely in reference to the original testator's estate out of that estate, as to those incurred in seeking relief against the defaulting executor out of his estate, and as to the remaining costs out of the two estates equally; but to avoid the complication and expense of thus apportioning the costs, the Court has allowed the defendant the costs of taking the account of the original

(*a*) *Tebbs* v. *Carpenter*, 1 Mad. 290, see 308; *Newton* v. *Bennet*, 1 B. C. C. 359; *Pride* v. *Fooks*, 2 Beav. 430; *Heighington* v. *Grant*, 1 Ph. 600.

(*b*) *Birks* v. *Micklethwait*, 33 Beav. 409; *Watson* v. *Row*, 18 L. R. Eq. 680; [*Lewis* v. *Trask*, 21 Ch. D. 862; *Re Basham*, 23 Ch. D. 195; *McEwan* v. *Crombie*, 25 Ch. D. 175.]

(*c*) *Bowyer* v. *Griffin*, 9 L. R. Eq. 340.

[(*d*) *Lewis* v. *Trask*, 21 Ch. D. 862; *Re Basham*, 23 Ch. D. 195; *McEwan* v. *Crombie*, 25 Ch. D. 175; *Re Vowles*, W. N. 1886, p. 73; *Secus*, *Clare* v. *Clare*, 21 Ch. D. 865.]

[(*e*) 46 & 47 Vict. c. 52, ss. 30, 37.]

[(*f*) *Re Vowles*, 32 Ch. D. 243; *Smith* v. *Dale*, 18 Ch. D. 516; *Re Basham*, 23 Ch. 195; and *ante*, p. 1045.]

testator's estate, and half the rest of his costs out of the original testator's estate (*a*).]

Costs of discussing a doubtful point of law.

20. An executor, instead of accumulating a fund as directed by the will, had improperly kept the balance in his hands; but, as the amount of costs had in great measure been occasioned by the enquiry what rule the Court ought to adopt with respect to the computation of interest, it was thought hard under the circumstances to fix the executor with payment of costs even relatively to the breach of trust; and therefore the Court gave no costs (*b*).

Costs to be paid in part and received in part by the trustee.

21. In one case, as to part of the suit, the trustee ought from his misconduct to have *paid* the costs, and, as to another, to have been *allowed* his costs; and the Court, by a kind of compromise, left each party to pay his own costs (*c*).

Trivial misconduct.

22. When the breach of trust is trivial, the Court may overlook it altogether, and give the trustee his own costs (*d*).

[Action by representative of trustee to recover the trust estate.]

[23. If the representative of a trustee who has invested the trust estate on an unauthorized security, bring an action to recover the trust estate, he will not be allowed the costs of that action as against the *cestuis que trust*, but must look for such costs to the estate of the trustee (*e*).]

Trustees protecting from parental influence.

24. The Court watches with jealousy transactions between parent and child occurring shortly after the child has attained twenty-one, more especially when the transactions had their inception during minority, and trustees acting *bonâ fide* in refusing to convey under such suspicious circumstances will be entitled to their costs (*f*).

Trustee instituting a suit for his private ends.

25. If a trustee have a private interest of his own, separate and independent from the trust, and oblige the *cestui que trust* to come into a Court of equity merely to have some point relating to the trustee's private interest determined at the expense of the trust, that is such a vexatious proceeding in the trustee, that, for example's sake, he will be decreed to pay the whole costs of the suit (*g*).

Trustee falsely denying the plaintiff's claims.

26. If in a suit for an account the defendant states his belief that the plaintiff is considerably indebted to him, and after a

[(*a*) *Re Griffiths*, 26 Ch. Div. 465; and see *Palmer* v. *Jones*, 43 L. J. N.S. Ch. 349; *Re Kitto*, 28 W. R. 411.]

(*b*) *Raphael* v. *Boehm*, 13 Ves. 592.

(*c*) *Newton* v. *Bennet*, 1 B. C. C. 362.

(*d*) *Fitzgerald* v. *Pringle*, 2 Moll, 534; *Bailey* v. *Gould*, 4 Y. & C. 221; see 225; *Knott* v. *Cottee*, 16 Beav. 77; *Cotton* v. *Clark*, 16 Beav. 134; *Chugg* v. *Chugg*, W. N. 1874, p. 185.

[(*e*) *Gurney* v. *Gurney*, 48 L. T. N.S. 529.]

(*f*) *King* v. *King*, 1 De G. & J. 663, see 671.

(*g*) *Henley* v. *Philips*, 2 Atk. 48.

long investigation it proves that the defendant is considerably indebted to the plaintiff, the trustee, thus daring the plaintiff to his account, will be decreed to pay the costs (*a*). And if the balance be in favour of the trustee, but far below what he had stated, he will not be entitled to *have* his costs (*b*), or at least not the costs of the account itself (*c*).

Trustee mis-stating his accounts.

27. A trustee will be deprived of costs (*d*), or will even have to pay costs if he refuse to account (*e*), or if he wilfully mis-state the accounts (*f*), or if, by any chicanery in his answer, he keep the *cestui que trust* from a true knowledge of the accounts (*g*), or even if he has kept the accounts in a very confused manner (*h*). And an executor will be liable to pay costs if he deny assets, and the contrary be established against him (*i*). But an executor is entitled to have the accounts taken under the direction of the Court, and, therefore, even where he had obstructed the taking of the accounts, he was not decreed to pay the costs, though he was not allowed to have his costs (*j*). But in another case, where he had unnecessarily and unjustifiably protracted the suit, and multiplied the costs by his litigiousness, he was ordered to pay the costs of a simple administration suit up to the hearing (*k*).

Corporation pleading ignorance falsely.

28. Where a corporation filling the character of trustees for a grammar school by their answer pleaded ignorance of the claims of the charity, and the information was afterwards elicited from the documents scheduled to their answer, as the Court inferred from such conduct a disposition to obstruct and defeat the ends of justice, the corporation was decreed to pay the costs of the suit (*l*).

Corporation suppressing documents.

29. And a corporation similarly circumstanced was punished

(*a*) *Parrot* v. *Treby*, Pr. Ch. 254; *Eglin* v. *Sanderson*, 3 Giff. 434.

(*b*) *Attorney-General* v. *Brewers' Company*, 1 P. W. 376.

(*c*) *Fozier* v. *Andrews*, 2 Jon. & Lat. 199.

(*d*) *Gresham* v. *Price*, 35 Beav. 47.

(*e*) *Boynton* v. *Richardson*, 31 Beav. 340; *Kemp* v. *Burn*, 4 Giff. 348; *Wroe* v. *Seed*, 4 Giff. 425; *Underwood* v. *Trower*, W. N. 1867, p. 83; [*Re Radclyffe*, 50 L. J. N.S. Ch. 317.]

(*f*) *Sheppard* v. *Smith*, 2 B. P. C. 372; and see *Flanagan* v. *Nolan*, 1 Moll. 86.

(*g*) *Avery* v. *Osborne*, Barn. 349; *Reech* v. *Kennegal*, 1 Ves. 123.

(*h*) *Norbury* v. *Calbeck*, 2 Moll. 461.

(*i*) *Sandys* v. *Watson*, 2 Atk. 80.

(*j*) *Re King*, 11 Jur. N.S. 899. [But under the Rules of the Supreme Court now in force, an executor instituting proceedings to have the accounts taken must, to entitle him to costs, be able to satisfy the Court that under all the circumstances of the case the institution of the action was reasonable. See Order 65, R. 1.]

(*k*) *Talbot* v. *Marshfield*, 4 L. R. Eq. 661, 3 L. R. Ch. App. 622.

(*l*) *Attorney-General* v. *Burgesses of East Retford*, 2 M. & K. 35.

in the same manner where, the Court having directed the production of certain documents, it was afterwards discovered that a very material one had been suppressed (*a*).

Trustee setting up title of his own.

30. The costs of the suit will be cast upon the trustee, if, in his answer, he set up a title of his own, and make an ill defence (*b*); and he will not be allowed to *have* his costs if he set up any trust different from what it actually is (*c*); and where a trustee filed an improper answer he was not allowed the costs of the answer (*d*).

Executors denying relationship of next of kin.

31. An executor sued by the next of kin had put the plaintiffs to the proof of their relationship, and, the fact not admitting a doubt, the executor was fixed with the costs of the enquiry (*e*).

Costs where interest given against executors.

32. It was laid down as a rule by Lord Thurlow, that "where the Court is obliged to *give interest against executors* as a remedy for a breach of trust, costs against them will follow of course" (*f*); but Sir W. Grant said, "that was a proposition to which he was not quite prepared to accede, as there might be many cases in which executors must pay interest, which would not be cases for costs" (*g*); and the existence of any such rule has been denied (*h*). The meaning of Lord Thurlow probably was, that where the suit was occasioned by the misconduct of the trustee, and the charge against him was shown to be well founded by the Court's fixing him with interest, the costs of the suit in that case would be consequential upon the relief (*i*).

(*a*) *Borough of Hertford* v. *Poor of same Borough*, 2 B. P. C. 377.

(*b*) *Loyd* v. *Spillet*, 3 P. W. 344; *Bayly* v. *Powell*, Pr. Ch. 92; *Willis* v. *Hiscox*, 4 M. & Cr. 197; *Attorney-General* v. *Drapers' Company*, 4 Beav. 67; *Attorney-General* v. *Christ's Hospital*, Ib. 73; *Irwin* v. *Rogers*, 12 Ir. Eq. Rep. 159.

(*c*) *Ball* v. *Montgomery*, 2 Ves. jun. 191, see 199.

(*d*) *Eddowes* v. *Eddowes*, 30 Beav. 603.

(*e*) *Lowson* v. *Copeland*, 2 B. C. C. 156.

(*f*) *Seers* v. *Hind*, 1 Ves. jun. 294, and see *Franklin* v. *Frith*, 3 B. C. C. 433; *Mosley* v. *Ward*, 11 Ves. 581.

(*g*) *Ashburnham* v. *Thompson*, 13 Ves. 404.

(*h*) *Tebbs* v. *Carpenter*, 1 Mad. 308; *Woodhead* v. *Marriott*, C. P. Cooper's Rep. 1837-38, 62; *Holgate* v. *Haworth*, 17 Beav. 259; [*Re John Jones*, 49 L. T. N.S. 91.]

(*i*) See *Mosley* v. *Ward*, 11 Ves. 582.

APPENDIX.

No. I.

TRUSTEE RELIEF ACT.

10 & 11 Vict. cap. 96.

"*An Act for better securing Trust Funds, and for the Relief of Trustees.*" (22*nd July*, 1847.)

Whereas it is expedient to provide means for better securing trust funds, and for relieving Trustees from the responsibility of administering trust funds in cases where they are desirous of being so relieved: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all trustees, executors, administrators, or other persons, having in their hands any monies *belonging to any trust whatsoever* (*a*), or the major part of them, shall be at

(*a*) The owner of an estate *charged* with a sum in favour of another is not a trustee of that sum within the Act, for he has not the monies in his hands; and if it were held otherwise, the money might be paid into Court, and the incumbrancer would have to bear the costs of getting it out, whereas the nature of a charge is that the beneficiary is entitled to have it raised out of the estate, together with the costs of raising it; *Re Buckley's Trusts*, 17 Beav. 110; and see *Re Cooper's Legacy*, 17 Jur. 1087; *Warburton* v. *Cicognara*, 3 Ir. R. Eq. 592. But see Trustee Act, 1850, sect. 48.

It has been thought that where there is a power of *sale* without a power of signing *receipts* for the purchase-money, the purchaser may take the estate under the power of sale and pay the purchase-money into Court under the Trustee Relief Act; *Cox* v. *Cox*, 1 K. & J. 251. See Trustee Act, 1850, sect. 48.

A sum of money was payable by instalments, and the trustee after receiving one instalment paid it into Court, and on a petition of the *cestui que trust* the Court not only administered the instalment paid in, but also gave directions to the trustee as to the future instalments; and said the order would give ample indemnity to the trustee; *Re Wright's Settlement*, 1 Sm. & Giff. App. v. The Court had, in fact, no jurisdiction as to the instalments payable in future, and the order would be an indemnity in this sense only, that the trustee would be acting in a way which had received the sanction of the Court extra-judicially. See *Re Lloyd's Trusts*, 2 Ir. R. Eq. 507; and see Trustee Act, 1850, s. 31; and *Re Fortune's Trusts*, 4 Ir. R. Eq. 351.

[Trustees of charitable funds have a

liberty (*a*), on filing an affidavit shortly describing the instrument

strict right to pay their trust money into Court and relieve themselves of the trust, without giving notice to the Charity Commissioners, notwithstanding the 17th section of the Charitable Trusts Act, 1853, but their proper course is to apply first to the Commissioners; *Re Poplar and Blackwall Free School*, 8 Ch. D. 543.]

Where money in which a *lunatic* is interested has been paid into Court, the Court has jurisdiction under the Act to order repayment to the *Poor Law Guardians* of the expenses incurred by them for the support of the lunatic; *Re Upfull's Trust*, 3 Mac. & G. 281; *Re Colman's Trust*, 14 L. T. N.S. 587; *Re Parker*, 2 W. R. 139; *Re Ward's Estate*, 2 W. R. 406; *Re Drewery's Trust*, 2 W. R. 436; *Re Buckley's Trust*, Johns. 700, [but only to the extent of six years' arrears, *Re Newbegin's Estate*, 36 Ch. D. 477,] or [in the case of a lunatic not so found by inquisition] to order the maintenance of the lunatic; *Re Sturge's Trusts*, 5 Jur. N.S. 423; *Re Burke*, 2 De G. F. & J. 124; 6 Jur. N.S. 717; *Re Law*, 7 Jur. N.S. 410; *Re Perry's Trusts*, 31 L. T. N.S. 775; 23 W. R. 335. [*Re Whitby's Trust*, W. N. 1877, p. 208; but see *Re Irby*, 17 Beav. 334; and to order such maintenance out of capital, *Re Tuer's Will Trusts*, 32 Ch. Div. 39; and see *Re Grimmett's Trusts*, 56 L. J. N.S. Ch. 419. And the Court, without requiring the appointment of a guardian in lunacy, directed the income to be paid to the lunatic's wife for his maintenance during his life or until further order, *Re Silva's Trusts*, 36 W. R. 366; 57 L. J. N.S. Ch. 281; 58 L. T. N.S. 46.

If a lunatic is entitled to a fund which has been paid into Court under the Act, the Court has jurisdiction upon a petition presented in the Chancery Division under the Act and in lunacy to make an immediate order for the transfer of the fund to the account of the lunatic; *Re Tate*, 20 Ch. D. 135.]

Monies due upon a *policy* may be paid under the Act into Court by an insurance company: *United Kingdom Life Assurance Company*, 34 Beav. 493; *Re Hall*, 10 W. R. 37; *Re Webb's Policy*, 2 L. R. Eq. 456; and the company will be entitled to their costs, as between solicitor and client; *Re Webb's Policy*, 2 L. R. Eq. 456; *Re Cobbe*, 15 W. R. 29; *Re Haycock's Policy*, 1 Ch. D. 611. But in the last case the late M. R. observed that the Trustee Relief Act does not enable assurance companies to pay policy monies into Court after notice of conflicting claims, unless the policy monies were "monies belonging to some trust," in the words of the first section; *S.C.* [And in *Matthew* v. *Northern Assurance Company*, 9 Ch. D. 80, where the assurance company, in consequence of conflicting claims, paid the policy money into Court and contended that they were thereby discharged from all liability, the late M. R. held in an action by an assignee of the policy against the assurance company for the recovery of the policy money, that the company were only stakeholders in a limited sense; that the relation between them and the policy holder was that of debtor and creditor; that there was no trust or constructive trust such as to entitle them to pay the money into Court under the Act; and that the payment into Court was no discharge.

But now by 36 & 37 Vict. c. 66, s. 25, sub-s. 6, power is given to any *debtor trustee or other person* liable in respect of a debt or *chose en action*, and who has received notice of any written assignment thereof, to pay the same into Court, in the case of any disputed claim, under and in conformity with the provisions of the Trustee Relief Act. But this section only applies where there has been an assignment in writing of the debt or *chose en action; Re Sutton's Trusts*, 12 Ch. D. 175.

Under the "Public Works Loans Act, 1875," 38 & 39 Vict. c. 89, s. 28, the secretary of the Public Works Loans Commissioners may pay into Court any surplus monies under the control of the Commissioners arising from the taking possession, lease, sale, mortgage, or other disposition under the act of any mortgaged property, as if he were a trustee.]

(*a*) Trustees are at *liberty* to pay in, but they are not *bound* to pay in, if they are willing to execute the trust without the aid of the Court; *Mountain* v. *Young*, 18 Jur. 769; and see *Handley* v. *Davies*, 5 Jur. N.S. 190.

creating the trust (*a*) according to the best of their knowledge and belief, to pay the same, with the privity of the Accountant-General of the High Court of Chancery, into the Bank of *England* (*b*), to the account of such Accountant-General in the matter of the particular trust (*c*) (describing the same by the names of the parties, as accurately as

Trustees may pay trust monies or transfer stocks and securities into the Court of Chancery.

(*a*) The *affidavit* must not into go the whole history of the trust, so as to show upon the accounts how the particular sum arose, or the trustee will be deprived of his costs; *Re Waring*, 16 Jur. 652. All the trustees should properly join in the affidavit, as all may have some information to contribute, but under particular circumstances the Court (as the Act is silent who is to make the affidavit) will order the Paymaster-General to receive the money on the affidavit of one of several co-trustees; —— v. ——, 1 Jur. N.S. 974.

(*b*) The payment into Court may of course be made without an order of the Court; *Re Biggs*, 11 Beav. 27. And Annuities or Stocks of the Bank of England, or of the East India Company, or South Sea Company, or Government or Parliamentary securities, may be transferred into Court without an order, but *private securities* can only be deposited under the Trustee Relief Amendment Act, 12 & 13 Vict. c. 74, by an order to be made on petition. [But see *Re Ross's Trusts*, 28 W. R. 418, where V. C. Malins held that Railway Stock might be transferred into Court under the Trustee Relief Act. And as to securities which may be brought into Court and the mode of transferring and depositing various securities, see Seton, 5th edit. p. 183.]

Notice of the payment into Court [was by Chancery Funds Amended Orders, 1874, r. 5, required to be given to the persons named in the affidavit as interested; but now under Supreme Court Fund Rules, 1884, r. 41 (*vide post*, p. 1141), the trustee is no longer required to set out in his affidavit the names of the persons interested, and the first mentioned rule having, though not expressly repealed, become inoperative, the trustee is no longer bound to give such notice, *Re Graham's Trusts*, (1891) 1 Ch. 151. Under the former practice] if a person interested could not be found the notice might, by leave of the Court, be dispensed with; *Re Hansford*, 7 W. R. 199; [*Re Whitaker's Trusts*, 47 L. T. N.S. 507; 31 W. R. 114;] and where the parties were extremely numerous, the Court gave leave to substitute notice on some of them; *Re Colson's Trust*, 2 W. R. 111.

Where a person interested in the fund was *not named* as such in the affidavit upon which the money was paid into Court, it was held that he could not make his claim upon petition, but the Court gave him leave to file a bill; *Re Jephson*, 1 L. T. N.S. 5. But this case was not followed in subsequent practice. [See *Re Puttrell's Trusts*, 7 Ch. D. 647; *Pelling* v. *Goddard*, 9 Ch. D. 185.]

When an executor, after paying money into Court, discovered *debts* of the testator, he was allowed to have the money paid back to him out of Court on his undertaking to apply it properly; *Ex parte Tournay*, 3 De G. & Sm. 677.

(*c*) The money must not be paid in by an executor to an *account* "the trusts of the testator's will," for this implies not a particular trust, but a general administration of the testator's estate. The executor must take on himself the responsibility of severing the fund from the testator's assets and appropriating it to the particular purpose, and then pay it in to the limited account. If it has already been paid in to an account too general for the Court to deal with, it may be carried over to the correct account, and the Court will then proceed to adjudicate upon the rights of the parties; *Re Joseph's Will*, 11 Beav. 625; *Re Everett*, 12 Beav. 485; *Re Wright's Will*, 15 Beav. 367; *Re Robinson's Trust*, 1 Jur. N.S. 750; *Re Coulson's Trust*, 4 Jur. N.S. 6; *Re Godfrey's Trust*, 2 Ir. Ch. Rep. 105; and see *Re Monahan*, 8 Ir. R. Eq. 353. If the fund has been paid to the account of the *testator's estate, and in the matter*, &c., the Court will not proceed without the presence of the personal representative and his admission of assets; *Re Edwards' Estate*, 4 W. R. 801. As to the proper heading of the account, see further, *Re Jervoise*, 12 Beav. 209; *Re Tillstone's*

may be, for the purpose of distinguishing it), in trust to attend the orders of the said Court (*a*); and that all trustees or other persons having any annuities or stocks standing in their name in the books of the Governor and Company of the Bank of *England* (*or of the East India Company or South Sea Company* (*b*)), or any *Government* or *Parliamentary securities* (*c*) standing in their names (*d*), or in the names of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said Accountant-General, with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said Court; and in every such case the receipt of one of the cashiers of the said Bank for the money so paid, or in the case of stocks or securities the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited (*e*).

Receipt of Bank Cashier, or certificate of proper officer, to be sufficient discharge.

II. And be it enacted, That such orders as shall seem fit (*f*) shall be

Court of Chancery to make orders on petition, without bill, for application of trust monies and administration of trust.

Trusts, 9 Hare, App. lix.; and see Appach on the Acts, p. 44.

(*a*) The *County Courts* have jurisdiction where the sum does not exceed 500*l.*; 51 & 52 Vict. c. 43, s. 67.

[(*b*) These words were repealed by Statute Law Revision Act, 1875, 38 & 39 Vict. c. 66.]

(*c*) The Act does not extend to the bonds of a *foreign Government; Re Lloyd's Trust*, 2 W. R. 371.

(*d*) Where stock is standing in the joint names of a deceased and a surviving trustee, the *survivor may* transfer into Court under the Act; *Re Parry*, 6 Hare, 306.

(*e*) The payment into Court is a *discharge* only as to the money paid in, and leaves the trustee liable to a suit in respect of the costs deducted by him, or in respect of any other monies that might be recovered upon the footing of the trust; see *Beaty* v. *Curson*, 7 L. R. Eq. 194; *Goode* v. *West*, 9 Hare, 378; *Re Jephson*, 1 L. T. N.S. 5; *Attorney-General* v. *Alford*, 2 Sm. & G. 488; *Thorp* v. *Thorp*, 1 K. & J. 438; and the trustee cannot require a fund to be kept in Court to indemnify him against threatened proceedings; *Re Wright's Trusts*, 3 K. & J. 419; and see *England* v. *Lord Tredegar*, 35 Beav. 256.

Trustees by paying money into Court *retire* from their trust, and cannot thereafter exercise the powers of the trust; *Re Coe's Trust*, 4 K. & J. 199; *Re Williams's Settlement*, 4 K. & J. 87; *Re Tegg's Trusts*, 15 L. T. N.S. 236; 15 W. R. 52; [*Re Mulqueen's Trusts*, 7 L. R. Ir. 127; *Re Nettleford's Trusts*, W. N. 1888, p. 120; 59 L. T. N.S. 315;] and come under the usual words of "Trustees desirous of being discharged," so as to call into operation a power of appointing new trustees in that event; *Re Bailey's Trust*, 3 W. R. 31, [but discretionary trusts, as for maintenance, may thereafter be exercised by the Court, *Re Ashburnham's Trust*, 54 L. T. N.S. 84.]

Trustees, if they pay into Court, should pay in the *whole* fund, and if they do not, then, unless there be mistake or some ground of justification, they will bear the costs of accounting for the balance; *Mitchell* v. *Cobb*, 17 L. T. 25. But trustees may deduct the reasonable costs of the payment into Court where no dispute has arisen or is likely to arise as to the deduction; *Beaty* v. *Curson*, 7 L. R. Eq. 194; and see *Re Fortune's Trusts*, 4 Ir. R. Eq. 351.

(*f*) Where the Court is not satisfied as to the facts by affidavit, it will, before making an order direct an *enquiry*; *Re Wood's Trust*, 15 Sim. 469; and see *Re Sharpe's Trust*, 15 Sim. 470.

The Court has a *discretion* to be governed by the circumstances of the

from time to time made by the High Court of Chancery in respect of the trust monies, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment (*a*) and payment (*b*) of any such monies, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery of any such stocks and securities, and for the administration of any such trusts generally, upon a petition (*c*) to be presented in a summary way to the Lord

case, and, therefore, where money belonging to a lunatic found such in France was paid into Court, and the French curator (in whom by the French law the property became vested for the maintenance of the lunatic) applied for payment of the fund to himself, the Court refused to transfer the capital, and directed payment to him of the dividends only; *Re Garnier*, 13 L. R. Eq. 532. [And where there was a fund in Court belonging to a "lunatic patient" in New South Wales, not found lunatic by inquisition, and it appeared that the property of such patient was not by the law of the colony vested in the colonial master in lunacy, but that he had large powers of management and of suing for the recovery thereof, the Court declined to pay over the whole fund to the master, but directed payment only of so much as was shown to be necessary for the maintenance and benefit of the patient, *Re Barlow's Will*, 36 Ch. D. 287, *q.v.* as to the principle upon which the Court proceeds in such cases.]

(*a*) The Court has ordered an investment in *New Three per Cent.* Bank Annuities; *Re Dunster's Trusts*, 3 W. R. 267.

Where trustees were empowered with the consent of the tenant for life to invest in shares of railway companies guaranteed by the Indian Government, and the money was paid into Court under the Act, the Court declined to sanction such an investment, but offered to appoint new trustees and transfer the fund to them, with an intimation that the trustees had power to make the investment; *Re Sillar*, W. N. 1871, p. 3.

(*b*) The Court has ordered payment of income to the first tenant for life, and by the same order, on proof of his death to the Accountant-General, to the *next tenant for life*; *Re Brent's Trust*, 8 W. R. 270.

(*c*) [By Rules of the Supreme Court, 1883, O. lv. r. 2 (5) applications under the Trustee Relief Acts may be made by summons, in all cases where the money or securities in Court do not exceed £1000 or £1000 nominal value, or under r. 2 (1), where the title depends only upon proof of the identity, or the birth, marriage, or death of any person, *Re Broadwood*, W. N. 1886, p. 103, 55 L. T. 312; *Bates* v. *Moore*, 38 Ch. D. 381 (explaining *Re Rhodes*, 31 Ch. D. 499); but in other cases] the application must be made by *petition* [*Pelling* v. *Goddard*, 9 Ch. D. 185;] and cannot be made upon motion; *Re Masselin's Will*, 15 Jur. 1073; *Ex parte Stock*, 5 Ir. Ch. Rep. 341; nor by any order on further directions in a cause; *Otte* v. *Castle*, 1 W. R. 64; but see *Dixon* v. *Morley*, W. N. 1869, p. 49; [*Davies v. Davies*, 1 Set. on Decrees 496, 4th edit.] But when an order has been once made upon a petition in compliance with the Act, so as to found the jurisdiction, any further proceedings may be at Chambers. *Re Hodges*, 4 De G. M. & G. 491; and see *Re Tracey's Trusts* (under the Irish Act), 6 Ir. R. Eq. 271; [and where an order directing inquiries is made in Court upon a petition the further hearing of the petition may be adjourned into Chambers; *Re Moate's Trusts*, 22 Ch. D. 635.

If the fund in Court exceeds £1000 the application must be by petition, notwithstanding that it asks for payment out of a portion only, amounting to less than £1000; *Re Evan Evans*, 54 L. T. N.S. 527; W. N. 1886, p. 84.]

The trustees themselves (see Order 6, p. 1142, *post*) are *competent to present the petition*, but they are not the proper persons, and if they present the petition the Court will not allow them more than respondent's costs; *Re Cazneau's Legacy*, 2 K. and J. 249; *Re Hutchinson's Trusts*, 1 Dr. & Sm. 27. [And see *Re Poplar and Blackwall Free School*, 8 Ch. D. 543.]

Chancellor or the Master of the Rolls, without bill, by such party or parties, as to the Court shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the Court shall see fit and direct (*a*); and every

In one case the trustees, after paying in, applied by petition to have the fund distributed as in an administration suit, and the Court directed proper inquiries accordingly as to the persons interested; *Re Trower's Trust*, 1 L. T. N.S. 54.

The petition should set out the material statements of the affidavit under which the money is paid in, as the affidavit is regarded as a declaration of the trust to which the attention of the Court is to be called; *Re Levett's Trust*, 5 De G. & Sm. 619; *Re Flack's Will*, 10 Hare, App. xxx. But the petition must not set out the affidavit *in extenso*, or at a needless length; *Re Curtois*, 17 Jur. 852; 10 Hare, App. lxiv., and see *ante*, p. 1133, note(*a*).

Where a petition stands over for *amendment*, by adding a next friend on behalf of the petitioner, it is not necessary to have the petition reanswered; *Re Medow's Trusts*, 10 Jur. N.S. 536, and see *Robinson* v. *Harrison*, 1 Drewr. 307.

[A petition is the proper means of obtaining a stop order, where the fund is over £1000 (see *supra*), and the application for it is the first application after the payment into Court; *Re Day's Trusts*, 49 L. T. N.S. 499; *Re Toogood's Trusts*, 56 L. T. N.S. 703; W. N. 1887, p. 109.]

A claimant may proceed in *formâ pauperis* under the Act; *Re Money*, 13 Beav. 109.

A trustee who did not concur with his co-trustees in paying the money into Court, must still be served with any petition under the Act; *Re Bryant's Settlement*, W. N. 1868, p. 123.

Where an *infant* is to be served, a guardian *ad litem* should be appointed; *Re Ward's Will*, 2 Giff. 122; *Re Gillman's Trusts*, 1 Ir. R. Eq. 342. Under the Irish Act, guardians *ad litem* to infants are appointed upon motion; *Re Bennett's Trusts*, 6 Ir. R. Eq. 337.

The Court will *declare the rights* of parties upon a petition under the Act; *Re Walker's Trusts*, 16 Jur. 1154. And where the petitioner, as it turns out, is not himself entitled, the Court, if it be necessary to declare the rights, and the trustees desire the opinion of the Court, will declare the rights and give all the parties their costs, as in a suit under similar circumstances; *Re Woollard's Trust*, 18 Jur. 1012.

A petition may be presented by a person entitled to an *aliquot share* without bringing the other parties interested before the Court; *Re Befford's Will*, 21 L. T. 164. A petition by a person so entitled should ask that the other shares should be carried to the separate accounts of the other persons entitled, in order to save the expense of serving the petition on any future application; *Re Hawk's Trust* 18 Jur. 33. See *Re Young*, 5 W. R. 400. Or liberty may be given to the other parties entitled to apply at *chambers*; *Winkworth* v. *Winkworth*, 32 Beav. 233; and see *Re Tracey's Trusts*, 6 Ir. R. Eq. 271.

Where the claimants to the fund in opposition to the petitioner reside *abroad*, the Court will give them time to make out their case; *Re Hodson's Will*, 22 L. J. N.S. Ch. 1055.

(*a*) See [Orders 7 and 8 of Chancery Funds Amended Orders, 1874,] *post*, 1142.

[Where on the hearing of a petition class inquiries were directed, and the chief clerk made a certificate finding who were the persons interested in arguing the question in dispute, but several of those persons were not respondents, the petitioner was authorized by the Court to serve a copy of the petition, the order made on the first hearing, and the certificate, on those persons, and the hearing of the petition was adjourned to give the persons served an opportunity of appearing; *Re Battersby's Trusts*, 10 Ch. D. 228.]

It was intimated by V. C. Wood, on a petition by tenant for life for payment of the income, that for the future he should hold it unnecessary to *serve* the *remainderman*; *Re Whitling's Settlement*, 9 W. R. 830; and see *Ex parte Peart*, 17 L. J. N.S. Ch. 168. And where the corpus was only carried

order made upon any such petition shall have the same authority and effect, and shall be enforced and subject to re-hearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the Court (*a*), and if it shall appear that any such trust

over to a particular account, service on the remaindermen, who were extremely numerous, was dispensed with; *Re Hodges*, 6 W. R. 487; and in another case the Court gave no costs to the remainderman, who, the Court said, merely came to look after his own interests; *Re Thornton's Trust*, 9 W. R. 475.

When money has been paid into Court, and part of it has, by an order of the Court, been carried to the *separate account* of a *cestui que trust*, the trustees need not be served again on application by the *cestui que trust* to have it paid out of Court; *Re Young*, 5 W. R. 400.

If the trustee try to avoid service, the Court on being satisfied of the fact will make the order without service; *Ex parte Baugham*, 16 Jur. 325.

Where the trustees had not been heard of for ten years, and the place named for service in the trustees' affidavit had been pulled down, the Court dispensed with service on the trustees, but directed an inquiry at chambers who were the persons entitled; *Re Bolton's Will*, 18 W. R. 56; 21 L. T. N.S. 413.

It has been held under the Irish Act, 11 and 12 Vict. c. 68, which is similarly worded, that the Court has no jurisdiction to order service upon a person out of the jurisdiction; *Ex parte Crawford*, 2 Ir. Ch. Rep. 573; *Ex parte Bernard*, 6 Ir. Ch. Rep. 133. In *Re Bonelli's Electric Telegraph Company*, 18 L. R. Eq. 655, V. C. Bacon ordered a substituted service, and also service abroad. But in *Re Haney's Trusts*, W. N. 1874, p. 221, the V. C. expressed a doubt as to service abroad, as the M. R. had previously decided in *Re Mewburn's Settled Estates* (22 June, 1874) that this could not be done. However the L.JJ. adopted the view of V. C. Bacon, and ruled that the Court has jurisdiction to order service abroad; *Re Haney's Trusts*, 10 L. R. Ch. App. 275; [and this view has since been acted on by the late M. R. in *Re Morant's Trusts*, W. N. 1879, p. 144; and followed in Ireland, *Re Dunne's Trusts*, 1 L. R. Ir. 12. Under the rules of 1883 (which are to be regarded as forming a complete code in reference to service out of the jurisdiction; *Re Busfield*, 32 Ch. Div. 223), leave has been given to serve a petition under the Trustee Relief Act out of the jurisdiction; *Re Ruddiman*, Seton, 5th edit. p. 20; and see *Re Gordon's Settlement*, W. N. 1887, p. 192; but in *Re Jellard* (39 Ch. D. 424) North, J., held that the Court has no jurisdiction to order such service. The case went to the Court of Appeal, but the point was not there decided.] And see *Re Gethin*, 9 Ir. R. Eq. 512.

(*a*) The Court under this Act has as ample jurisdiction as in a suit, and may therefore declare the *validity* or *invalidity* of a deed without directing fresh proceedings, if the Court in the exercise of its discretion do not think a suit necessary; *Lewis* v. *Hillman*, 3 H. L. C. 607; [or may order a deed to be rectified; *Re Bird's Trusts*, 3 Ch. D. 214.] But in general the Court will not allow a deed to be impeached upon the petition without a suit; *Way's Settlement*, 10 Jur. N. S. 1166. In one case V. C. Wood, in disposing of a fund on petition, said that if there were creditors or other unascertained claims, a suit might be necessary, but that otherwise the Court had jurisdiction as in a suit, and might direct an issue to try a question of *sanity* or the like; *Re Allen's Will*, Kay App. li. Where trustees of a marriage settlement had transferred the fund into Court, and a petition was presented by a person claiming adversely to the settlement, V. C. Wood disposed of the case upon the petition, no party having objected; but before the Lords Justices, the respondent not consenting, the petition was ordered to stand over that a bill might be filed; *Re Fozard's Trust*, 1 K. & J. 233; 24 L. J. N.S. Ch. 441; and see *Re Bloye's Trust*, 2 H. & Tw. 140; 1 Mac. & G. 488; *Ex parte Stutely*, 1 De G. & Sm. 703.

An order made by the Court for maintenance of an infant out of a fund paid into Court, and to which the infant is entitled, constitutes the in-

funds cannot be safely distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls may direct any such suit or suits to be instituted (*a*).

fant a *ward of Court*; *Re Hodges' Settlement*, 3 K. & J. 213; [and see *De Pereda* v. *De Mancha*, 19 Ch. D. 451; *Brown* v. *Collins*, 25 Ch. D. 56.]

(*a*) The Court directs a suit for its own satisfaction only, and will not authorize the petitioner to commence an action because it may be the more convenient course for making out his title; *Re Harris's Trust*, 18 Jur. 721. Though a person be not named as a *cestui que trust* in the affidavit upon which the money was paid in, yet if he can make a *primâ facie* case, the Court will give him leave to bring an action; *Re Jephson*, 1 L. T. N.S. 5.

Where a trustee filed a bill instead of paying in under the Trustee Relief Act, the Court allowed him only such costs as he would have been entitled to had he paid in under the Act; *Wells* v. *Malbon*, 31 Beav. 48; and see *Gunnell* v. *Whitear*, 10 L. R. Eq. 664.

The following is a summary of the decisions in reference to costs under the Act:—

The trustee who is served with the petition is *primâ facie* entitled to his costs; *Re Erskine's Trust*, 1 K. & J. 302; *Croyden's Trust*, 14 Jur. 54; *Re Wylly's Trusts*, 28 Beav. 458; *Re Wright's Trusts*, 3 K. & J. 419; *Re Headington's Trust*, 27 L. J. N.S. Ch. 175; *Re Robertson's Trust*, 6 W. R. 405; and it is not thought desirable to hold too strict a hand over trustees paying in trust monies; *Re Wylly's Trust*, 6 Jur. N. S. 906; *Re Brocklesby*, 29 Beav. 652; *Re Bendyshe*, 3 Jur. N. S. 727; though it is not matter of course that they should have their costs; *Re Elgar*, 11 L. T. N.S. 415; *Re Lane's Trust*, 24 L. T. 181; and see *Hankey* v. *Morley*, 4 Jur. N. S. 234; *Handley* v. *Davis*, 5 Jur. N. S. 190.

[But a trustee is within Rule 27 (19) of Order 65 of the Rules of the Supreme Court, 1883, and if he has been tendered and has accepted 30s. for his costs, he will not be allowed his costs of appearing on the petition, if he comes merely to ask for his costs, and his appearance is otherwise unnecessary; *Re Sutton*, 21 Ch. D. 855.]

In Ireland the costs of lodging a trust fund in Court are restricted in ordinary cases to 8*l.*; *Re Boyd's Trusts*, 1 Ir. Rep. Eq. 489. And if they retain more they may be deprived, in consequence, of their costs of appearing on the petition; *Re Blayney's Trust*, 9 Ir. R. Eq. 413.

A trustee objected to act with a proposed new trustee of whom he disapproved, and on the appointment of such new trustee the old trustee paid the fund into Court, and was allowed his costs; *Re Williams' Trust*, 6 W. R. 218.

A trustee holding a *chose en action* to which a married woman is entitled, is justified, having regard to her right to a settlement, in paying it into Court; *Re Swan*, 2 H. & M. 34. But see *contra*, *Re Roberts' Trusts*, 38 L. J. N.S. Ch. 708.

But a trustee who, after accepting the trust, throws it up from caprice soon after, and pays the money into Court, will not have his costs of appearing on the tenant for life's petition; *Re Leake's Trusts*, 32 Beav. 135.

When the trustee has paid in the fund abusively, as in order to avoid an action about to be brought against him, he will have no costs; *Re Waring*, 16 Jur. 652; and *Re Fagg's Trust*, 19 L. J. N.S. Ch. 175. And on the other hand, where a trustee refuses in a proper case to pay the fund into court, and obliges the *cestuis que trust* to bring an action, the Court will not allow him all his costs of suit, but only such costs as he would have got had he paid the money into Court, and then the plaintiff had presented a petition; *Weller* v. *Fitzhugh*, 22 L. T. N.S. 567; *Gunnell* v. *Whitear*, 10 L. R. Eq. 664. And where he has transferred the fund into Court without sufficient reason, though he may be allowed his costs of the transfer, he will not be allowed the costs of appearing on the petition; *Re Covington's Trust*, 1 Jur. N. S. 1157; *Re Heming's Trust*, 3 K. & J. 40; and see *Croyden's Trust*, 14 Jur. 54; *Re Leake's Trusts*, 32 Beav. 135; [and trustees who pay money into Court under the Act when the only question arising might be decided on originating summons under Order 55,

§ IV. And be it enacted, That the Lord Chancellor, with the assistance of the Master of the Rolls or of one of the Vice-Chancellors, shall

Lord Chancellor, with Master of the Rolls, &c., may make General Orders.

will not be allowed costs occasioned by such payment in; *Re Giles*, 55 L. J. Ch. 695;] and in cases of gross misconduct in paying in the fund, the Court has jurisdiction to throw upon the trustee personally the costs of the petition; *Re Woodburn's Will*, 1 De G. & J. 333; *Re Cater's Trust*, 25 Beav. 361, 366; *Re Knight's Trusts*, 27 Beav. 45; *Re Foligno's Mortgage*, 32 Beav. 131; *Re Glendenning*, W. N. 1867, p. 191; *Re Roberts' Trusts*, 38 L. J. N.S. Ch. 708; *Re Wise's Trust*, 3 Ir. R. Eq. 599; *Re Elliott's Trusts*, 15 L. R. Eq. 194; [*Re Hoskin's Trusts*, 5 Ch. D. 229; 6 Ch. Div. 281. But if a trustee is without sufficient reason deprived of his costs, he may *semble* appeal for them; *Turner* v. *Hancock*, 20 Ch. Div. 303, 307; disapproving, *Re Hoskin's Trusts, ubi supra*; and see *supra*, p. 1125.]

If the person who pays in is the personal representative of a testator whose will creates the difficulty, the executor should take his costs of paying in the fund out of the testator's estate, but the subsequent costs come out of the fund; *Re Cawthorne*, 12 Beav. 56; *Re Jones*, 3 Drew. 679; *secus*, however, if the trust fund has been severed from the testator's estate, and is paid in by a trustee and not by the executor; *Re Lorimer*, 12 Beav. 521; *Ex parte Lucas*, V. C. Knight Bruce, 6 July, 1849.

The *Court* cannot direct the costs to be paid out of another fund, also paid in by the trustee, but standing to a different account, though it may form part of the testator's residuary estate, and therefore be, *per se*, liable to costs; *Re Hodgson*, 18 Jur. 786; *S. C.* 2 Eq. Rep. 1083; nor out of the testator's residuary estate when it has not been paid in; *Re Bartholomew's Will*, 13 Jur. 380; and see *Re Sharpe's Trusts*, 15 Sim. 470; *Re Feltham's Trusts*, 1 K. & J. 534. See, however, *Re Trick's Trusts*, 5 L. R. Ch. App. 170. [But the payment of a legacy into Court does not relieve the residuary estate from bearing the costs of an inquiry to ascertain the persons entitled to the legacy; *Re Trick's Trusts*, 5 L. R. Ch. App. 170; *Re Birkett*, 9 Ch. D. 576; *Re Gibbon's Will*, 36 Ch. D. 486, and] where five-sixteenths of a fund paid into Court had lapsed, the Court threw the whole costs on the lapsed shares as constituting part of the residue; *Re Ham's Trust*, 2 Sim. N. S. 106.

[As the jurisdiction of the Court is limited to the fund paid into Court, if] a trustee deducts his costs before paying in the fund, the Court has no jurisdiction as to the sum deducted; *Re Bloye's Trust*, 1 Mac. & G. 504; 2 Hall & Tw. 153; *Re Barber*, 9 Jur. N.S. 1098; *Re Fortune's Trusts*, 4 Ir. R. Eq. 351; [*Re Parker's Will*, 39 Ch. Div. 303.] But where the trustee is allowed the costs of the petition, his costs will be taxed, including those which he had deducted; *Re Hue's Trusts*, 27 Beav. 337; and where a trustee has deducted costs improperly, an action may be brought against him for recovery of the costs so improperly deducted, and the costs of the action will be thrown upon the trustee; *Beaty* v. *Curson*, 7 L. R. Eq. 194.

It has been held, though the policy of the decision may be doubtful, that the trustee who is served with a petition will not be allowed in taxation the costs of taking copies of the affidavits filed by the parties beneficially interested; *Re Lazarus*, 3 K. & J. 555.

Whether on a petition by tenant for life for payment of the dividends the costs should come out of the corpus or out of the income is a point on which the practice has much varied. In favour of payment out of the *corpus* are the following cases: *Re Ross's Trust*, 1 Sim. N. S. 196, V. C. Cranworth; *Re Staples' Settlement*, 13 Jur. 273, V. C. E.; *Re Field's Trusts*, 16 Beav. 146; *Re Butler's Trust*, 16 Jur. 324; and *Re Leake's Trusts*, 32 Beav. 135, Sir J. Romilly; and in support of the contrary view; *Ex parte Fletcher*, 12 Jur. 619; 17 L. J. N.S. Ch. 169; *Ex parte Peart*, 12 Jur. 620; 17 L. J. N.S. Ch. 168, V. C. Knight Bruce; *Re Lorimer*, 12 Beav. 521, Lord Langdale; *Re Bangley's Trust*, 16 Jur. 682; *Re Ingram*, 18 Jur. 811, V. C. Kindersley; *Re Jepson*, 6 March, 1859, V. C. Wood; and *Re Hamersley's Settlement*, 23 Beav. 267, Sir J. Romilly.

In other cases the costs have been divided, and the costs of the tenant

have power and is hereby authorized to make such orders as from time to time shall seem necessary for better carrying the provisions of this Act into effect (*a*).

for life thrown on the income, and the costs of the trustees and remainderman on the *corpus*; *Re Whitling's Settlement*, 9 W. R. 830; *Re Tchitchagoff's Will*, 12 W. R. 1100; *Re Hadland's Settlement*, 23 Beav. 266.

In *Re Turnley*, 1 L. R. Ch. App. 152, Lord Romilly wished the point in question to be submitted to the Lord Chancellor, who directed the costs to be paid out of the *corpus*.

But the costs cannot be thrown on the *corpus* without service on the remainderman; *Ex parte Peart*, 17 L. J. N.S. Ch. 168; *Ex parte Fletcher*, 17 L. J. N.S. Ch. 169; or on those who sufficiently represent them; *Re Greenland's Trust*, 1 W. R. 46. And as the necessity of serving the remaindermen would lead to great inconvenience and expense, it was resolved by all the judges that for the future *the costs of a petition for payment of dividends should be thrown upon the income, and service upon the remaindermen be dispensed with*; *Re Marner's Trusts*, 12 Jur. N. S. 959, 3 L. R. Eq. 432; *Re Cameron*, 1 Ir. R. Eq. 258. The rule therefore now is, that upon a petition for payment of dividends only, while the costs, charges and expenses properly incurred by the trustee in paying the money into Court will, where not previously deducted, be directed to be paid out of the *corpus* (*Re Whitton's Trusts*, 8 L. R. Eq. 353), the costs of the petitioners and of all persons appearing on the petition will fall upon the income; *Re Mason's Trust's*, 12 L. R. Eq. 111; *Re Whitton's Trust's*, 8 L. R. Eq. 353. It was held in some cases, that the *costs of the trustee's appearance* upon the petition were an exception, and ought to be borne by the *corpus* (*Re Gordon's Trusts*, 6 L. R. Eq. 335; *Re Wood's Trusts*, 11 L. R. Eq. 155), but this has since been determined otherwise; *Re Evans' Trusts*, 7 L. R. Ch. App. 609; *Re Smith's Trusts*, 9 L. R. Eq. 374. "It is said," observed L. J. James, "that a difference ought to be made with respect to the appearance of the trustees, but I think that *Re Marner's Trusts* was intended to apply to *all* the costs of the petition; and I am the more disposed to follow that construction, because the reasonable course for a tenant for life to pursue, when about to present a petition, is to write to the trustee and tell him that he does not seek to affect the *corpus*, but only wants his income, and therefore that there is no occasion for the trustee to incur the costs of appearing. In such a case, if the title of the tenant for life be clear the trustee ought not to appear." But it was probably intended by the L. J. that the letter must be accompanied with the tender of a sufficient sum to cover the expense of the trustee's consulting his solicitor; [see now rule 27 (19) of Order 65 of Rules of the Supreme Court, 1883.]

If a person not appearing by the affidavit to have an interest, but who made a claim, be served with the petition and *disclaim* at the bar, he will not be allowed his costs; *Re Parry's Trust*, 12 Jur. 615; *Re Smith*, 3 Jur. N. S. 659.

If the money was paid in from the unreasonable claim of a person who is served with and appears upon the petition, and *opposes* it, the Court has jurisdiction to throw the costs upon such wrongful claimant; *Re Armston's Trusts*, 4 N. R. 450; *S. C.* 4 De G. J. & S. 454.

If the petition be presented by an incumbrancer, whose debt will swallow up the whole fund, and be served on a subsequent incumbrancer with notice that his costs of appearing will be resisted, such subsequent incumbrancer, if he appear, will not have his costs; *Roberts* v. *Ball*, 24 L. J. N.S. Ch. 471.

The costs in all cases are in the discretion of the Court; *Roberts* v. *Ball*, 24 L. J. N.S. Ch. 471.

(*a*) [This section has become obsolete, and was repealed by 42 & 43 Vict. c. 78. The general rules and orders relative to this Act now in force are as follows:—

V. And be it enacted, That in the construction of this Act the expression "the Lord Chancellor" shall mean and include the Lord Construction of expression "Lord Chancellor."

SUPREME COURT FUNDS RULES, 1886.

RULE 41. When a trustee or other person desires to lodge (I.) funds in Court in the Chancery Division, under the Act 10 & 11 Vict. c. 96, he shall annex to the affidavit to be filed by him pursuant to the said Act a schedule in the same printed form as the lodgment schedule to an order, setting forth—

(*a*) His own name and address.

(*b*) The amount and description of the funds proposed to be lodged in Court.

(*c*) The ledger credit in the matter of the particular trust to which the funds are to be placed.

(*d*) A statement whether legacy or succession duty (if chargeable) or any part thereof has or has not been paid.

(*e*) A statement whether the money or the dividends or the securities so to be lodged in Court, and all accumulations of dividends thereon, are desired to be invested in any and what description of Government securities, or whether it is deemed unnecessary so to invest the same.

An office copy of such schedule is to be left with the Paymaster.

RULE 74. When it is stated in the schedule to the affidavit made pursuant to Rule 41, that it is desired that any money to be lodged in Court, or the dividends accruing on any securities to be lodged in Court in pursuance of the Act 10 & 11 Vict. c. 96, and the accumulations thereof, shall be invested in any description of Government securities, the Paymaster shall (if or so soon as such money shall amount to or exceed £40, or so soon as dividends accruing on such securities shall amount to or exceed £10) invest the same accordingly, without any order or further request for that purpose. If such money does not amount to £40 (and is not less than £10), the Paymaster shall place such money on deposit without a request for that purpose, unless the said schedule contains a statement that it is deemed unnecessary to place such money on deposit, or unless notice in writing be left at the Pay Office of an order having been made, or of an intended application to the Court, affecting such money, securities, or dividends. Dividends accruing on funds or on investments or accumulations of funds lodged in Court under the said Act prior to the commencement of the Chancery Funds Rules, 1872, may, when, or so soon as they amount to or exceed £10, be invested without any request.

CHANCERY FUNDS AMENDED ORDERS, 1874.

ORDER 5. A person having made a payment or transfer of money or securities into, or a deposit of securities in Court under the above-mentioned Act of the 10th & 11th Vict. c. 96, shall forthwith give notice thereof to the several persons named in his affidavit (II.) to be made in pursuance of Rule 34 of the

[(I.) "Lodge in Court" means pay or transfer into Court or deposit in Court; see Rule 3.]

[(II.) Where the person mentioned in the affidavit could not be found, the Court declined to give any directions as to what would be sufficient notice, but intimated extra-judicially what, under the circumstances, would probably be held to be sufficient; *Re Hardley's Trusts*, 10 Ch. Div. 664. It will be observed that, under the Supreme Court Funds Rules, 1886, which repealed the Chancery Funds Consolidated Rules, 1874, it is not necessary to state in the affidavit the names of the persons interested in or entitled to the fund, and the above order of 1874, though not expressly repealed, has become inapplicable to the practice under the Rules of 1886; *Re Graham's Trusts*, (1891) 1 Ch. 151, *ante*, p. 1133; but in a case under the recent Rules, Pearson, J., in order to protect the trustees and prevent useless litigation, directed that notice of the affidavit should be served in the same way and upon the same parties as it would have been if the 34th Rule of the Chancery Funds Consolidated Rules, 1874, had remained in force; *Re Stening's Trust*, 50 L. T. N.S. 586.]

Chancellor, Lord Keeper, and Lords Commissioners for the custody of the Great Seal of *Great Britain* for the time being.

Chancery Funds Consolidated Rules, 1874, and the said Act, as interested in or entitled to such money or securities (*a*).

Order 6. The persons interested in or entitled to any money or securities so paid or transferred into, or deposited in Court, in pursuance of the said Act of the 10th & 11th Vict. c. 96, and named in the affidavit, or any of such persons, or the person so paying or transferring into or depositing in Court may apply by petition, or, in cases where the fund does not exceed 300*l.* cash or 300*l.* in securities (*b*), by summons as occasion may require, respecting the investment, payment out, or distribution of the money or securities, or of the dividends or interest of such securities.

Order 7. A person who has paid or transferred money or securities into, or deposited securities in Court pursuant to the said Act of the 10th & 11th Vict. c. 96, shall be served with notice of any application made to the Court, or a Judge in Chambers, respecting such money or securities, or the dividends thereof, by any person interested therein or entitled thereto.

Order 8. The persons interested in or entitled to such money or securities shall be served with notice of any application made by the trustee to the Court, or Judge, respecting such money or securities, or the dividends thereof (*c*).

Order 9. No petition relating to such money or securities as mentioned in the last four preceding Orders shall be set down to be heard, and no summons relating thereto shall be sealed until the petitioner or applicant has first named in his petition or summons a place where he may be served with any petition or summons, or notice of any proceeding or order relating to such money or securities, or the dividends thereof.

Order 10. Petitions presented and summonses issued under the said Act of 10 & 11 Vict. c. 96, shall be entitled in the matter of the said Act and in the matter of the particular trust.]

(*a*) Where a *cestui que trust* was believed to be in New York, but the address was unknown, the Court allowed publication in two New York papers to be sufficient notice: *Re Goodsman's Will*, W. N. 1870, p. 152.

[(*b*) Now extended by Rules of the Supreme Court, Order 55, R. 2, (5) to cases where the money or securities in Court do not exceed £1,000 or £1,000 nominal value.]

[(*c*) This notice may be dispensed with under special circumstances, as where a person has gone abroad many years ago and has not since been heard of; *Re Whitaker's Trusts*, 47 L. T. N.S. 507; 31 W. R. 114; *Re Hansford*, 7 W. R. 199, 254.]

No. II.

TRUSTEE RELIEF AMENDMENT ACT.

12 & 13 Vict. cap. 74.

"An Act for the further Relief of Trustees." (28*th July*, 1849.)

Whereas difficulties have arisen in the transfer of securities vested in trustees in certain cases under the provisions of an Act passed in the Session of Parliament holden in the tenth and eleventh years of the reign of Her present Majesty, intituled *An Act for better securing Trust Funds, and for the Relief of Trustees*, and it is expedient to make further provision for carrying into effect the objects of the said recited Act: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that if upon any petition presented to the Lord Chancellor or Master of the Rolls in the matter of the said Act it shall appear to the Judge of the Court of Chancery before whom such petition shall be heard, that *any monies, annuities, stocks or securities* (*a*) are vested in any persons as trustees, executors, or administrators, or otherwise, upon trusts within the meaning of the said recited Act, and that the *major part* of such persons (*b*) are desirous of transferring, paying, or delivering the same to the Accountant-General of the High Court of Chancery under the provisions of the said recited Act, but that for any reason the concurrence of the other or others of them cannot be had (*c*), it shall be lawful for such Judge as aforesaid to order and direct such transfer, payment, or delivery to be made by the *major part* of such persons without the concurrence of the other or others of them; and where any such monies or Government or Parliamentary securities shall be deposited with any banker, broker, or other depositary, it shall be lawful for such Judge as aforesaid to make such order for the *payment or delivery* of such monies, Govern-

10 & 11 Vict. c. 96.

Court of Chancery may, upon application by majority of trustees, &c., order payment or transfer of trust monies, stocks, or securities into Court of Chancery.

[(*a*) Under these words the debenture stock of a Railway Company, the consolidated stock of a Railway Company, and India 4 per Cent. stock have been ordered into Court; *Re Gledstane's Trusts*, W. N. 1878, p. 26.]

(*b*) Where of three trustees, one was invalided and two petitioned, the Court made the order; *Re Broadwood's Trust*, 8 L. T. N.S. 632.

(*c*) The non-concurring trustee must be served with any petition under the Act.

ment or Parliamentary securities, to the *major part* of such trustees, executors, administrators, or other persons as aforesaid, for the purpose of being paid or delivered to the said Accountant-General, as to the said Judge shall seem meet; and every *transfer* of any annuities, stocks, or securities, and every *payment* of money or *delivery* of securities, in pursuance of any such order, shall be as valid and effectual as if the same had been made on the authority or by the act of *all the persons* entitled to the annuities, stocks, or securities so transferred, or the monies or securities so paid or delivered respectively, and shall fully protect and indemnify the Governor and Company of the Bank of *England, the East India Company, and the South Sea Company* (*a*), and all other persons acting under or in pursuance of such order.

County Courts.

By 51 & 52 Vict. c. 43, s. 67, it is enacted, that the County Courts shall have and exercise all the power and authority of the High Court "in all proceedings under the Trustees Relief Acts, in which the trust estate or fund to which the action or matter relates shall not exceed in amount or value the sum of 500*l.*"

And by sect. 70 of the same Act, it is enacted, that "any moneys, annuities, stocks, or securities vested in any persons as trustees, executors, administrators or otherwise, upon trusts, within the meaning of the Trustee Relief Act, where the same do not exceed in amount or value the sum of 500*l.*, upon the filing by such trustees or other persons, or the major part of them, to or with the registrar of the [county] court within the district of which such persons or any of them shall reside, of an affidavit shortly describing, according to the best of their knowledge, the instrument creating the trust, may, in the case of money, be paid into a *post-office savings bank* established in the town in which the court is held, in the name of the Registrar of such court, in trust, to attend the orders of the court," and "in the case of stocks or securities may be transferred or deposited into or in the name of the *treasurers and registrars* of such court, in trust, to attend the orders of the court," &c.

[(*a*) These words are repealed by the Statute Law Revision Act, 1875.]

No. III.

TRUSTEE ACT, 1850.

13 & 14 Vict. cap. 60.

"*An Act to Consolidate and Amend the Laws relating to the Transfer of Real and Personal Property vested in Mortgagees and Trustees.*" (5 *August*, 1850.)

Whereas an Act was passed in the first year of the reign of His late Majesty King William the Fourth, intituled *An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give effect to their Decrees and Orders in certain cases:* And whereas an Act was passed in the fifth year of the reign of His late Majesty King William the Fourth, intituled *An Act for the Amendment of the Laws relative to Escheats and Forfeitures of Real and Personal Property holden in Trust:* And whereas an Act was passed in the second year of the reign of Her present Majesty, intituled *An Act to remove Doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgagees:* And whereas it is expedient that the provisions of the said Acts be consolidated and enlarged,—Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same (*a*).

I. (*This section was repealed by* "The Statute Law Revision Act, 1875.")

II. And, whereas it is expedient to define the meaning in which certain words are hereafter used: It is declared that the several words hereinafter named are herein used and applied in the manner following respectively: (that is to say), Interpretation of terms.

The word "lands" shall extend to and include manors, messuages, tenements, and hereditaments, corporeal and incorporeal, of every

(*a*) The Court has no jurisdiction under the Trustee Acts to decide on a disputed question of title; *Re Draper's Settlement*, 9 W. R. 805.

tenure or description, whatever may be the estate or interest therein (*a*):

The word "stock" shall mean any fund, annuity, or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein (*b*):

The word "seised" shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity (*c*), in possession or in futurity, in any lands:

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands:

The words "contingent right," as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

The words "convey" and "conveyance" applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised, or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an Act passed in the fourth year of the reign of His late Majesty King *William* the Fourth, intituled *An Act for the abolition of Fines and Recoveries, and the substitution of more simple modes of Assurance* (*d*), and including also surrenders and other acts which a tenant of

(*a*) In one case, where the word "lands" only was used in the vesting order, and the property comprised *rent-charges*, the order was amended by adding the word "hereditaments;" *Re Harrison*, 1 Set. on Dec. 516, 4th edit.

(*b*) The word "stock" includes shares in *joint-stock companies*; *Re Angelo*, 5 De G. & Sm. 278; and shares in ships, 18 & 19 Vict. c. 91, s. 10.

(*c*) In suits where all parties beneficially interested are before the Court, it is sufficient for the purchaser to take a conveyance of the *legal* estate, for the equities of the parties are bound by the order of sale, and no vesting order as to the *equitable estate* is required or will be made; *Re Williams' Estate*, 5 De G. & Sm. 515; [and see *Cottrell* v. *Cottrell*, 2 L. R. Eq. 330.] See the analogous case under the prior Act, *Goddard* v. *Macaulay*, 6 Ir. Eq. Rep. 221.

(*d*) Thus, where there is an adult tenant for life, with remainder to an infant *tenant in tail*, with remainders over, a vesting order of the infant's estate with the consent of the tenant for life as protector will bar the entail, and all remainders over; *Powell* v. *Matthews*, 1 Jur. N. S. 973; see form of order, 1 Set. on Dec. p. 535, 4th edit.

customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold lands (*a*) :

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate :

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another :

The words "Lord Chancellor" shall mean as well the Lord Chancellor of *Great Britain* as any Lord Keeper or Lords Commissioners of the Great Seal for the time being :

The words "Lord Chancellor of *Ireland*" shall mean as well the Lord Chancellor of *Ireland* as any Keeper or Lords Commissioners of the Great Seal of *Ireland* for the time being :

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage (*b*) ; but, with this exception, the words "trust" and "trustee" shall extend to and include implied and constructive trusts (*c*), and shall extend to and include

(*a*) See, as to copyholds, *Rowley* v. *Adams*, 14 Beav. 130, and *post*, p. 1163, note (*a*).

(*b*) As to the question upon the former Act, 1 W. 4. c. 60, whether the word "*trust*" included a *mortgage*," see note (*c*), p. 836, 3rd edit.

(*c*) A *vendor*, after a contract, has been held to be a trustee of shares in a *joint-stock bank* for the purchaser; *Re Angelo*, 5 De G. & Sm. 278. But in cases of *real estate*, if not universally, at least where the alleged trustee can possibly dispute the trust, the constructive trust must first have been declared by the judgment of the Court, and the infant heir of the vendor who died intestate after having contracted to sell real estate is not a constructive trustee for the *purchaser* unless so declared: *Re Carpenter*, 1 Kay, 418; [*Re Colling*, 32 Ch. Div. 333;] *Re Burt*, 9 Hare, 289; *Re Dickenson*, 17 L. T. 231; *Cust* v. *Middleton*, 7 Jur. N. S. 151; *Re Weeding's Estate*, 4 Jur. N. S. 707; *Re Faulder*, W. N. 1866, p. 83; *Jackson* v. *Milfield*, 5 Hare, 538; *Re Milfield*, 2 Ph. 254; [*Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582.] *Re Wise*, 5 De G. & Sm. 415, is distinguishable; and see *Re Probert's Purchase*, 22 L. J. N.S. Ch. 948. But where a vendor died before acceptance of the title having devised the estate to an infant, and the executors prayed that the infant might be declared a trustee within the Act, and that the property on payment of the purchase-money might be conveyed to the purchaser who had accepted the title, and the prayer was supported by the infant's counsel, the Court made the order; *Re Lowry's Will*, 15 L. R. Eq. 78. [This point is, however, not likely to arise in the future in the case of freeholds, as by the Conveyancing and Law of Property Act, 1881, s. 4, the personal representative of the vendor is empowered to convey, where at his death an enforceable contract is subsisting. Where on the purchase of land by a company the land had been conveyed to the secretary of the company as absolute owner, and no declaration of trust had been executed by him, North, J., doubted whether he had jurisdiction under the Act to appoint a new trustee in the place of the secretary, and required an action to be instituted to establish the trusteeship; *Re Martin's Trusts*, W. N. 1886, p. 183.]

If the owner of *copyholds* covenant

cases where the trustee has some beneficial interest or estate in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person (*a*):

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon commission of inquiry in the nature of a writ *de lunatico inquirendo*:

to surrender, and declares that in the meantime he will stand seised upon *trust* for the covenantee, the covenantor is a trustee within the Act; *Re Collingwood's Trusts*, 6 W. R. 536; and see *Steele* v. *Waller*, 28 Beav. 466. And even where there is no such declaration, yet if the contract be not *in fieri*, but has been carried out and completed, the covenantor is a trustee within the Act; *Re Cuming*, 5 L. R. Ch. App. 72; [*Re Bradley's Settled Estate*, 54 L. T. N.S. 43; and see *Re Colling*, 32 Ch. Div. 333.]

If the *cestui que trust* has sold his *equitable* interest, and the sale has been *completed*, the purchaser is then the *cestui que trust*, and may apply for a transfer of the legal estate; *Re Wilkinson's Trust*, 10 Jur. N. S. 716; *Re Groom*, 11 L. T. N.S. 336.

Where a testator had signed an agreement to convey certain easements in compromise of an action, an infant devisee, no title being in question, was held to be a constructive trustee within the Act; *Re Taylor*, W. N. 1866, p. 5.

Where a *compulsory* sale had been made to a railway company, and the purchase-money had been *paid* and *possession* taken in the lifetime of the ancestor, the case was held to be within the Act; *Re Russell's Estate*, 12 Jur. N. S. 224; and see *Re Badcock*, 2 W. R. 386.

A vendor who refused to convey after tender of a deed *settled by the judge*, or to receive the purchase-money, was declared a trustee, and on the purchaser paying his purchase-money into Court, his solicitor was to execute the conveyance for the vendor; *Warrender* v. *Foster*, 1 Set. on Dec. 438, 4th edit.

An executor holding a legacy bequeathed to persons successively is a constructive trustee; *Re Davis's Trusts*, 12 L. R. Eq. 214.

[An infant who is the sole beneficial owner of stock standing in his name, subject to a provision or direction for his maintenance which is vested in some other person, is a constructive trustee within the Act; *Gardner* v. *Cowles*, 3 Ch. D. 304; and see *Re Findlay*, 32 Ch. D. 221, 641, and see *post*, p. 1182.]

Where a *feme covert* is a trustee of stock, the *husband*, as the Bank acts upon his directions, is a constructive trustee within the Act; *Re Wood*, 7 Jur. N. S. 323. [See now 45 & 46 Vict. c. 75.]

An heir who takes by descent, but has bound himself on the doctrine of *election* to hold upon the trusts of the will, is a trustee within the Act; *Dewar* v. *Maitland*, 2 L. R. Eq. 834.

Three persons were appointed assignees of a bankrupt; one of them resigned his office and went abroad, and his resignation was accepted by the creditors, and the Court held that the one who had resigned and gone abroad was a trustee within the Act; and an order was made vesting the legal estate in the two acting assignees; *Re Joyce's Estate*, 2 L. R. Eq. 576; 12 Jur. N. S. 1015.

[(*a*) For the purposes of the Trustee Act, 1888, the expression "trustee" is to be deemed to include "an executor or administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds," see sect. 1, sub-s. 3, *ante*, p. 314. A trustee may by virtue of this definition be appointed to perform the duties of an executor; *Re Moore*, 21 Ch. D. 778; but see *Re Willey*, W. N. 1890, p. 1, where Cotton, L.J., is reported to have intimated that *In re Moore* went too far, and that the Court could not appoint a person to discharge duties which belonged only to the office of executor and not to that of trustee; and the petition in that case stood over for evidence that debts and funeral and testamentary expenses had been paid.]

The expression "person of unsound mind" shall mean any person *not an infant*, who, not having been found to be a lunatic, shall be incapable from infirmity of mind (*a*) to manage his own affairs:

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not an heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent:

The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate which would in a Court of equity be deemed merely a security for money:

The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate (*b*).

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

Power to make vesting order as to lands of a lunatic trustee or mortgagee. [*Repealed.*]

III. (*This section and the three following sections, except so far as they relate to Ireland, are repealed by the Lunacy Act*, 1890, *but are replaced by sections* 135 *and* 136 *of that Act, see post*, pp. 1189, 1190.) And be it enacted, that when any *lunatic* or person of unsound mind (*c*) shall be seised or possessed of any *lands* upon any *trust* (*d*) or by way of *mortgage* (*e*),

(*a*) See *Re Wakeford*, 1 Jon. & Lat. 2 (under 1 W. 4. c. 60); *Re Jones*, 6 Jur. 545. A person is of unsound mind within this definition if from permanent mental incapacity he is incapable of managing his affairs, although his state of mind is not such as to render him liable to be found lunatic if an inquisition were held on him. *Re Martin* (34 Ch. Div. 618), overruling *Re Phelp's Settlement Trusts* (31 Ch. Div. 351); but it is otherwise if the incapacity to transact business, however complete, arises from infirmity of body, *Re Barber*, 39 Ch. Div. 187.

(*b*) By 25 & 26 Vict. c. 37, s. 10, the Trustee Act, 1850, is made to extend to a trustee or trustees of the *private estates* of Her Majesty, her heirs or successors, and any petition or other proceeding for obtaining the benefit of the Act shall be in the name or names of any person or persons authorized by any writing under the sign manual.

(*c*) Where the unsoundness of mind is *contested*, the case is not within the Act; *Re Walker*, Cr. & Ph. 147; *Re Campbell*, 18 L. T. 202.

(*d*) See definition of Trust, *ante*, p. 1147.

(*e*) See definition of Mortgage, *supra*. [The Court had jurisdiction under this section to make an order for the transfer of a mortgage vested in a lunatic. *Re Nicholson*, 34 Ch. Div. 663; *Re Pell*, 35 W. R. 81; 55 L. T. N.S. 554. The lunatic's interest might also be sold under sect. 116 of the Lunacy Regulation Act, 1853 (now replaced by s. 117 of the Lunacy Act, 1890); *Re Brown*, 50 L. T. N.S. 373.]

Under this and the 20th sections, where new trustees had been appointed in the place of a lunatic and a deceased trustee to act jointly with a continuing trustee the Court made an order vesting in the continuing trustee the right to convey the mortgaged property for the estate of himself and the lunatic; *Re Vicat*, 33 Ch. Div. 103; and the section

it shall be lawful for the Lord Chancellor (*a*), intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, to make an order that such lands be *vested* (*b*) in such

was held to apply to the case of a lunatic or person of unsound mind who as one of several trustees was seised or possessed *jointly* with other persons, *Re Jones*, 33 Ch. Div. 414; and now sect. 135 of the Lunacy Act, 1890, see *post*, p. 1190, expressly provides for the case of a lunatic jointly seised or possessed of land on trust.]

(*a*) It was doubted whether the Lords Justices, though they were in fact intrusted under the Queen's sign manual with the care, &c., of lunatics, had power to exercise the jurisdiction given by the Act to the Lord Chancellor intrusted, &c.; *Re Waugh's Trust*, 2 De G. M. & G. 279; *Re Pattinson*, 21 L. J. N.S. Ch. 280. See, however, 15 & 16 Vict. c. 87, s. 15, removing the doubt, and the 11th section of the Trustee Extension Act, *post*, p. 1185. [The jurisdiction of the Lords Justices was, by the 7th section of 38 & 39 Vict. c. 77, rendered exercisable by such of the Judges of the High Court of Justice or Court of Appeal as are intrusted by the Queen's sign manual with the care, &c., of lunatics. By sec. 51 of the same Act, upon the request of the Lord Chancellor, any Judge of the Court of Appeal may sit and act as a Judge of the High Court, and under this section the Judges of the Court of Appeal sitting in lunacy are enabled to act as additional Judges of the Chancery Division not only in all petitions under the Trustee Acts, but in all applications in lunacy which require also an exercise of the jurisdiction of the Chancery Division; *Re Platt*, 36 Ch. Div. 410. But the jurisdiction of the Lords Justices to act as Judges of the Chancery Division in lunacy matters can only be exercised in aid of their jurisdiction in lunacy; *Re Barber*, 39 Ch. Div. 187. Sect. 7 of 38 & 39 Vict. c. 77 has now been repealed by the Lunacy Act, 1890, and the exercise of the jurisdiction of the "Judge in lunacy" is regulated by s. 108 of that Act, *see post*, p. 1187.]

In cases of *lunacy* or *unsoundness of mind*, the application must have been made exclusively to the Judges so intrusted as aforesaid, as the other Judges had no jurisdiction; *Jeffryes* v. *Drysdale*, 9 W. R. 428; *Re Ormerod*, 3 De G. & J. 249, and cases there cited; and see *Re Irby*, 17 Beav. 334; *Herring* v. *Clark*, 4 L. R. Ch. App. 167; *Re Mason*, 10 L. R. Ch. App. 273; [*Re Stamper*, 46 L. T. N.S. 372.]

As the section speaks of *conveyance* and *assignment*, the Court had no authority under it to vest a *power* though an imperative one; *Re Porter's Will*, 3 W. R. 583. See *post*, p. 1170.

[Where the person of unsound mind is tenant in tail, it is not necessary in the vesting order to refer to the Fines and Recoveries Act, or to the manner in which the trustee could have conveyed if sane. The order should simply direct the property to vest for all the estate which the person of unsound mind could convey if sane; *Mason* v. *Mason*, 7 Ch. Div. 707.]

Where one of several trustees was a *lunatic*, and it was desired to obtain from the Court an appointment of new trustees in the place of the lunatic and others with a vesting order, the petition had to be intituled in Lunacy *and* in the Chancery Division; [*Re Pearson*, 5 Ch. Div. 982; *Re Chell*, 49 L. T. N.S. 196;] *Re Davidson*, 20 L. J. N.S. Ch. 644.

As to a person "of unsound mind," who is an *infant*, see p. 1152, *post*, note (*c*).

As to the parties to be served, see p. 1173, *post*, note (*b*).

(*b*) The vesting order being a *conveyance*, should be so worded as to make it clear by the description what property passes; *Re Ord's Trust*, 3 W. R. 386.

Where the circumstances require a severance of the property, the Court will make two vesting orders instead of one general one; *Brader* v. *Kerby*, W. N. 1872, p. 174. [Where property mortgaged to a lunatic was being sold under the power of sale in the mortgage it seems that resort to a vesting order under this section was necessary notwithstanding sects. 116, 136 of the Lunacy Regulation Act, 1853. In *Re Harwood*, 35 Ch. Div. 470.]

person or persons (*a*) in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment (*b*) of the lands in the same manner for the same estate (*c*).

Power to discharge any contingent right of a lunatic trustee or mortgagee in respect of lands. [*Repealed.*]

IV. And be it enacted, that when any *lunatic* or person of unsound mind shall be entitled to any *contingent right* in any *lands* upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, *intrusted as aforesaid*, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

Power to vest stock or *chose en action* of a lunatic trustee or mortgagee. [*Repealed.*]

V. And be it enacted, that when any *lunatic* or person of unsound mind shall be *solely* entitled to any *stock* or to any *chose en action* upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, *intrusted as aforesaid*, to make an order vesting in any person or persons (*d*) the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose en action*, or any interest in respect thereof (*e*), and when any person or persons shall be entitled *jointly* with any lunatic or person of unsound mind to any *stock* or *chose en action* upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose en action*, or any interest

[(*a*) The Court will not on the petition of a person absolutely entitled vest the property in the person so entitled, but will appoint a new trustee and vest the property in him, leaving the petitioner to take further steps to put an end to the trust; *Re Holland*, 16 Ch. Div. 672; but see *Re Currie*, 10 Ch. Div. 93.]

(*b*) See definition of Conveyance and Assignment, pp. 1146, 1147. [Where a person who had agreed to grant a lease with a covenant for quiet enjoyment became lunatic before the lease was granted it was held that under a vesting order of the interest of the lunatic the lessee would not obtain a covenant for quiet enjoyment; *Cowper* v. *Harmer*, 57 L. J. N.S. Ch. 461.]

(*c*) As to Costs, see sect. 51, and *post*, p. 1177, note (*b*).

[(*d*) The Court of Lunacy declined under this section to make an order vesting the right to transfer the stock in the persons beneficially entitled to it, as that would in effect be an administration of the trust in Lunacy which the Court always refuses, but on a petition instituted in the Chancery Division as well as in Lunacy the Court would appoint the beneficiaries new trustees of the settlement, and vest the right in them in that capacity; *Re Currie*, 10 Ch. Div. 93.]

(*e*) Where a person of unsound mind was entitled to a sum of stock as trustee, and also entitled to another sum of the same stock beneficially, as the Bank would not *apportion* the past *dividend* between the trust estate and the beneficial estate, the Court in appointing new trustees vested the right to receive the whole dividend in the new trustees upon their undertaking that they would invest in the name of the old trustee so much as belonged to him beneficially; *Re Stewart*, 2 De G. F. & J. 1; [see *Hodges* v. *Wheeler*, 1 Set. on Dec. 4th edit. 522.]

in respect thereof, either in such person or persons so jointly entitled as aforesaid (*a*), or in such last-mentioned person or persons, together with any other person or persons the said Lord Chancellor may appoint (*b*).

Power to vest stock or *chose en action* of a person whose personal representative is a lunatic. [*Repealed.*]

VI. And be it enacted, that when any *stock* shall be standing in the name of any deceased person whose personal representative is a *lunatic* or person of unsound mind, or when any *chose en action* shall be vested in any *lunatic* or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, *intrusted as aforesaid*, to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose en action* or any interest in respect thereof, in any person or persons he may appoint.

Power to vest lands of an infant trustee or mortgagee.

VII. And be it enacted, that where any *infant* (*c*) shall be seised or possessed of any *lands* upon any *trusts* or by way of *mortgage* (*d*), it shall be lawful for the Court of Chancery (*e*) to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct (*f*); and the order shall have

(*a*) See *Re White*, 5 L. R. Ch. App. 698; [*Re Wucher*, 22 Ch. Div. 535, where, one of three executors of the surviving executor of a testator being of unsound mind, an order was made vesting the right to transfer stock belonging to the estate of the original testator and still standing in his name. In *Re Nash*, 16 Ch. Div. 503, where consols were standing in the names of three trustees one of whom was a lunatic, L. J. Cotton refused to make an order vesting the right to transfer until a new trustee had been appointed in the place of the lunatic. But the section clearly gave jurisdiction to vest the right in the other trustees without appointing a new trustee, and where there was no object to be attained by such appointment it was dispensed with; *Re Watson*, 19 Ch. Div. 384; and see *Re Ray*, 47 L. T. N.S. 500. Where a mortgage debt and stock were vested in two trustees of a settlement, one of whom was lunatic and the other resident out of the jurisdiction, and new trustees of the settlement had been appointed, the Court made an order vesting the mortgage debt and the right to call for a transfer of the stock first in the trustee resident out of the jurisdiction, and then, it appearing that he was out of the jurisdiction, in the new trustees, *Re Batho*, 39 Ch. Div. 189.]

(*b*) The lunatic *husband* of a *feme covert* a trustee is within the Act; *Re Wood*, 3 De G. F. & J. 125; and see *Ex parte Bradshaw*, 2 De G. M. & G. 900.

(*c*) A "person of unsound mind" is defined by the 2nd section to mean "any person *not an infant*, who, not having been found a lunatic, shall be incapable from infirmity of mind to manage his own affairs." And, therefore, where an infant trustee is of unsound mind the case does not fall under the lunacy jurisdiction of the Chancellor, but the ordinary jurisdiction in Chancery; *Re Arrowsmith's Trusts*, 4 Jur. N. S. 1123, [and the Lunacy Act, 1890 (by sect. 143, see post p. 1192), does not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant]. The infant need not be served with the petition; *Re Tweedy*, 9 W. R. 398; *Re Willan*, Ib. 689 [but see *contra Re Adam's Trusts*, W. N. 1887, p. 175; 35 W. R. 770; 57 L. T. N.S. 337.]

[(*d*) Where an equitable mortgagor died intestate leaving an infant heir-at-law, an order was made vesting the legal estate in the mortgagees subject to the heir's right to redeem. *In Re Jones' Mortgage*, 59 L. T. N.S. 859].

(*e*) As to the County Courts, see *post*, p. 1185.

(*f*) It is now settled, notwithstanding the doubts entertained at first (see *Re Howard's Estate*, 5 De G. & Sm.

the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*a*).

Power to discharge contingent right of infant trustee or mortgagee to lands.

VIII. And be it enacted, that where any infant shall be entitled to any *contingent right* in any *lands* upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right.

Power to vest lands of a *sole* trustee out of the jurisdiction.

IX. And be it enacted, that when any person *solely* (*b*) seised or possessed of any lands *upon any trust* (*c*) shall be *out of the jurisdiction*

435), that the Court will make an order, vesting an estate on a purchase to the uses commonly called the uses to bar dower; but will not incorporate a declaration that no woman shall be entitled to dower, this being no part of the conveyance; but as uses to bar dower have not that effect as to a woman married since Jan. 1, 1834, a woman so married will be entitled to dower unless otherwise barred; *Re Lush's Estate*, 5 De G. & Sm. 436; *Davey* v. *Miller*, 17 Jur. 908.

An order has been made to vest the legal estate in the devisees of a mortgagor, subject to a *charge* created by his will; *Re Ellerthorpe*, 18 Jur. 669. [Under this section and s. 45 of the Copyhold Act, 1887, an order was made vesting in the executors of a deceased mortgagee the legal estate in copyholds outstanding in his infant heir; *Re Franklyn's Mortgages*, W. N. 1888, p. 217.]

Where the executor and executrix (a married woman) of a mortgagee applied for a vesting order, the Court instead of vesting the property in the executor and executrix, when the *feme covert* in order to part with it would have to acknowledge the deed, vested it in such person or persons as the executor and executrix should appoint, and in default thereof, in the executor and executrix; *Re Powell*, 4 K. & J. 338.

(*a*) Tenant for life with remainder to an infant *in tail*. A vesting order as to the estate of the infant with the consent of the tenant for life, will bar the entail and remainders over; *Powell* v. *Matthews*, 1 Jur. N. S. 973. See the interpretation clause as to the words "convey," and "conveyance," *ante*, p. 1146.

(*b*) [It has been held] that a coparcener who has no beneficial interest, but holds in trust for the other coparcener, is solely seised as trustee for such coparcener; *McMurray* v. *Spicer*, 5 L. R. Eq. 527; [but see *Re Greenwood's Trusts*, 27 Ch. D. 352; *post* p. 1154].

(*c*) An *heir* who takes the trust estate by the *disclaimer* of the trustees, *Wilks* v. *Groom*, 6 De G. M. & G. 205, [or by the death of the trustee in the testator's lifetime, *Re Gill*, 1 Set. on Dec. 4th edit. 520], is a trustee within the section. [And so also is a mortgagee, nominee of third persons to whom the mortgage money belongs, although no declaration of trust has been made by him, *Re Barber's Mortgage Trusts*, W. N. 1888, p. 11; 58 L. T. N.S. 303.] And an heir of a mortgagee who has taken possession has been held to be a trustee for the mortgagee's executors; *Re Skitter's Mortgage*, 4 W. R. 791; see *post*, 1156, note (*c*); [and see 44 & 45 Vict. c. 41, s. 30.]

A person had contracted to sell an estate, which in equity had converted it into personalty, but before he executed the conveyance died intestate, and it was held that the heir was a trustee for the personal representative; *Re Badcock*, 2 W. R. 386. But see *ante*, p. 1147, note (*c*); [and see 44 & 45 Vict. c. 41, s. 4.]

of the Court of Chancery (*a*), or cannot be found (*b*), it shall be lawful for the said Court (*c*) to make an order vesting such *lands* in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Power to vest lands of a joint trustee out of the jurisdiction.

X. And be it enacted, that when any person or persons shall be seised or possessed of any lands *jointly* (*d*) with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said Court to make an order vesting the *lands* in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the *trustee* (*e*) out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*f*).

(*a*) A temporary absence, as where the captain of a merchantman was abroad on a voyage, is not within the Act; *Hutchinson* v. *Stephens*, 5 Sim. 499 (a case under the old Act, 11 G. 4. & 1 W. 4. c. 60). [A trustee may be treated as out of the jurisdiction, although he appears by counsel; *Stillwell* v. *Ashley*, 1 Set. on Dec. 4th edit. 520.]

(*b*) A defendant against whom an absolute decree of foreclosure upon an equitable mortgage was made, but who could not be found, was deemed to be a trustee for the mortgage within the Act, and a vesting order was made accordingly; *Lechmere* v. *Clamp*, 30 Beav. 218; 31 Beav. 578. See p. 1164, *post*, note (*e*).

[One of three joint mortgagees, who were trustees, refused to concur in a transfer of the mortgage which was executed by the other mortgagees; a new trustee was afterwards appointed in his place, and on a petition for a vesting order, it was held that the recusant trustee was a trustee within the meaning of the Act for the transferee of the mortgage; *Re Walker's Mortgage Trusts*, 3 Ch. D. 209.]

[(*c*) This section applies where the trustee out of the jurisdiction is of unsound mind; *Re Gardner's Trusts*, 10 Ch. D. 29.]

[(*d*) The words "seised jointly" are not limited to a legal joint tenancy but are used in a wide sense, and apply to the case of lands descending to the co-heiress and the surviving heir or (if the case fall within sect. 30 of the Conveyancing and Law of Property Act, 1881) the personal representative of a deceased co-heiress of the deceased trustee; *Re Greenwood's Trusts*, 27 Ch. D. 359; *Re Templer's Trusts*, 4 N. R. 494; but see *McMurray* v. *Spicer*, 5 L. R. Eq. 527.]

(*e*) The word "trustee" does not include a joint *mortgagee*. One of the mortgagees being out of the jurisdiction, the mortgage money was paid to the joint account of the joint mortgagees, but the Court refused to make an order; *Re Osborn's Mortgage*, 12 L. R. Eq. 392.

[But the section is applicable if the mortgagees are trustees of the mortgage money; *Re O'Gorman's Trusts*, 25 L. R. Ir. 93; and a mortgagee who is a mere nominee of the persons entitled to the mortgage money is a trustee; *Re Barber's Mortgage*, 58 L. T. N.S. 303.]

(*f*) The concluding words of this section (as a conveyance by one of several trustees would have the effect of severing the joint tenancy) led to a doubt at one time whether the Court had power under this section to vest the lands in the joint owner within the jurisdiction and another as *joint tenants*; *Re Watt's Settlement*, 9 Hare, 106; *Re Plyer's Trust*, Ib. 220. But the doubt has since been dispelled; *Smith* v. *Smith*, 3 Drew. 72; *Re Marquis of Bute's Will*, Johns. 15.

Power to discharge contingent right of sole trustee out of the jurisdiction to lands.

XI. And be it enacted, that when any person *solely* entitled to a *contingent right* in any lands upon any *trust* shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Power to discharge contingent right of joint trustee out of the jurisdiction to lands.

XII. And be it enacted, that when any person *jointly* entitled with any other person or persons to a *contingent right* in any *lands* upon any *trust* shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

Power to vest lands held upon trust where it is unknown which of the co-trustees survived.

XIII. And be it enacted, that where there shall have been two or more persons jointly seised or possessed of any *lands* upon any *trust*, and it shall be uncertain *which of such trustees was the survivor*, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Where it is unknown whether the trustee be living or dead.

XIV. And be it enacted, that where any one or more person or persons shall have been seised or possessed of any *lands* upon any *trust*, and it shall not be known, as to the trustee last known to have been seised or possessed, *whether he be living or dead*, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Where it is unknown who is the heir or devisee of the trustee.

XV. And be it enacted, that when any person seised of any *lands* upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known *who is his heir or devisee*, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for

If one of the *co-heirs* of a mortgagee be out of the jurisdiction, he is a trustee within the 10th section of the Act for the persons entitled to the mortgage money, and the entirety on their petition may be vested in the co-heir within the jurisdiction; *Re Templer's Trusts*, 4 N. R. 494; and see *Re Hughes' Settlement*, 2 H. & M. 695. See p. 1156, note (*c*).

such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate (*a*).

Powers to discharge the contingent right of persons unborn who if born would be trustees.

XVI. And be it enacted, that when any *lands* are subject to a *contingent right* in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any *trust*, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands.

XVII and XVIII.—(*These sections were repealed by the Extension Act.* See *post*, p. 1181.)

Power to make vesting orders as to legal estates derived from a mortgagee who has not entered into possession.

XIX. And be it enacted, that when any person to whom any lands have been conveyed by way of *mortgage* shall have *died* (*b*) *without having entered into the possession* or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands (*c*), then in any of the following cases it shall be lawful

(*a*) This section does not apply to *leaseholds for years; Re Mundel's Trust*, 8 W. R. 683; *Re Harvey*, Set. on Dec. 520, 4th edit. But a vesting order as to leaseholds for years may be made on the appointment of new trustees under the 34th section; *Re Driver's Settlement*, 19 L. R. Eq. 352; *Re Rathbone*, 2 Ch. Div. 483; *Re Dalgleish's Settlement*, 4 Ch. Div. 143, reversing *S. C.* 1 Ch. D. 46; *Re Mundel's Trust*, 6 Jur. N. S. 880; *Re Matthews' Settlement*, 2 W. R. 85. See, however, *Re Robinson's Will*, 9 Jur. N. S. 385.

[An order vesting the property in a person absolutely entitled can be made under this section; *Re Godfrey's Trusts*, 23 Ch. D. 205.

Now that by 44 & 45 Vict. c. 41, s. 30, trust estates devolve upon the legal personal representatives as if they were chattels real, it is conceived that this section has ceased to have any application to lands held by a trustee dying after the 31st December, 1881, except in the case of copyholds as to which see 50 & 51 Vict. c. 73, s. 45, and *Re Mills's Trusts*, 37 Ch. D. 312; 40 Ch. Div. 14, 18, and *ante*, pp. 234, 730.]

[(*b*) Where the death has occurred since the 31st December, 1881, it is now unnecessary to have recourse to this section, see 44 & 45 Vict. c. 41, s. 30; but as to copyholds see 50 & 51 Vict. c. 73, s. 45.]

(*c*) The personal representative of a mortgagee who had *not taken possession*, or the assignee of the representative, may obtain an order vesting the legal estate, which has descended to the heir, notwithstanding the word "re-conveyance" points in strictness to a conveyance to the mortgagor; *Re Boden's Trust*, 1 De G. M. & G. 57; 9 Hare, 820; *Re Quinlan's Trust*, 9 Ir. Ch. Rep. 306; *Re Lea's Trust*, 6 W. R. 482; overruling *Meyrick's Estate*, 9 Hare, 116; and see *Re Hewitt*, 27 L. J. N.S. Ch. 302.

If the mortgagee died intestate, and was *illegitimate*, the Court will make the vesting order on service of the petition on the Crown; *Re Minchin's Estate*, 2 W. R. 179.

If the mortgagee had *taken possession*, the *executors* of the mortgagee may obtain an order for vesting in them the legal estate, which has descended to the heir, under the 9th

for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; that is to say:

When an *heir or devisee* (*a*) of such mortgagee shall be *out of the jurisdiction* of the Court of Chancery or *cannot be found:*

When an *heir or devisee* of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorized agent of such last-mentioned person, have *stated in writing* that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a *proper deed* (*b*) for conveying such lands shall have been *tendered* to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person:

When it shall be uncertain *which of several devisees* of such mortgagee was the *survivor:*

When it shall be uncertain as to the *survivor* of several devisees of such mortgagee, or as to the *heir* of such mortgagee *whether he be living or dead:*

When such mortgagee shall have died intestate as to such lands, and *without an heir*, or shall have died and it *shall not be known who is his heir or devisee:*

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Power, instead of making a vesting order, to appoint a person to execute the requisite conveyance, assignment, or release of *lands*, and to direct the Secretary, Deputy Secretary, or Accountant-General of the Bank of England or other company to transfer the *stock* in question.

XX. And be it enacted, that in every case where (*the Lord Chancellor, intrusted as aforesaid, or*) (*c*) the Court of Chancery, shall, under the provisions of the Act, be enabled to make an order having the effect of a conveyance or assignment of any *lands*, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for (*the Lord Chancellor, intrusted as aforesaid, or*) the Court of Chancery (*as the case may be*) (*d*), should it be deemed more convenient, to *make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right:* and the conveyance or assignment, or release or disposi-

section; *Re Skitter's Trusts*, 4 W. R. 791; or under the 15th section, *Re Keeler*, 11 W. R. 62.

(*a*) See the interpretation clause, p. 1149, *ante*, as to the meaning of the word "devisee."

(*b*) As to the instrument to be tendered in the case of *copyholds*, see *Rowley* v. *Adams*, 14 Beav. 130, where the question arose upon the 17th section, since repealed.

[(*c*) By the Lunacy Act, 1890, sched. 5, sects. 20, 26, 27, 28, 31, 40, 41, 42, 44, 45, 51, 52, and 53 are repealed so far as they relate to "the Lord Chancellor entrusted as aforesaid," except so far as the above sections relate to *Ireland.*]

(*d*) In the case of an *infant* trustee being a "*person of unsound mind*," the case falls, not under lunacy, but under the ordinary jurisdiction of the

tion, of the person so appointed (*a*), shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of (*the Lord Chancellor, intrusted as aforesaid, or*) the Court of Chancery, would in the particular case have had under the provisions of this Act. And in every case where (*the Lord Chancellor, intrusted as aforesaid, or*) the Court of Chancery, shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any *stock* transferable in the books of the Governor and Company of the Bank of *England*, or of any other company or society established or to be established, it shall also be lawful for (*the Lord Chancellor, intrusted as aforesaid, or*) the Court of Chancery, if it be deemed more convenient, to *make an order directing the Secretary, Deputy Secretary, or Accountant General* for the time being of the Governor and Company of the Bank of *England*, or *any officer of such other company or society*, at once to transfer or join in transferring the stock to the person or persons to be named in the order (*b*); and this Act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of *England*, and all other companies or societies, and their officers and servants, for all acts done or permitted to be done pursuant thereto (*c*).

The same powers given to the Duchy Chamber of Lancaster and the Courts of Chancery of the counties palatine of Lancaster and Durham as to *lands* within their respective jurisdictions as are given by the Act to the Court of Chancery.

XXI. And be it enacted, that as to any *lands* situated within the Duchy of *Lancaster* or the counties palatine of *Lancaster* or *Durham*, it shall be lawful for the Court of the Duchy Chamber of *Lancaster*, the Court of Chancery in the county palatine of *Lancaster*, or the Court of Chancery in the county palatine of *Durham*, to make a like order in the same cases as to any lands within the jurisdiction of the same Courts respectively as the Court of Chancery has under the provisions hereinbefore contained been enabled to make concerning any lands; and every such order of the Court of the Duchy Chamber of *Lancaster*,

Court; *Re Arrowsmith's Trusts*, 4 Jur. N. S. 1123; see p. 1152, *ante*, note (*c*).

(*a*) The conveyance should contain a recital showing that it is made in obedience to the order of the Court, and should be executed by the *person appointed to convey in his own name*; though the late Vice-Chancellor of England, in a case arising upon the 1 W. 4. c. 60, seems to have considered that the execution by the person appointed to convey, of a deed purporting to be the conveyance of the trustee who refused, would, with a mere reference in the attestation clause to the order appointing the person to convey, be sufficient; *Ex parte Foley*, 8 Sim. 395.

(*b*) The person here meant is not a beneficiary, but where a person has become absolutely entitled, the Court can appoint him a trustee, and direct a transfer to him; *Re Dickson's Settlement*, 27 L. T. N.S. 671; 21 W. R. 220; [and see *Re Currie*, 10 Ch. Div. 93.]

(*c*) The Court under this section can only direct the bank officer to transfer in the place of the person creating the difficulty, and therefore where the stock was standing in the names of *two* persons, one of whom was out of the jurisdiction, it was necessary to order the person within the jurisdiction to join in the transfer; *Wade* v. *Hopkinson*; *Hodgson* v. *Hodgson*, 1 Set. on Dec. 521, 4th edit.

the Court of Chancery in the county palatine of *Lancaster*, or the Court of Chancery in the county palatine of *Durham*, shall, as to such lands, have the same effect as an order of the Court of Chancery: provided always that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local Courts to be an absent trustee or mortgagee within the meaning of this Act (*a*).

Power where joint or sole trustees of stock or *choses en action* are out of the jurisdiction, or cannot be found, or it is not known whether they are living or dead.

XXII. And be it enacted, that when any person or persons shall be *jointly* entitled with any person *out of the jurisdiction* of the Court of Chancery (*b*), or who *cannot be found*, or concerning whom it shall be *uncertain whether he be living or dead*, to any *stock or chose en action* upon any *trust* (*c*), it shall be lawful for the said Court (*d*), to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof (*e*), or to sue for or recover such *chose*

(*a*) This section does not (nor does 17 & 18 Vict. c. 82) enable the provincial Courts to make orders in *lunacy*; *Re Ormerod*, 3 De G. & J. 249.

[The Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23), provides that the Court of Chancery of the county palatine of Lancaster shall from and after the passing of that Act, as regards all persons, bodies corporate, and property within or becoming subject to its jurisdiction, have and exercise the like powers and jurisdiction, and in a similar manner, and subject to the same restrictions in all respects, as the High Court in its Chancery Division now has and exercises, or may, under or by virtue of any Act of Parliament hereafter passed, and not expressly enacting to the contrary thereof, have and exercise, in respect of all persons, bodies corporate, and property within its jurisdiction; and by the Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47), s. 8, it is provided that "all the powers and authorities under the Trustee Act, 1850, and by the Act of the fifteenth and sixteenth years of the Queen, chapter fifty-five, exercisable by Her Majesty's High Courts of Justice, and all the provisions therein contained, shall and may be exercised in like manner by the Palatine Court with respect to all lands and personal estate within the county palatine: Provided always that no person who is anywhere within the limits of the jurisdiction of the said High Court shall be deemed by the Palatine Court to be an absent trustee or mortgagee within the meaning of the said Acts."]

(*b*) Where the trustee out of the jurisdiction is incapacited from *lunacy* or *infancy*, the power of the Court must be sought for in the enactments applicable to cases of lunatics and infants, and not in this section. Consequently, in a case arising before the Trustee Extension Act (see 3rd section), the Court had no authority to make a vesting order with respect to stock held by an infant trustee out of the jurisdiction; *Cramer* v. *Cramer*, 5 De G. & Sm. 312.

The order should recite the fact that the trustee is out of the jurisdiction; *Re Mainwaring*, 26 Beav. 172.

As to what will amount to being out of the jurisdiction, see *ante*, p. 1153, note (*d*).

(*c*) The *husband* of an executrix is a trustee within the Act; *Ex parte Bradshaw*, 2 De G. M. & G. 900; and see *Re Wood*, 3 De G. F. & J. 125. [But see now 45 & 46 Vict. c. 75, ss. 1, 2, 5, 18.]

(*d*) If the Court be asked to transfer the stock to new trustees appointed under a *power*, it must first be satisfied of the fitness of the persons proposed, and all parties interested must be served; *Re Maynard's Settlement*, 16 Jur. 1084. See p. 1169, note, and p. 1173, note (*b*).

(*e*) Of four trustees of stock one was out of the jurisdiction, and M. R., without disturbing the capital, vested the right to receive the dividends in the three trustees. The Bank appealed from this, on the ground that the section did not authorize an unlimited

en action, or any interest in respect thereof, either in *such person or persons so jointly entitled* as aforesaid, or in such last-mentioned person or persons *together with any person or persons* the said Court may appoint (*a*); and when any *sole* trustee (*b*) of any *stock or chose en action* shall be *out of the jurisdiction* of the said Court, or *cannot be found*, or it shall be uncertain *whether he be living or dead*, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose en action*, or any interest in respect thereof, in any person or persons the said Court may appoint.

When sole trustee of stock or a *chose en action* refuses to transfer the stock, or receive the dividends, or recover the *chose en action.*

XXIII. And be it enacted, that where any *sole trustee* (*c*) of any *stock or chose en action* shall *neglect or refuse to transfer* such stock or to *receive the dividends or income* thereof, or to *sue for or recover such chose en action* or any *interest* in respect thereof, according to the direction of the person *absolutely entitled thereto* (*d*), for the space of twenty-eight days next after a request in writing (*e*) for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Court of Chancery to make an order (*f*) vesting the

severance of the dividends from the capital, and the L. J.J. confined the order to the dividends to accrue during the lives of the *three* trustees; *Re Peyton's Settlement*, 2 De G. & J. 290; 25 Beav. 317.

(*a*) Where the stock is vested in *two* trustees, one of whom is out of the jurisdiction, the Court has no authority under the first branch of the section to vest the right in the person who asks for it as being the *absolute owner*; *Re Brass's Trust*, 4 W. R. 764, but see *Ex parte Bradshaw*, 2 De G. M. & G. 900. [Where a new trustee had been appointed by deed in the place of the trustee out of the jurisdiction the Court vested the right to transfer in the continuing trustee and the new trustee; *Re Blaine's Trusts*, W. N. 1886, p. 203.] It does not appear from the report what jurisdiction the Court had to make the order in *Re Ryan's Settlement*, 9 W. R. 137. The stock was standing in the names of two deceased trustees, and the survivor of them had died intestate, and as letters of administration to him involved no inconvenience, but only expense, the case was not within the purview of the Act, except on the appointment of new trustees; see pp. 1166, note (*a*), and 1171, note (*a*).

(*b*) A. and B. being trustees, the Master found that it was uncertain whether A. was living or dead, but that B. was living. Afterwards B. died. Held that A. was not a sole trustee within the meaning of the 22nd section, as he was not *originally* the sole trustee; *Re Randall's Will*, 1 Drew, 401.

(*c*) Sole trustee may mean the *whole number* of the co-trustees; see interpretation clause, *ante*, p. 1149. *Re Hartnall*, 5 De G. & Sm. 111; [*Re Hyatt's Trusts*, 21 Ch. D. 846.] See *Re Spawforth's Settlement*, 12 W. R. 978, in which case the order was refused, but it does not appear whether, because the request was not in writing, or, which is more likely, because the petitioner's title was disputed.

(*d*) A tenant for life is not a person *absolutely entitled* within the meaning of the Act, except for the purpose of an application limited to the income only; nor is one of two trustees; *Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338; more fully reported 16 Jur. 723. But persons duly appointed new trustees are "*absolutely entitled*;" *Ex parte Russell*, 1 Sim. N. S. 404; *Re Baxter's Will*, 2 Sm. & G. App. v.; *Re Ellis's Settlement*, 24 Beav. 426.

(*e*) The case of a trustee refusing to obey the order of the Court was not within this section; *Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338. But see now sect. 4 of the Trustee Extension Act.

(*f*) As to the person to be served

sole right to transfer such stock, or to receive the dividends or income thereof (*a*), or to sue for and recover such *chose en action*, or any interest in respect thereof, in such person or persons as the said Court may appoint.

When one of several trustees of stock or a *chose en action* refuses to transfer the stock or receive the dividends, or recover the *chose en action.*

XXIV. And be it enacted, that where any *one of the trustees* of any *stock or chose en action* shall *neglect or refuse to transfer* such stock, or to *receive the dividends or income thereof*, or to *sue for or recover such chose en action* according to the directions of the person *absolutely entitled thereto*, for the space of *twenty-eight days* next after a *request in writing* for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose en action*, in the *other trustee* or trustees of the said stock or *chose en action*, or in *any person* or persons whom the said Court may appoint *jointly with such other trustee* or trustees (*b*).

When stock is standing in the name of a deceased person, and the personal representative is out of the jurisdiction, or cannot be found, or it is not known whether he is living or dead, or refuses to transfer or receive the dividends.

XXV. And be it enacted, that when any *stock* shall be standing in the *sole name of a deceased person,* and his or her *personal representative* shall be *out of the jurisdiction* of the Court of Chancery, or *cannot be found* (*c*), or it shall be *uncertain whether such personal representative be living or dead*, or such personal representative (*d*) shall *neglect or refuse to transfer such stock*, or *receive the dividends or income thereof*, according to the direction of the person *absolutely entitled thereto*, for the space of *twenty-eight days* next after a *request in writing* for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends

under this and the following section, see *post*, 1173, note (*b*).

(*a*) The Court cannot, under this section, make any order as to dividends accrued due subsequently to the date of the request, and *à fortiori* not as to *prospective* dividends; *Re Hartnall*, 5 De G. & Sm. 111. See now sect. 4 of Extension Act.

(*b*) See *Re White*, 5 L. R. Ch. App. 698.

[(*c*) Where stock was standing in the names of two original trustees (both deceased), and the survivor of them had died intestate, and there had never been any representation taken to his estate, but new trustees had been appointed under a power, the Court reappointed the new trustees, and made an order vesting the right to call for a transfer of and to transfer the stock in the new trustees; *Re Crowe's Trusts*, 14 Ch. D. 304, 610; and see *Re Hilliard's Settlement Trust*, 42 L. T. N.S. 79.]

(*d*) This enactment applies where the executor of a surviving trustee has not proved, and declines to say whether he intends doing so, and has neglected to transfer; *Re Ellis's Settlement*, 24 Beav. 426; [and where the executor of the executor of the last surviving trustee refuses to prove; *Re Price's Settlement*, W. N. 1883, p. 202]; and see under 1 W. 4. c. 60; *Cockell* v. *Pugh*, 6 Beav. 293; *Re Lunn's Charity*, 15 Sim. 464; and the Court seems to have made a similar order when the next of kin who was entitled to take out administration had refused to make the transfer; *Re Stroud's Trusts*, W. N. 1874, p. 180.

or income thereof, in any person or persons whom the said Court may appoint.

Vesting order as to stock confers a right to transfer the stock and receive the dividends and indemnifies companies and persons acting in obedience to such order.

XXVI. And be it enacted, that where any order shall have been made under any of the provisions of this Act vesting the right (*a*) to any stock in any person or persons appointed by (*the Lord Chancellor, intrusted as aforesaid, or*) (*b*) the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise (*c*), or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of *England*, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of *England*, or such companies, associations or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order (*of the Lord Chancellor, intrusted as aforesaid, or*) of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of *England*, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof.

Effect of vesting order as to *chose en action*.

XXVII. And be it enacted, that where any order shall have been made under the provisions of this Act, (*either by the Lord Chancellor, intrusted as aforesaid, or*) by the Court of Chancery, vesting the legal right to sue for or recover any *chose en action* or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute, in his or their own name or names, any action, suit, or other proceeding at law or in equity for the recovery of such *chose en action*, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such *chose en action*.

(*a*) See sect. 6 of the Trustee Extension Act, and p. 1183, note (*e*), *post*.

[(*b*) See p. 1157, note (*c*).]

[(*c*) See *Re Peacock*, 14 Ch. Div. 212; where the order was made so as to vest in the new trustees the right to call for a transfer of the funds to themselves or to any purchaser or purchasers.]

In the case of copyholds, the Court may, with the consent of the lord, vest the lands or appoint a person to make the necessary surrender.

XXVIII. And be it enacted, that whensoever under any of the provisions of this Act, an order shall be made, (*either*) by (*the Lord Chancellor, intrusted as aforesaid, or*) the Court of Chancery, vesting any *copyhold* or customary lands in any person or persons, and such order shall be made with the *consent* (*a*) *of the lord* or lady of the manor whereof such lands are holden, then the lands shall, *without any surrender or admittance* in respect thereof, vest accordingly; and whenever, under any of the provisions of this Act, an order shall be made (*either*) by (*the Lord Chancellor, intrusted as aforesaid, or*) the Court of Chancery, *appointing any person or persons to convey or assign* any *copyhold* or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands (*b*); and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of the manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments.

When a decree is made for sale of real estate for payment of debts,

XXIX. And be it enacted, that when a decree shall have been made by any Court of equity directing the *sale* of any *lands* for the payment of the *debts* (*c*) of a deceased person, every person *seised* or

(*a*) The Court has power *without the consent of the lord* to vest in the person nominated by the Court all such estate as was vested in the person in respect of whom the inconvenience to be remedied by the Court arises. Such an order does not affect the interests of the lord, and therefore the petition need not be served upon him. On the order being made, the person in whom the property is vested applies for admission as an ordinary surrenderee would have done. So instead of a *vesting* order, the Court, without the consent of the lord, may appoint a person to *convey* the copyholds, and then the person so appointed must surrender, and the surrenderee must be admitted. But to prevent circuity, this section *allows* the lord to consent to a vesting order, and then the estate will vest without the necessity of any surrender or admission; *Paterson* v. *Paterson*, 2 L. R. Eq. 31; *S. C.* 35 Beav. 506; *Re Flitcroft*, 1 Jur. N. S. 418; *Re Hurst*, 1 Set. on Dec. 540, 4th edit.; *Re Hey's Will*, 9 Hare, 221, overruling *Cooper* v. *Jones*, 2 Jur. N.S. 59; *Re Howard*, 3 W. R. 605.

When on the death of a trustee the customary heir was out of the jurisdiction and the Court appointed a new trustee, the lord claimed two fines, one for the admission of the customary heir and another for the admission of the new trustee, but it was ruled that he could claim one fine only, viz., on the admission of the new trustee; *Bristow* v. *Booth*, 5 L. R. C. P. 80.

Where the lord consents, it may be by act *in pais*, without appearance in Court; *Ayles* v. *Cox*, 17 Beav. 585.

[Where a bare trustee of copyholds has died intestate and without an heir, the Court has jurisdiction under this section and section 15 to make an order vesting the copyholds in the beneficial owner; *Re Godfrey's Trusts*, 23 Ch. D. 205.]

(*b*) See 20th section, and see form of order appointing a person to complete the assurance of a copyhold estate; *Re Hey's Will*, 9 Hare, 221.

(*c*) A sale for payment of *costs* of suit was not within this Act; *Weston* v. *Filer*, 5 De G. & Sm. 608. But

the legal owner shall be deemed a trustee within the Act, and the Court may discharge any contingent right.

possessed of such lands, or entitled to a *contingent right* therein as heir, or under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this Act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person (*a*).

In decrees for specific performance, partition, or exchange, or where any conveyance is directed by

XXX. And be it enacted, that where any *decree* (*b*) shall be made by any Court of equity for the *specific performance* of a contract concerning any *lands* (*c*), or for the *partition* (*d*) or *exchange* of any *lands*, or generally when any *decree* shall be made for the *conveyance or assignment* of any *lands* (*e*), either in cases arising out of the doctrine

see now sect. 1 of the Trustee Extension Act, and *Wake* v. *Wake*, 17 Jur. 545.

(*a*) See such an order without a petition in *Wood* v. *Beetlestone*, 1 K. & J. 213. But see *Gough* v. *Bage*, 25 L. T. N.S. 738.

(*b*) See Trustee Extension Act, s. 1, which applies not only to a decree but to any *order* of the Court.

(*c*) See such an order under this Act and the Trustee Extension Act, in *Ex parte Mornington*, 4 De G. M. & G. 537. [In suits for the specific performance of a contract for a *lease* the Court has on several occasions made orders under this section appointing a person to convey, or vesting the interests of unborn persons; see *Hodgson* v. *Bower*, *Howell* v. *Palmer*, 1 Set. on Dec. 4th edit. pp. 529, 530; *Hall* v. *Hale*, 51 L. T. N.S. 226; but in *Grace* v. *Baynton*, 25 W. R. 506, the late M. R. expressed his opinion that in such a case the Court had no power either to appoint a person to convey in the place of a party refusing to execute the lease, or to make a vesting order.]

(*d*) In a *partition* suit, instead of giving an *infant* entitled to a share a day to show cause, the Court may declare him to be a trustee of such parts of the property as are allotted to other parties; *Bowra* v. *Wright*, 4 De G. & Sm. 265.

Where a *lunatic* was interested in an undivided share, and a partition was decreed with a declaration that the lunatic was a trustee within the Act, the L. JJ. authorized the committee of the estate to convey by an order made under the Trustee Act, and under 16 & 17 Vict. c. 70 (repealed by the Lunacy Act, 1890, see *post*, p. 1187); *Re Bloomar*, 2 De G. & J. 88. But it was afterwards held that the L.JJ. had jurisdiction to make a vesting order under the Trustee Act; *Re Molyneux*, 4 De G. F. & J. 365.

(*e*) In a foreclosure suit by an equitable mortgagee, the Court in making an absolute decree for foreclosure and directing a conveyance, can add a declaration that the mortgagor is a trustee for the mortgagee, and make a vesting order; *Lechmere* v. *Clamp* (No. 2), 30 Beav. 218; *S. C.* (No. 3), 31 Beav. 578; [and in a recent case of an equitable mortgage, where the mortgagor had died having devised his estate to trustees upon trust for sale, and the trustees having disclaimed, the *legal* estate descended to the heir of the mortgagor, who was an infant and was made a defendant to a foreclosure action, the Court, in making the usual foreclosure decree, inserted a declaration that "in case the plaintiffs were not redeemed within six months, the infant should be a trustee for them within the Act, and that his mother, who was executrix of the mortgagor, should be ordered to convey on his behalf;" *Foster* v. *Parker*, 8 Ch. D. 147; but where the mortgagor who had created an equitable mortgage by deposit died intestate, and the estate descended to the infant heir subject to the mortgage, the judgment directed the infant to convey when he attained twenty-one, and gave him a day to show cause; *Mellor* v. *Porter*, 25 Ch. D. 158. "This section applies to all cases where there is a judgment against an infant for an immediate conveyance, but this is not the form of a judgment for foreclosure in the

of election *or otherwise*, it shall be lawful for the said Court to declare that any of the *parties to the said suit* wherein such decree is made are trustees of such lands or any parts thereof, within the meaning of this Act, or to declare concerning the interests of *unborn persons* (*a*) who might claim under any *party to the said suit*, or under the *will or voluntary settlement* of any person deceased who was during his lifetime a *party to the contract or transactions* concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this Act, and thereupon it shall be lawful for (*the Lord Chancellor, intrusted as aforesaid, or*) the Court of Chancery, (*as the case may be,*) to make such order or orders as to the estates, rights and interests of such persons, born or unborn, as the said Court (*or the said Lord Chancellor*) might under the provisions of this Act make concerning the estates, rights and interests of trustees born or unborn.

decree, the Court may declare persons born or unborn to be trustees within the Act, and make orders accordingly.

XXXI. And be it enacted, that it shall be lawful for (*the Lord Chancellor, intrusted as aforesaid, or*) the Court of Chancery, *to make declarations and give directions concerning the manner* in which the *right to any stock or chose en action* vested under the provisions of this Act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced (*b*).

Court has power to give directions how the right to any stock or *chose en action* shall be exercised.

XXXII. And be it enacted, that whenever it shall be *expedient* (*c*) to

Power of the Court to make orders appointing new trustees.

case of an equitable mortgagee," *per* Kay, J., *Mellor* v. *Porter, ubi sup.*] In another case the Court required a *separate* application to be made; *Smith* v. *Boucher*, 1 Sm. & G. 72.

In *Weston* v. *Filer*, 5 De G. & Sm. 608, where an estate had been ordered to be sold for payment of costs, there was no *decree* for a *conveyance*, so that the case was not within the section; and V. C. Parker considered that it could not be deemed a case of constructive trust, but as to this see *Jackson* v. *Milfield*, 5 Hare, 538, and the other cases on sect. 18 of the 1 W. 4. c. 60, note (*e*), p. 839 of 3rd edit. of this work.

The vesting order may now be obtained at chambers; [Rules of the Supreme Court, O. lv. r. 2 (8); r. 13 a; *post*, p. 1172; *Re Morris's Settlement*, W.N. 1889, p. 31; 37 W.R. 317; 60 L. T.N.S. 96.]

(*a*) The expression "unborn persons" has been construed liberally, and has been held to include the "*heirs* of a person now *living*; *Basnett* v. *Moxon*, 20 L. R. Eq. 182.

(*b*) Under this section the Court has no jurisdiction to order the fund into Court; *Re Parby*, 29 L. T. 72. But it can direct trustees to transfer into Court under the Trustee Relief Act; *Re Thornton's Trusts*, 9 W. R. 475.

(*c*) Where a trustee appointed by a will is an *infant*, the Court deems it expedient to appoint a trustee in his place; *Re Porter's Trust*, 2 Jur. N.S. 349; *Re Gartside's Estate*, 1 W. R. 196. But the order should be without prejudice to an application by the infant on his coming of age to be restored to the trust; *Re Shelmerdine*, 33 L. J. N.S. Ch. 474; [*Re Brunt*, W. N. 1883, p. 220; *Re Tallatire*, W. N. 1885, p. 191.

Where a trustee is by age and infirmity incapable of acting as a trustee the Court considers it expedient to appoint a new trustee in his place; *Re Lemann's Trusts*, 22 Ch. D. 633; *Re Phelps' Settlement Trusts*, 31 Ch. Div. 351; and see *Re Barber*, 39 Ch. Div. 187.]

Where there is a great difficulty in ob-

appoint (*a*) *a new trustee or new trustees*, and it shall be found *inexpedient, difficult* (*b*) or *impracticable* so to do without the assistance of

taining *administration* to the deceased trustee, or last surviving trustee, the Court considers it *expedient* to appoint new trustees; *Davis* v. *Chanter*, 4 Jur. N.S. 272; *Re Matthews*, 26 Beav. 463; or generally where there is no personal representative of a surviving trustee; *Re Davis' Trust*, 12 L. R. Eq. 214.

Where two trustees were desirous of retiring, and it was *doubtful* whether the power of appointing new trustees in the settlement applied to the case, it was deemed *expedient* to appoint new trustees; *Re Woodgate's Settlement*, 5 W. R. 448; *Re Armstrong's Settlement*, Ib.

A trustee had become bankrupt, never surrendered, and absconded, and the Court under the Trustee Act, 1850, and the Bankruptcy Act, 1849, s. 130, appointed a new trustee in his place; *Re Renshaw's Trusts*, 4 L. R. Ch. App. 783.

The three trustees appointed by a testator died in his lifetime, and the Court appointed new trustees; *Re Smirthwaite's Trusts*, 11 L. R. Eq. 251.

Under the combined effect of this section, and of the Bankruptcy Act, [1883, s. 147, which in substance re-enacted the 117th section of the Bankruptcy Act, 1869] the Court has power to appoint a new trustee in the place of a trustee who has become bankrupt, whether he voluntarily resigns or not; *Coombes* v. *Brookes*, 12 L. R. Eq. 61.

[Where the sole trustee of a will, who had acted and was in no way personally disqualified from continuing to act in the trusts, was desirous of being discharged from the trusts of a particular fund forming a portion of the trust property, and had expressed his intention of lodging such fund in Court unless new trustees were appointed in respect of it, whom he declined to appoint himself, it was held that there was not a case of expediency for the appointment of additional trustees within sect. 32; In *Re Nesbitt's Trusts*, 19 L. R. Ir. 509.]

(*a*) The Court cannot under the Act *remove* a trustee who is willing to act; *Re Hodson's Settlement*, 9 Hare, 118; *Re Hadley*, 5 De G. & Sm. 67; *Re Garty's Settlement*, 3 N. R. 636; [*Re Combs*, 51 L. T. N.S. 45.] Thus where one of the two trustees was residing out of the jurisdiction, but it did not appear whether such residence was likely to be permanent, the Court refused to appoint a new trustee in his room; *Re Mais*, 19 Jur. 608; see *Re Lincoln Primitive Methodists*, 1 Jur. N. S. 1011. [Where it was alleged that a trustee was of unsound mind, but the trustee disputed his insanity and was unwilling to be removed, the Court refused to make an order; *Re Combs*, 51 L. T. N.S. 45.] If there be ground for *removing* a trustee for misconduct or other cause, the application to the Court should be by suit, as it was not the intention of the Act to deprive retiring trustees of their right to have their accounts taken in the presence of their *cestuis que trust*, or of their *lien* upon the trust estate, for any balance due to them; *Re Blanchard*, 7 Jur. N. S. 505. Even a *solicitor*, though an officer of the Court, is not removable by petition against his will, on grounds of misconduct in the character, not of solicitor, but of trustee; *Re Blanchard*, 3 De G. F. & J. 131. But where one of the trustees had gone to Australia, and it was not known where he was, the Court appointed a new trustee in his place; *Re Harrison's Trusts*, 22 L. J. N.S. Ch. 69. And where an assignee in bankruptcy had resigned his office and gone abroad, and the creditors had accepted his resignation, the Court made a vesting order; *Re Joyce's Estate*, 2 L. R. Eq. 576; and in another case where a trustee had gone abroad to reside permanently the Court appointed a trustee in his place; *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223. [Under the Bankruptcy Act, 1883, s. 147, as was the case under the Bankruptcy Act, 1869, s. 117, a bankrupt trustee may be removed against his will, both these sections containing the words "whether voluntarily resigning or not;" *Re Adams' Trusts*, 12 Ch. D. 634. A bankrupt trustee who had obtained his discharge was removed on the application of his co-trustee, who was also a beneficiary, although the application was opposed by beneficiaries entitled to larger shares than the petitioner; *Re Foster's Trusts*, 55 L. T. N.S. 479.]

(*b*) Where there is a *power of appointment* of new trustees, and the donee is willing to exercise it, the

the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or trustees, either in substitution for or in addition to any existing trustee or trustees (*a*).

Court will not appoint new trustees upon a suggestion that the power will be improperly exercised; *Re Hodson's Settlement*, 9 Hare, 118. But where the parties having the power of appointing new trustees were resident in India, the Court made an order; *Re Humphry's Estate*, 1 Jur. N.S. 921. [And where the power of appointment was vested in husband and wife jointly, and the wife had obtained a judicial separation, and the husband was resident abroad, the Court made an order; *Re Somerset*, W. N. 1887, p. 122.] If the power of appointing new trustees be vested in a lunatic, the Court of Chancery has jurisdiction to appoint a new trustee not under the special power given to the lunatic, but under the statutory power of the Act; *Re Sparrow*, 5 L. R. Ch. App. 662. [See s. 128 of the Lunacy Act, 1890, *post*, p. 1188. The petition should state, if such is the case, that there is a power of appointing new trustees, but that the persons capable of exercising it are not willing to do so; *Re Sutton*, W. N. 1885, p. 122.]

Where trustees had been already appointed under a power, the Court has in some cases appointed them again for the purpose of making a vesting order; *Re Mundel's Trust*, 2 L. T. N.S. 653; [*Re Pearson*, 5 Ch. Div. 982; *Re Chell*, 49 L. T. N.S. 196;] *Re Carson's Settlement Trusts*, W. N. 1867, p. 32; *Re Clay's Settlement*, W. N. 1873, p. 129; *Re Dalgleish's Settlement*, 4 Ch. Div. 143, reversing *S. C.* 1 Ch. D. 46; [*Re M'Carthy's Trusts*, 1 L. R. Ir. 16; but in *Re Vicat*, 33 Ch. Div. 103, a case in lunacy, L.JJ. Cotton and Lindley considered that it was not proper to reappoint trustees of the validity of whose appointment under the power there was no doubt, and declined to make such an order, and in the subsequent case in Chancery of *Re Dewhirst's Trusts*, 33 Ch. Div. 416, the Court of Appeal followed *Re Vicat*, and held that the earlier authorities must be treated as over-ruled; and see *Re Gardiner's Trusts*, 33 Ch. D. 590;] *Re Driver's Settlement*, 19 L. R. Eq. 352. But where such an order has been made, the Court, before making it, has required evidence of the fitness of the persons to be appointed; *Re Maynard's Settlement*, 16 Jur. 1084.

(*a*) Where it is sought to substitute a trustee in the place of a *lunatic* trustee, the application must be made in lunacy; *Re Ormerod*, 3 De G. & J. 249, and cases there cited; *Re Davidson*, 20 L. J. N.S. Ch. 644; *Re Waugh's Trust*, 2 De G. M. &. G. 279; *Re Good Intent Benefit Society*, 2 W. R. 671; *Jeffryes* v. *Drysdale*, 9 W. R. 428; see Trustee Extension Act, s. 10, [repealed by the Lunacy Act, 1890, but replaced by s. 141 of that Act, see post p. 1191,] and see *Re Burton's Trusts*, 6 Ir. R. Eq. 270.

On an application for the appointment of new trustees and a vesting order where the legal estate is vested in three persons, one of whom is a lunatic, the petition should be presented in Lunacy as well as in Chancery; *Re Mason*, 10 L. R. Ch. App. 273; [*Re Duce's* or *Druce's Trusts*, 30, W. R. 759; 46 L. T. N.S. 669; but where the application is merely for the appointment of new trustees and no vesting order is required, the order may be made in Chancery only; *Re Vicker's Trusts*, 3 Ch. D. 112. Where there were originally three trustees, and a new trustee had been appointed under a power, in the place of one of the trustees who was a lunatic, it was held that a petition for a vesting order must be entitled in Chancery as well as in Lunacy, as otherwise the vesting order would sever the joint tenancy, and that the new trustee must be reappointed by the Court before a vesting order could be made; *Re Pearson*, 5 Ch. Div. 982; *Re Chell*, 49 L. T. N.S. 196. Where the existing trustee was of unsound mind *and out of the jurisdiction*, new trustees were appointed in Chancery and a vesting order made under sect. 9; *Re Gardner's Trusts*, 10 Ch. D. 29.]

If the power of appointing new trustees be in the tenant for life who is a *lunatic*, the Court will not appoint a new trustee under the Act until the appointment of a committee; *Re Parker's Trusts*, 32 Beav. 580.

In an application to the Court, for

Powers of new trustees.

XXXIII. And be it enacted, that the person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees,

the appointment of new trustees of a settlement, it was objected that the deed was *invalid*, but the Court refused to enter into that question, and appointed new trustees to protect the property; *Re Matthews*, 26 Beav. 463.

The decisions were formerly in conflict, whether under this section the Court could appoint new trustees in a case where there was *no existing trustee*, Vice-Chancellor Parker holding the affirmative; *Re Tyler's Trust*, 5 De G. & Sm. 56; and Vice-Chancellor Turner the negative; *Re Hazeldine*, 16 Jur. 853. And see *Re Frost's Settlement*, 15 Jur. 644. But all doubt for the future has been removed by the 9th section of the Trustee Extension Act.

The Court in appointing new trustees under this section does not limit itself necessarily to the number named in the original instrument of trust. Thus it has appointed two instead of one; *Tunstall's Will*, 4 De G. & Sm. 421; and has added two new trustees to the two original trustees; *Re Baycott*, 5 W. R. 15. But it never appoints a *single* trustee where there were originally more trustees than one; *Re Ellison's Trust*, 2 Jur. N. S. 62; *Re Porter's Trust*, 2 Jur. N. S. 349; *Re Tunstall*, 15 Jur. 645; *Re Dickinson's Trust*, 1 Jur. N. S. 724. But where there was only one trustee originally and the trust was coming to an end the Court appointed a single trustee; *Re Reynault*, 16 Jur. 233. The Court will appoint two trustees where there were originally three; *Bulkeley* v. *Earl of Eglinton*, 1 Jur. N. S. 994; *Re Marriot's Settlement*, 18 L. T. N.S. 749; or will appoint three where there were originally four; *Emmet* v. *Clarke*, 7 Jur. N. S. 404; and where a fund was bequeathed to a single trustee upon trust for a person for life, with remainder to two others, and the remaindermen petitioned for the appointment of an additional trustee, the Court made the order but threw the costs upon the remaindermen; *Re Brackenbury's Trusts*, 10 L. R. Eq. 45; [*Re Gregson's Trusts*, 34 Ch. D. 209.]

In one case, where there was a power of appointing new trustees, with a direction that the number might be augmented or reduced, and one of the three trustees wished to retire, but no new trustee could be found, the Court appointed the two continuing trustees to be the sole trustees; *Re Stokes' Trusts*, 13 L. R. Eq. 333; [and this decision was subsequently followed in *Re Tatham's Trusts*, W. N. 1877, p. 259; *Re Harford's Trusts*, 13 Ch. D. 135; *Re Gibbin's Trusts*, W. N. 1880, p. 99; *Re Shipperdson's Trusts*, 49 L. J. N.S. Ch. 619; *Re Northorp*, 29 W. R. 134; and see *Re Mare's Trusts*, W. N. 1887, p. 232; *Re Fowler's Trusts*, 55 L. T. N.S. 546] but in *Re Colyer*, 50 L. J. N.S. Ch. 479, L. J. Cotton, in a Lunacy petition, declined to follow it, and required the full number of trustees to be made up; and in *Re Aston*, 23 Ch. Div. 217, the late M. R., with the concurrence of the other members of the Court, while adhering to his decision in *Re Harford's Trusts*, declined to follow it, on the ground of L. J. Cotton's objection, and to avoid a conflict of decisions between the practice of different members of the Court; and see *Re Lamb's Trusts*, 28 Ch. D. 77; *Re Gardiner's Trusts*, 33 Ch. D. 590. But where the whole of the fund is immediately divisible, the Court will not require the appointment of a new trustee; *Re Martyn*, 26 Ch. Div. 745; *Re Lamb's Trust*, *ubi supra*; and in one case where an action was pending to execute the trusts, the Court dispensed with a new trustee on the continuing trustees undertaking to bring the trust funds immediately into Court in the action; *Davies* v. *Hodgson*, 32 Ch. D. 225.]

In the case of a *charity*, the Court appointed ten new trustees and vested the estate in the whole body, and directed that when reduced to three the trustees should apply at Chambers for the appointment of new trustees; *Re Bergholt*, 2 Eq. Rep. 90.

The Court will not [in general] appoint persons trustees who are resident *out of the jurisdiction*; *Re Guibert*, 16 Jur. 852; *Re Curtis's Trust*, 5 Ir. R. Eq. 429; [but the Court has in several cases, where the special circumstances rendered that course advisable, appointed such trustees; *Re Liddiard* 14 Ch. D. 310; *Re Austen's Settlement*, 38 L. T. N.S. 601; *Re Cunard's Trusts*, 48 L. J. N.S. Ch. 192; 27 W. R. 52; *Re Hill's Trusts*, W. N. 1874, p. 228; *Re Freeman's Settlement*, 37 Ch. D.

shall have all the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.

148;] and it will not appoint one of the *cestuis que trust* a trustee, if it can be avoided; *Ex parte Clutton*, 17 Jur. 988; *Re Clissold's settlement*, 10 L. T. N.S. 642; *Ex parte Conybeare's Settlement*, 1 W. R. 458; and see *Re Giraud*, 32 Beav. 385.

The husband of a *cestui que trust* was appointed jointly with another, on the husband's undertaking that if he became sole trustee he would immediately take steps for the appointment of a co-trustee; *Re Hattatt's Trusts*, 21 L. T. N.S. 781; 18 W. R. 416; [*Re Burgess's Trusts*, W. N. 1877, p. 87; *Re Lightbody's Trusts*, 52 L. T. N.S. 40; but this undertaking was not required in *Re Jesson* (In Lunacy, 7 Aug. 1878, M.S.), where three new trustees were appointed, one of whom was the husband of the tenant for life.] In another case one of the firm of solicitors who acted for the petitioners was appointed trustee; *Re Brentnall's Trusts*, W. N. 1872, p. 77.

Though a *cestui que trust* may apply for the appointment of new trustees by *petition* under the Act, he is not precluded from instituting a suit for that purpose; *Legg* v. *Mackrell*, 1 Giff. 165; 4 L. T. N.S. 568. But if he adopt the latter course instead of presenting a petition, the Court may make the offending party answerable for the difference of the costs; *Thomas* v. *Walker*, 18 Beav. 521.

[Upon an originating summons for administration and the appointment of new trustees, all persons interested being parties, the Court, in the exercise of its general jurisdiction, made an appointment; *Re Allen*, 56 L. J. Ch. 779; 56 L. T. N.S. 611, and see O. lv. r. 13a, *post*, p. 1172.]

Where there are *two distinct trust estates* under the same will, but only one set of trustees, the Court, with the consent of the representative of the surviving trustee, will appoint new trustees of one estate without dealing with the other estate; *Re Dennis*, 12 W. R. 575; and generally the Court has assumed the like power of appointing separate trustees of separate shares; *Re Cotterill's Trusts*, W. N. 1869, p. 183; *Re Cunard's Trusts*, 48 L. J. N.S. Ch. 129; 27 W. R. 52; *Re Paine's Trusts*, 28 Ch. D. 725; *Re Moss's Trusts*, 37 Ch. D. 513; and sect. 5 of the Conveyancing Act, 1882, 45 & 46 Vict. c. 39, now expressly authorizes this to be done. Under that section the application may be made although the trusts of the separate shares may in certain events become identical; *Re Hetherington's Trusts*, 34 Ch. D. 211; but not unless an appointment of new trustees of the whole property is being made; *Savile* v. *Couper*, 36 Ch. D. 520; *Re Nesbitt's Trusts*, 19 L. R. Ir. 509; but this latter restriction does not apply when the appointment is within the Trustee Act; *Re Moss's Trusts*, *ubi supra*.

The Court can appoint new trustees under this section where a trust is an *office* without any estate; *Re Boyce*, 4 De G. J. & Sm. 205; 10 Jur. N. S. 138; but in such a case where the trustee was a lunatic, the order should have been made both in Chancery and Lunacy; *S. C.* see *ante*, p. 1150, note (*a*). But by the 10th section of the Extension Act the order could be made in lunacy only; *Re Owen*, 4 L. R. Ch. App. 782. [*Re Rolls Hoare*, W. N. 1888, p. 94; and see now the Lunacy Act, 1890, sect. 141, *post*, p. 1191.] The Court (notwithstanding the 197th section of the Bankruptcy Act, 24 & 25 Vict. c. 134) appointed new trustees of a creditors' deed; *Re Price's Trust Deed*, 6 L. R. Eq. 460; *Re Bache's Trust*, 16 W. R. 1078; *Re Raphael's Trust Estate*, 9 L. R. Eq. 233; *Re Donisthorpe*, 10 L. R. Ch. App. 55.

In addition to the evidence of the necessary facts to bring the case within the Act, the Court before appointing new trustees requires evidence by affidavit of the *fitness* of the proposed trustees, and *their consent* to act; *Re Battersby's Trust*, 16 Jur. 900. But if the evidence be satisfactory the Court will make the order at once, without a *reference*; *Re Tunstall*, 15 Jur. 645. [In ordinary cases an affidavit of fitness by one responsible person is sufficient, and the costs of a second affidavit may be disallowed, but if the trust fund be of large amount, the evidence of a second person may be required; *Re Hartley's Will*, W. N. 1879, p. 197; *Re Arden*, W. N. 1887, p. 166. Where the proposed new trustee has been

Power of the Court on appointing new trustees to vest the lands.

XXXIV. And be it enacted, that it shall be lawful (*a*) for the said Court of Chancery upon making any order (*b*) for appointing a new trustee or new trustees, either by the same or by any subsequent order (*c*), to direct that any *lands* subject to the trust (*d*) shall *vest* in the person or persons who upon the appointment shall be the trustee or trustees, for such estate as the Court shall direct; and such order shall have

described simply as "gentleman" the Court has disallowed the costs of the affidavit on the ground of its being useless, owing to the vagueness of the description; *Re Horwood*, 55 L. T. N.S. 373; *Re Orde*, 24 Ch. Div. 271; and the deponent by whom the affidavit is made should be described fully and not merely as "gentleman;" *Re Horwood, ubi sup.*; and as to the form of affidavit of fitness, see *Re Castle Sterry's Trusts*, W. N. 1888, p. 179.]

Where the trust fund is the subject of a *suit*, the affidavit of the *solicitor in the cause* is not the proper evidence of the fitness of the new trustee, as it is the trustees' duty to watch the solicitor; *Grundy* v. *Buckeridge*, 22 L. J. N.S. Ch. 1007.

The new trustees *need* not appear upon the petition to consent; *Re Draper's Settlement*, 2 W. R. 440; though they *may* appear to consent; *Re Parke's Trust*, 21 L. T. 218. If they do not appear an *affidavit* that the proposed new trustees will consent is insufficient; *Re Parke's Trust*, 21 L. T. 218; and their *written consent* must be proved. [But now by Order 38, r. 19a, a written consent signed by the trustee and verified by the signature of his solicitor is sufficient evidence of his consent. This order does not apply to proceedings in lunacy; *Re Wilson, a lunatic*, 31 Ch. Div. 522; but it applies to proceedings in Chancery, although entitled in lunacy also; *Re Hume* (No. 2), 35 Ch. Div. 457.]

In one order the Court inadvertently appointed an *alien* a trustee and afterwards refused to substitute a natural born subject without the consent of the Crown, which was not given. The order was then reheard by the same judge *pro formâ* and discharged, and a natural born subject appointed in the place of the alien; *Re Giraud*, 32 Beav. 385. See now 33 Vict. c. 14, s. 2. Where the *cestuis que trust* were living abroad and English trustees could not be found, the Court appointed aliens; *Re Hill's Trusts*, W. N. 1874, p. 228; [and see *ante*, p. 1168.]

As to the parties to be served on applications for the appointment of new trustees, see note (*b*), p. 1173, *infra*.

(*a*) The late Vice-Chancellor Parker was not disposed to make a *vesting* order in cases where a *conveyance* could be had; *Langhorn* v. *Langhorn*, 21 L. J. N.S. Ch. 860. But it is clear that the Court has power to make, and according to the present practice, it frequently does make, vesting orders even where there is no incapacity in the person seised or possessed of the legal estate to convey to the new trustee; *Re Manning's Trusts*, Kay, App. xxviii.

[(*b*) Where a trustee, ordered to transfer stock, died before the completion of an order appointing new trustees and vesting the estate, the petition was amended and the order was re-made so as to bear date subsequently to the production of the necessary evidence; *Re Havelock's Trusts*, 11 Jur. N. S. 906; 35 L. J. Ch. 228; 14 W. R. 26, 174.]

(*c*) The new trustees may be appointed in a suit, and a *vesting order* may be made *subsequently*. See *Re Hughes's Settlement*, 2 H. & M. 695.

(*d*) If the lands be *leaseholds* for a term of years, the Court can, under this section, make a vesting order, and without the concurrence of the landlord, unless there was a restriction against alienation; *Re Matthew's Settlement*, 2 W. R. 85, &c.; [*Re Driver's Settlement*, 19 L. R. Eq. 352; *Re Dalyleish's Settlement*, 4 Ch. Div. 143, reversing *S. C.* 1 Ch. D. 46; *Re Rathbone*, 2 Ch. Div. 483;] see *ante*, p. 1156, note (*a*). But see *Re Farrant's Trust*, 20 L. J. Ch. 532. And the Court has jurisdiction to vest the estate though it has escheated to the Crown, provided the Crown consent; *Re Martinez' Trust*, W. N. 1870, p. 70; 22 L. T. N.S. 403; and see sect. 15, of this Act.

the same effect as if the person or persons who before such order [was or] were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate (*a*).

Power of the Court to vest right in the trustees to call for transfer of stock or sue for any *chose en action*.

XXXV. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making an order for appointing a new trustee or new trustees, either by the same or by any subsequent order (*b*), to *vest* the right to call for a transfer of any *stock* (*c*) subject to the trust, or to receive the *dividends* or income thereof, or to sue for or recover any *chose en action*, subject to the trust, or any *interest* in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees (*d*).

Old trustees not to be discharged from liability.

XXXVI. And be it enacted, that any such appointment by the Court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Who may apply in case of trust.

XXXVII. And be it enacted, that an order under any of the hereinbefore contained provisions for the appointment of a *new trustee or*

(*a*) The Court has jurisdiction to divest the *whole estate* from the continuing and incapacitated trustees, and to vest it in the new body of trustees (including the continuing trustees) as joint tenants; *Re Fisher's Will*, 1 W. R. 505; *Smith* v. *Smith*, 3 Drew. 72, overruling *Re Watts's Settlement*, 9 Hare, 106, and *Re Plyer's Trust*, Ib. 220. But the Court has no power to give any direction as to the mode in which the trust shall be executed by the trustees; *Re Tayler*, 2 De G. F. & J. 125; see *ante*, p. 1065, note (*b*). [And where in an action judgment was given removing a trustee who was of unsound mind, the Court declined to make a vesting order under this section, considering that application ought to be made in lunacy; *Re Martin*, 34 Ch. Div. 618.]

[(*b*) Where part of the trust property was inadvertently omitted from the order appointing new trustees and vesting the trust property in them, a further order was made on a new petition vesting the property so omitted in the new trustees, *Re Hopper's Trust*, W. N. 1886, p. 41; 54 L. T. N.S. 267.]

(*c*) The Court has no power under this section to vest the *right to the stock* itself, but only the right to *call for a transfer*; and an order professing to vest the right to the stock was accordingly discharged; *Re Smyths' Settlement*, 4 De G. & Sm. 499; but see now sect. 6 of the Trustee Extension Act, and p. 1183, *post*, note (*e*).

The Court has power under this section to vest the right to stock standing in the name of a deceased person who has no personal representative; *Re Herbert's Will*, 8 W. R. 272. [See *Re Crowe's Trusts*, 14 Ch. D. 304, 610.]

The Court will not make a vesting order which would lend any sanction to a past breach of trust; *Re Harrison*, 22 L. J. N.S. Ch. 69. And the Court, as distinct from the L. C. & L. JJ., will not make a vesting order where the old trustee in whom the property is vested is a lunatic; *Re Smith's Trusts*, 4 Ir. R. Eq. 180.

[Where part of the trust funds had been invested in unauthorized securities, and it was desired to sell them and reinvest the proceeds in proper securities, the Court vested in the new trustees the right to call for a transfer of the funds to themselves, or to *any purchaser or purchasers*, the trustees undertaking to hold the proceeds on the trusts of the settlement; *Re Peacock*, 14 Ch. Div. 212.]

(*d*) A vesting order vests the estate from the date of the order; *Woodfall* v. *Arbuthnot*, 3 L. R. P. & D. 108.

trustees, or concerning any *lands, stock, or chose en action* subject to a trust, may be made upon the application of any *person beneficially interested* in such lands, stock, or *chose en action*, whether under disability or not (*a*), or upon the application of any *person duly appointed as a trustee thereof;* and that an order under any of the provisions hereinbefore contained concerning any *lands, stock, or chose en action* subject to a *mortgage*, may be made on the application of any person *beneficially interested* in the *equity of redemption*, whether under disability or not, or of any *person interested in the monies secured by such mortgage*.

Who may apply in case of mortgage.

XXXVIII. and XXXIX. (*These sections were repealed by* "The Statute Law Revision Act, 1875.")

Power to present petition in the first instance.

XL. And be it enacted, that any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, (*or from the Lord Chancellor intrusted as aforesaid,*) (*b*) may, should he so think fit, *present a petition* (*c*) in the first instance to the Court of Chancery, (*or to the Lord Chancellor intrusted as aforesaid,*) for such order as he may deem himself entitled to (*d*), and may give

(*a*) A person *contingently* entitled to a beneficial interest is within the meaning of the Act; *Re Sheppard's Trusts*, 8 Jur. N. S. 711, reversed 1 N. R. 76; 4 De G. F. & J. 423.

In sales by the Court the *purchaser*, as beneficially interested in the property sold, is within the meaning of the section; *Ayles* v. *Cox*, 17 Beav. 584; *Rowley* v. *Adams*, 14 Beav. 130. And the plaintiffs in the suit, as beneficially interested in the proceeds, are also within the meaning of the section; *Re Wragg*, 1 De G. J. & S. 356. And of course the purchaser or several purchasers and the plaintiffs can join as co-petitioners; *Rowley* v. *Adams*, 17 Beav. 130; see 135.

Committees of a lunatic *cestui que trust* are not beneficially interested within the meaning of the section; *Re Bourke*, 2 De G. J. & S. 426.

(*b*) See *ante*, p. 1157, note (*c*).

(*c*) Rule 13a of R. S. C., O. 55, which came into operation in June, 1889, provides, "that in all cases in which the Court has jurisdiction to appoint new trustees upon petition, an application may be made to a judge in chambers by summons, and thereupon new trustees may be appointed; and by the same or by any subsequent orders to be made on the same or any other summons for the purpose, such vesting and other consequential orders may be made as the Court has jurisdiction to make upon petition for the appointment of new trustees. Every such summons shall be intituled in the same manner as the petition seeking the like relief ought to have been, and shall be served upon the same persons upon whom the petition ought to have been served."

Where trustees have been appointed out of Court, this rule does not apply, and a vesting order can only be obtained on petition; *Re Peach*, 33 Sol. Jo. 575.

The particular sections under which the Court is asked to make an order should be indicated in the petition (or summons); *Re Moss's Trusts*, 37 Ch. D. 513; *Re Hall's Settlement*, 58 L. T. N.S. 76.

In a complicated case a petition may be presented, notwithstanding the rule, and the costs thereof allowed; *Re Morris's Settlement*, 60 L. T. N.S. 96; 37 W. R. 317; W. N. 1889, p. 31.

Where trustees had been appointed by the Court in an administration action, and an application by summons in the action for the appointment of new trustees had been refused on the ground that the above rule applies to originating summonses only, North, J., on motion under sect. 43, made an order referring it to Chambers to appoint new trustees; *Re Kay*, W. N. 1889, p. 80.

(*d*) When a petition has been pre-

evidence by *affidavit or otherwise* (*a*) in support of such petition before the said Court, (*or the Lord Chancellor intrusted as aforesaid,*) and may *serve such person or persons* with notice of such petition *as he may deem entitled to the service thereof* (*b*).

Form of evidence.

Who to be served.

XLI. And be it enacted, that upon the hearing of any such (*motion or*) (*c*) petition it shall be lawful for the said Court, (*or for the said Lord Chancellor,*) should it be deemed necessary, to *direct a reference* to one of the Masters in Ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said Court (*or the said Lord Chancellor*) to direct such

The Court may either make an order on the petition or direct a reference, or the petition to stand over for further evidence or service on other parties.

sented, it may be *amended* by order of the Court by adding co-petitioners without being re-answered; *Re Cartwright's Trust*, 8 W. R. 492.

(*a*) In practice the *evidence* adduced is universally by affidavit, but under the words "or otherwise" the applicant is not confined to evidence by affidavit.

(*b*) In applications for the appointment of new trustees, all the *cestuis que trust* ought, as a general rule, to be *served*; *Re Richards' Trust*, 5 De G. & Sm. 636; *Re Sloper*, 18 Beav. 596; *Re Fellows's Settlement*, 2 Jur. N. S. 62; *Re Maynard's Settlement*, 16 Jur. 1084; and see *Re Lonsdale's Trust*, 14 Jur. 1101; *Re Thomas's Trust*, 15 Jur. 187; *Re Prescott's Trust*, 19 L. T. 371. But in special cases the Court relaxes the rule; *Re Smyth's Settlement*, 2 De G. & Sm. 781; *Re Blanchard*, 3 De G. F. & J. 137; *Re Blanchard's Estate*, 2 N. R. 386; [*Re Lightbody's Trusts*, 52 L. T. N.S. 40; *Re Wilson*, 31 Ch. Div. 522.] The devolution of the beneficial title may be traced by affidavit, without strict evidence by certificates and affidavits of identity; *Re Hoskins*, 4 De G. & J. 436.

Where it is proposed to appoint new trustees in *substitution* for existing trustees the petition must be served on the old trustees, *Re Sloper*, 18 Beav. 596; who will have their costs; *Futvoye* v. *Kennard*, 3 L. T. N.S. 687.

[But where a trustee is permanently resident abroad, *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223; *Re Martin Pye's Trusts*, 42 L. T. N.S. 247; or where a trustee has absconded and cannot be found, *Re Nicholson's Trusts*, W. N. 1884, p. 76; *Hyde* v. *Benbow*, W. N. 1884, p. 117; service is unnecessary.]

Where an order is asked against *recusant* trustees under the 23rd or 24th section, the trustees need not be served; *Re Baxter's Will*, 2 Sm. & G. App. v.; and see the following cases, decided under 1 Will. 4. c. 60, s. 8; *Re Third Burnt Tree Building Society*, 18 Sim. 296; *Re Bradburne*, 12 L. J. N.S. Ch. 353.

In orders against a *lunatic* trustee, the committee of the estate must be served, as the lunatic trustee may have some claim for costs or otherwise; *Re Saumarez*, 8 De G. M. & G. 390; and see *Re Wood*, 7 Jur. N. S. 323. But in other cases service on the lunatic or his committee was deemed unnecessary; *Re East*, 8 L. R. Ch. App. 735; *Re Green*, 10 L. R. Ch. App. 272. The guardian of the infant heir of a trustee need not be served with a petition for a vesting order upon the appointment of new trustees; *Re Little*, 7 L. R. Eq. 323. But the adult heir of the last surviving trustee must be served, for he may have some claim to costs; *Re Oxenham's Trusts*, W. N. 1875, p. 6. [But see 44 & 45 Vict. c. 41, s. 30.]

Where an estate is subject to an *annuity*, a vesting order may be made without service on the annuitant; *Re Winteringham's Trust*, 3 W. R. 578.

As to service on the lord of a manor, in respect of *copyholds*, see *ante*, p. 1163, note (*a*).

As to service on the *remainderman*, where the trust estate is a term of years, see *ante*, p. 1170, note (*d*).

[The Court has jurisdiction to order service of the petition upon a person out of the jurisdiction; *Re Wycherley's Trusts*, 1 L. R. Ir. 12; but see *ante*, p. 1137.]

[(*c*) The words "motion or" in this section are repealed by "The Statute Law Revision Act, 1875."]

(*motion or*) (*a*) petition to *stand over*, to enable the petitioner or petitioners to adduce evidence or further evidence before the said Court, (*or before the said Lord Chancellor*), or to enable notice or any further notice of such (*motion or*) petition to be served upon any person or persons.

Petition may be dismissed with or without costs.

XLII. And be it enacted, that upon the hearing of any such (*motion or*) (*b*) petition, whether any (*certificate or*) report from a Master shall have been obtained or not, it shall be lawful for the Court, (*or the Lord Chancellor, intrusted as aforesaid,*) *to dismiss such* (motion or) *petition, with or without costs*, or to *make an order* thereupon in conformity with the provisions of this Act.

Power to make an order in a cause.

XLIII. And be it enacted, that whensoever in any *cause or matter*, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the Masters of the Court of Chancery, the facts necessary for an order under this Act shall appear to such Court to be sufficiently proved, it shall be lawful for the said Court, either upon the *hearing of the said cause*, or of *any petition or motion* (*c*) in the said cause or matter, to make such order under this Act (*d*).

[(*a*) The words "motion or" in this section are repealed by "The Statute Law Revision Act, 1875."]

[(*b*) The words "motion or" and "certificate or" in this section are repealed by "The Statute Law Revision Act, 1875."]

[(*c*) The procedure by motion should only be adopted in the very simplest cases; *Re Capital Fire Insurance Association*, 55 L. T. N.S. 633.

Where proceedings have been instituted by originating summons (which, if not a "cause," is a "matter" within the section), a vesting order may be made on motion; *Re Jones*, 38 W. R. 203; 59 L. J. Ch. 157; 61 L. T. N.S. 554.]

(*d*) An order may be made in a *suit* without a *petition*; *Wood* v. *Beetlestone*, 1 K. & J. 213; *Collard* v. *Roe*, 4 Jur. N. S. 431; 4 De G. & J. 525; *Lechmere* v. *Clamp*, 9 W. R. 860; *Hargreaves* v. *Wright*, 1 W. R. 408; *Hughes* v. *Wells*, 2 W. R. 575; but see *Gough* v. *Bage*, 25 L. T. N.S. 738. [But where no suit was pending there was no jurisdiction to make the order on originating summons, *Re Gill*, W. N. 1885, p. 205; 53 L. T. N.S. 623; 34 W. R. 134, unless under the *general* jurisdiction of the Court, *Re Allen*, 56 L. J. Ch. 779; 56 L. T. N.S. 611. But see now Rules of Court, O. lv. r. 13a, *ante*, p. 1172.] The High Court has no such jurisdiction to make a vesting order respecting property which is vested in a *lunatic*, but there must be a petition in lunacy; *Jeffryes* v. *Drysdale*, 9 W. R. 428. [In *Frodsham* v. *Frodsham*, 15 Ch. Div. 317, it was held by the Court of Appeal, reversing the late M. R., that, having regard to the recital in 18 & 19 Vict. c. 134, s. 16, Cons. Ord. xxxv. rule 1, and the practice which had prevailed ever since, it was so doubtful whether there was jurisdiction to make a vesting order in chambers, except in cases provided for by general order, as to render it unsafe to make such orders. And see *Re Moate's Trust*, 22 Ch. D. 635. But where the matter had in the first instance been brought before the Court upon petition, it was competent to the judge who heard it to mould his order so as to direct the disposal in chambers of any of the questions arising on the petition. The making of a vesting order may thus be referred to chambers, but an order so made in chambers should state so much of the previous order as directed any inquiry preliminary to the vesting order, and as gave liberty to apply in chambers for a vesting order, and should also state the certificate which followed the inquiry; *Re Tweedy*, 28 Ch. Div. 529. Under O. 55 r. 13a, *ante*, p. 1172, the Bank of England at first declined to act on a vesting order made in chambers, and Chitty, J., on their objection, made an order in Court; *Re Griffith's*

Orders made by the Court of Chancery, founded on certain allegations, to be conclusive evidence of the matter contained in such allegations.

XLIV. And be it enacted, that whenever any order shall be made under this Act, (*either by the Lord Chancellor intrusted as aforesaid, or*) by the Court of Chancery, for the purpose of *conveying or assigning any lands*, or for the purpose of releasing or disposing of any *contingent right*, and such order shall be founded on an allegation of the *personal incapacity* of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is *out of the jurisdiction* of the Court of Chancery or *cannot be found*, or that it is *uncertain which* of several trustees, or which of several devisees of a mortgage, *was the survivor*, or whether the last trustee, or the heir or last surviving devisee of a mortgage be living or dead, or on an allegation that any trustee or mortgagee has died intestate, *without an heir*, or has died and it is *not known who is his heir or devisee*, then in any of such cases the fact that (*the Lord Chancellor intrusted as aforesaid, or*) the Court of Chancery, has made an order upon such an allegation shall be *conclusive evidence* of the matter so alleged in any Court of law or equity upon any question as to the legal validity of the order: Provided always that nothing herein contained shall prevent the Court of Chancery directing a reconveyance or re-assignment of any lands conveyed or assigned by any order under this Act, or a redisposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

Jurisdiction in respect of trustees of charities or societies.

XLV. And be it enacted, that it shall be lawful for (*the Lord Chancellor intrusted as aforesaid, or*) the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock, or *chose en action* in the trustee or trustees of any *charity or society* over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted (*a*), whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said Court under any statute authorizing the said Court to make an order to that effect in a summary way upon petition.

Settlement, W. R. 1889, p. 171; but in *Re Jones*, 38 W. R. 203; 59 L. J. Ch. 157; 61 L. T. N.S. 554; it was held that the Bank was bound to act on a vesting order made on motion in proceedings instituted by originating summons under the rule, and that such a summons though not a "cause" was a "matter" within s. 43. And it is believed that vesting orders made in chambers are now commonly acted on by the Bank.]

(*a*) See orders under this section, *Re Norton Folgate, Re Basingstoke School*, 1 Set. on Dec. 565, 4th edit. Under 16 & 17 Vict. c. 137, where the value of the property exceeds 30*l.* per annum, any person authorized by the Charity Commissioners may apply to the judge at *chambers* for any order which may be made by such a judge, notwithstanding any lunacy; *Re Davenport's Charity*, 4 De G. M. & G. 839; and see p. 968, *supra*.

No escheat or forfeiture of real or personal property held upon trust or mortgage by reason of any attainder or conviction of the trustee or mortgagee.

XLVI. And be it enacted, that *no lands, stock, or chose en action* vested in any person upon any *trust* or by way of *mortgage*, or any profits thereof, shall *escheat or be forfeited* to her Majesty, her heirs, or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the *attainder or conviction* for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place (*a*).

Act not to prevent escheat or forfeiture of beneficial interest of the trustee or mortgagee.

XLVII. And be it enacted, that nothing contained in this Act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any *beneficial interest therein* of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this Act had not passed (*b*).

Money payable to infants or lunatics in discharge of lands, stock or *choses en action* dealt with by the Court under the Act may be paid into Court.

XLVIII. And be it enacted, that where any *infant* or person of *unsound mind* shall be entitled to any *money payable in discharge of any lands, stock, or chose en action* conveyed, assigned, or transferred under the Act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the Accountant-General, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said Court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

Court may make a decree in the absence of a trustee who is merely such, and cannot be found.

XLIX. And be it enacted, that where in any suit commenced or to be commenced in the Court of Chancery it shall be made to appear to the Court by affidavit that diligent search and inquiry has been made after any person made *a defendant, who is only a trustee*, to serve him with the process of the Court, and that he *cannot be found*, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if

(*a*) This section is a re-enactment almost *verbatim* of section 3 of the Escheat and Forfeiture Act, 4 & 5 W. 4. c. 23. See now section 8 of the Extension Act, giving the Court power to appoint new trustees in the place of persons convicted of felony.

(*b*) This is a re-enactment of sect. 5 of the Escheat and Forfeiture Act. See now 33 & 34 Vict. c. 23.

such trustee had been duly served with the process of the Court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: Provided always, that no such decree shall bind, effect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time of making such decree for his own use and benefit, or otherwise than as a trustee as aforesaid (*a*).

L. (*This section was repealed by* "The Statute Law Revision Act, 1875.")

LI. And be it enacted, that (*the Lord Chancellor intrusted as aforesaid, and*) the Court of Chancery, may order the *costs and expenses* of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said (*Lord Chancellor or*) Court shall think proper (*b*). Costs may be directed to be paid out of the estate.

(*a*) In *Westhead* v. *Sale*, 6 W. R. 52, the Court directed the Records and Writ Clerk to certify that the cause was ready for hearing in the absence of a trustee who could not be found.

(*b*) The prayer as to the costs should not contain the words "incidental to or consequent" upon the application, as they give rise to uncertainty; *Re Fellows' Settlement*, 2 Jur. N. S. 62.

[Costs will not be allowed on the higher scale merely on the ground that the trust funds are large; *Re Spettigue's Trusts*, 32 W. R. 385.]

Where an *infant* trustee was ordered to convey, it was said that the infant was entitled to the same costs as an adult, and the order was made, "the other party undertaking to pay such costs as should appear to be reasonably incurred;" *Re Cant*, 10 Ves. 554 (decided under 7 Anne, c. 19).

Where a mortgaged estate has descended to an *infant* heir of the mortgagee, and the mortgagor is asking for a reconveyance on payment of principal and interest, the infant is also entitled to the costs of any inquiry as to the infancy *ultra* the ordinary costs; *Ex parte Ommaney*, 10 Sim. 298; *Miltown* v. *Trimbleston*, 1 Flan. & K. 338 (decided under 1 Will. 4. c. 60).

If the *lunatic*, against whom an order is sought, be a *trustee*, the trust estate or the *cestui que trust* must bear the costs of the proceedings under the Act, and if he be a *mortgagee*, and it appears *upon the face of the mortgage deed* that the lunatic mortgagee is a trustee for a third party, the costs will fall on the mortgagor; *Re Lewes*, 1 Mac. & G. 23. But if the mortgagor had no notice of the fact that the lunatic was a trustee, the costs will follow the general rule; *Re Townsend*, 1 Mac. & G. 686; *Re Jones*, 2 Ch. Div. 70.

What is the general rule has been much disputed. The latest phase of the law is, that where the lunatic is beneficially interested in the mortgage money, there the costs of the petition, which should be presented by the committee and need not be served on the mortgagor, are (exclusive of the costs of the mortgagor if served) by force of authority and contrary to principle to be borne by the lunatic's estate; *Re Wheeler*, 1 De G. M. & G. 436; *Re Stuart*, 4 De G. & J. 319, and cases cited Ib.; *Re Phillips*, 4 L. R. Ch. App. 629; but that in all other cases the costs must be paid by the mortgagor; *Ex parte Clay*, Shelf. Lun. 510, 2nd edit., where the mortgage money had *not* been paid; *Re Stuart*, 4 De G. & J. 317; *Re Jones*, 2 De G. F. & J. 554, where the mortgage money *had* been paid; and see *Re Viall*, 8

Court may direct a commission concerning person of unsound mind.

LII. And be it enacted, that upon any petition being presented under this Act (*to the Lord Chancellor intrusted as aforesaid,*) concerning a person of unsound mind, it shall be lawful for the (*said*) Lord Chancellor, should he so think fit, to direct that a *commission in the nature of a writ de lunatico inquirendo* shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission (*a*).

Court may direct a suit to be instituted.

LIII. And be it enacted, that upon any petition under this Act being presented (*to the Lord Chancellor intrusted as aforesaid, or*) to the Court of Chancery, it shall be lawful for (*the said Lord Chancellor, or*) the said Court of Chancery, to postpone making any order upon such petition *until the right* of the petitioner or petitioners *shall have been declared in a suit* duly instituted for that purpose (*b*).

De G. M. & G. 439; *Re Rowley's Lunacy*, 1 N. R. 251; *Re Townsend*, 2 Ph. 348, and cases there cited.

[Where a mortgagee became of unsound mind but was not so found by inquisition, and an order was made on the petition of the mortgagor authorizing him to pay the mortgage debt into the Bank of England, and vesting the estate in the petitioner, it was held that the Court had no jurisdiction to make the mortgagee or his estate bear the costs where the application was made by the mortgagor; and no costs were allowed on either side; *Re Sparks*, 6 Ch. Div. 361.]

The costs of applications for the *appointment of new trustees* come out of the *corpus* of the trust fund; *Re Fellows's Settlement*, 2 Jur. N. S. 62; *Re Fulham*, 15 Jur. 69; *Ex parte Davies*, 16 Jur. 882. And where new trustees of two funds are appointed upon the same petition the costs are borne by the two funds rateably according to their respective values; *Re Grant's Trusts*, 2 J. & H. 764.

In *Ex parte Davies*, 16 Jur. 882, the Court, though after some hesitation, declared that certain costs incurred under the Act should, with *interest* at 4 per cent., form a *charge* on the inheritance.

The Court, on appointing new trustees of real estate, has power under the section to direct the costs to be raised by a *mortgage* to be settled by the Court; *Re Crabtree*, V.C. Wood, 11 Jan. 1866 (MS.).

Where a petition is presented for vesting the legal estate of the lots sold by the Court in the purchasers, the petition may properly be presented by the purchasers, and the costs of the purchaser of each lot is payable out of the purchase-money of such lot; *Ayles* v. *Cox*, 17 Beav. 584. See *ante*, p. 1172, note (*a*).

The Court has no jurisdiction [under this section] to order a person served with the petition to pay the costs personally; *Re Primrose*, 23 Beav. 590. But see the decisions upon the Trustee Relief Act, *Re Woodburn's Will*, 1 De G. & J. 333, and subsequent cases, *ante*, p. 1138. [In *Re Sarah Knight's Will*, 26 Ch. Div. 82, Pearson, J., was of opinion that he had jurisdiction under the Rules of the Supreme Court, 1883, Order 65, r. 1, to order a respondent to pay the costs personally, but the decision was reversed on appeal on other grounds, the Court refraining from deciding the point, but Cotton, L.J., expressing a doubt as to the jurisdiction.]

[(*a*) A commission will not be directed to issue under this section, where the trustee disputes his insanity, but the inquiry in that case should be under the ordinary proceedings in lunacy. The object of the section is only to give a summary and easy remedy for the removal of the trustee where there is no contest as to the facts, but the *Court* requires information; *Re Combs*, 51 L. T. N.S. 45.]

(*b*) Thus where a father purchased in the name of his son, but without intending an advancement, the Court refused to declare the son, who was a lunatic, a trustee for his father without a suit, and directed a suit accord-

LIV. And be it enacted, that the powers and authorities given by this Act to the *Court of Chancery* in England shall extend to all *lands and personal estate* within the dominions, plantations, and colonies belonging to her Majesty (*except Scotland*) (*a*). Powers of Court of Chancery to extend to property in the colonies, but not to Scotland.

LV. And be it enacted that the powers and authorities given by this Act to the *Court of Chancery* in England shall and may be exercised in like manner and are hereby given and extended to the Court of Chancery *in Ireland* with respect to all *lands and personal estate in Ireland*. Powers given to Court of Chancery may be exercised by that Court in Ireland.

LVI. And be it enacted, that the powers and authorities given by this Act to the *Lord Chancellor* of Great Britain intrusted as aforesaid, shall extend to all *lands and personal estate* within any of the dominions, plantations, and colonies belonging to her Majesty (*except Scotland and Ireland*) (*b*). Powers of Lord Chancellor in *lunacy* to extend to the colonies, but not to Scotland or Ireland.

LVII. And be it enacted, that the powers and authorities given by this Act to the *Lord Chancellor* of Great Britain intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to the *Lord Chancellor of Ireland* intrusted as aforesaid, with respect to all lands and personal estate in Ireland. Powers in *lunacy* may be exercised by Lord Chancellor of Ireland with respect to property in Ireland.

LVIII. And be it enacted, that in citing this Act in other Acts of Parliament, and in legal instruments and in legal proceedings, it shall be sufficient to use the expression "The Trustee Act, 1850." Short title of the Act.

LIX. And be it enacted, that this Act shall come into operation on the first day of November, one thousand eight hundred and fifty. Commencement of Act.

ingly; *Collinson* v. *Collinson*, 3 De G. M. & G. 409; and see *Re Burt*, 9 Hare, 289.

(*a*) Consequently the *High Court of Justice here* may make a vesting order as to lands or personal estate in Ireland; *Re Hewitt's Estate*, 6 W. R. 537; *Re Taitt's Trusts*, W. N. 1870; p. 257; [*Re Lamotte*, 4 Ch. Div. 325; *Re Hodgson*, 11 Ch. Div. 888; *Re Steele*, W. N. 1885, p. 218; 53 L. T. N.S. 716]; or, as to lands in Canada, *Re Schofield*, 24 L. T. 322; *Re Groom*, 11 L. T. N.S. 336; [notwithstanding that the title arises under a will which has not been proved in this country; *In re Best's Settlement* (unreported: C. A. over-ruling *Kay*, J., 1888).]

(*b*) The *Lord Chancellor of Great Britain*, sitting in *lunacy*, has no jurisdiction over lands in Ireland; *Re Davies*, 3 Mac. & G. 278; [but the Judges of the Court of Appeal who have jurisdiction in Lunacy, having been by special order appointed additional Judges of the Chancery Division for the purposes of applications connected with lunacy, can under the two jurisdictions appoint new trustees and make an order vesting lands or personal estate in Ireland; *Re Lamotte*, *ubi supra*; *Re Hodgson*, *ubi supra*; *Re Bowyer Smyth*, 55 L. T. N.S. 37.]

No. IV.

TRUSTEE EXTENSION ACT, 1852.

15 & 16 Vict cap. 55.

An Act to extend the Provisions of the "Trustee Act, 1850"
(*30th June*, 1852.)

Whereas it is expedient to extend the provisions of the Trustee Act, 1850: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same.

Court of Chancery may after a decree or order for sale make an order for vesting the estate in lieu of conveyance by a party to the suit or a person bound by the decree or order.

I. That when any *decree or order* shall have been made (*a*) by any Court of equity directing the sale (*b*) of any lands for any purpose whatever (*c*), every person seised or possessed of such land, or entitled to a contingent right therein, being a *party* to the suit or proceeding in which such decree or order shall have been made, and bound thereby (*d*), or being *otherwise bound* by such decree or order, shall be

(*a*) A decree made *before* the passing of this Act is within the operation of this clause; *Wake* v. *Wake*, 17 Jur. 545. The decree or order binds only the parties to the suit, and therefore in an administration suit, if the legal estate has descended to the heir of the testator who is not a party, the Court has no jurisdiction to make a vesting order; *Gunson* v. *Simpson*, 5 L. R. Eq. 332; and see *Gough* v. *Bage*, W. N. 1871, p. 327; 25 L. T. N.S. 738.

[By 47 & 48 Vict. c. 71 (The Intestates Estates Act, 1884), s. 5, on a sale under that Act of any estate or interest of the Crown, this section is to apply as if such estate or interest were vested in a subject.]

[(*b*) This section applies to a sale under the Partition Acts; *Beckett* v. *Sutton*, 19 Ch. D. 646.]

(*c*) The 29th section of the Trustee Act, 1850, applied only to decrees directing a sale for the payment of *debts*; and consequently where the decree for sale had been made in order to provide a fund available for the payment of *costs*, the Court had no power to make a vesting order; *Weston* v. *Filer*, 5 De G. & Sm. 608. This enactment remedies the inconvenience; *Hancox* v. *Spittle*, 3 Sm. & G. 478. And now in cases falling under this section, a vesting order may be obtained in Chambers; see [Rules of the Supreme Court, Order 55, R. 2, Art. 8. The section applies to the case where the person to convey is not under disability, *per* V. C. Bacon; *Re Lee*, *Kenyon* v. *Lee*, 1 Set. on Dec. 4th edit. 537; *Beckett* v. *Sutton*, 19 Ch. D. 646; but see *Strong* v. *Padmore*, *contra*, 1 Set. on Dec. 4th edit. 537.]

[(*d*) A devisee of real estate charged with debts who had become a lunatic, and had subsequently by his committee, with the sanction of the Master in Lunacy, commenced an action for the administration of his testator's estate, is bound by an order for sale of the real estate made in the action, and is a trustee within the section; *Re Stamper*, 46 L. T. N.S. 372.]

deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case it shall be lawful for the Court of Chancery (*a*), if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for *such estate as the Court shall think fit*, either in any *purchaser* (*b*) or in such other person as the Court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate.

Power to make an order for vesting the estate, on refusal or neglect of a trustee to convey or release.

II. In every case where any person is or shall be *jointly* or *solely* seised or possessed of any *lands* or entitled to a *contingent right* therein upon any *trust*, and a *demand* shall have been made upon such trustee by a person *entitled to require a conveyance or assignment* of such lands, or a duly authorized agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said Court shall be satisfied that such trustee has wilfully refused (*c*) or neglected to convey or assign the said lands for the space of twenty-eight days after such demand (*d*), to make an order vesting such lands in such person, in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate (*e*).

(*a*) And the Court of Chancery had jurisdiction even where the party seised or possessed was of unsound mind, but not found lunatic; *Herring* v. *Clark*, 4 L. R. Ch. App. 167.

(*b*) As to the persons to present the petition where lands are sold in several lots to different purchasers, see *ante*, p. 1172, note (*a*); p. 1178, note.

As to the costs of the petition, see *ante*, p. 1178, note.

(*c*) A *married woman* is capable of refusing; *Rowley* v. *Adams*, 14 Beav. 130. [A refusal is not wilful if the title of the person requiring the conveyance is disputed and the trustee entertains a *bonâ fide* doubt as to it; *Re Mills' Trusts*, 40 Ch. Div. 14, 19, where Cotton, L.J., observed that the section was only intended to apply in clear cases, as, for instance, where a conveyance to a new trustee as to whose title there is no doubt, is asked for. Quære, whether the refusal must be by the person who is trustee at the date of the order; see *Re Mills' Trusts*, *ubi sup.*]

(*d*) In *Knight* v. *Knight*, 14 L. T. N.S. 161, a *divorced* woman obtained a vesting order against her late husband.

(*e*) Under the 17th & 18th sections of the Trustee Act, 1850, the power of the Court arose only upon *written* refusal to convey, *or* neglect or refusal so to do after tender of a proper deed. The former contingency was of rare occurrence, and considerable difficulty was often experienced in bringing the case within the terms of the latter. In copyholds, for instance, vested in a *feme covert*, who could only surrender with consent of the husband, and on being privately examined, how could a proper deed be tendered? See *Rowley* v. *Adams*, 14 Beav. 130.

Where a mortgagor covenanted to

Power to make an order for the transfer, or receipt of dividends of stock in name of an infant trustee.

III. That when any *infant* shall be *solely* entitled to any *stock* upon any *trust*, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof (*a*); and when any infant shall be entitled *jointly* with any other person or persons to any *stock* upon any *trust*, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons conjointly entitled with the infant, or in him or them together with any other person or persons the said Court may appoint (*b*).

On neglect to transfer stock or receive dividends or to sue

IV. That where *any person* shall neglect or refuse to *transfer* any *stock* or to receive the dividends or income thereof, or to *sue for* or recover any *chose en action*, or any interest in respect thereof, for the

surrender copyholds to the mortgagee, and refused to surrender for twenty-eight days, the Court made a vesting order, and service on the mortgagor, who could not be found, was dispensed with; *Re Crowe's Mortgage*, 13 L. R. Eq. 26; [and see *Re Mills' Trusts*, 37 Ch. D. 312, at p. 316.]

(*a*) An order was once made by mistake under this Act, where the infant was entitled beneficially; *Re Westwood*, 6 N. R. 61; but the order was afterwards corrected, and made under the proper Act, viz., 1 W. 4. c. 65, s. 32; *Re Westwood*, 6 N. R. 316.

Agents of executors invested a sum of stock in the names of infants, who had an interest under the will, instead of in the names of the executors, and the Court made a vesting order for the transfer into the names of the executors; *Rives* v. *Rives*, W. N. 1866, p. 144; 14 L. T. N.S. 351. So where executors had invested stock in the names of themselves and an infant, and the infant was the survivor; *Gardner* v. *Cowles*, 3 Ch. D. 304.

[Where stock had been invested in the name of an infant domiciled in Scotland, and the Court of Session had authorized advances from time to time not exceeding in the whole £100 out of capital for maintenance and education, an order was made declaring the infant a trustee, and vesting the right to transfer £100 stock, and to receive the dividends to accrue during the minority in the guardian; but the Bank objected to act upon the order so far as it declared the infant a trustee and vested the right to transfer the stock, and this part of the order was thereupon abandoned; *Re Findlay*, 32 Ch. D. 221, 641. And where a sum of consols was standing in the sole name of an infant, and the dividends were not required for her maintenance, the Court, upon a petition for appointment of trustees of the stock, suggested that an order might be made directing the Bank to accumulate the dividends. The Bank, however, refused to act on such an order, and the Court under 11 Geo. 4. c. 65, s. 3, made an order for payment of the dividends to the trustees of the will under which the infant was entitled, to be by them applied for her benefit; *Re Alice Kemp*, 36 W. R. 729; W. N. 1888, p. 138; 59 L. T. N.S. 209.]

Where stock was standing in the names of three trustees *and* (*legefor*) an infant, and two of the trustees were dead and the third was out of the jurisdiction, the Court appointed a guardian, and allowed maintenance, and vested the right to receive the dividends in the guardian during the infant's minority; *Re Morgan*, 1 Set. on Dec. 516, 4th edit.

(*b*) In *Cramer* v. *Cramer*, 5 De G. & Sm. 312, Vice-Chancellor Parker held that, the Trustee Act 1850 having conferred no general power in the case of an *infant* trustee of stock *within the jurisdiction*, the Court had no authority to make a vesting order with regard to stock held by an infant trustee *out of the jurisdiction*. Hence this clause; see *Sanders* v. *Homer*, 25 Beav. 467.

[The section applies to the case of stock to which an infant is beneficially entitled standing in the joint names of the infant and another person; *Re Harwood*, 20 Ch. D. 536; *Re Barnett*, 61 L. T. N.S. 676.]

space of *twenty-eight days* next after an *order* of the Court of Chancery for that purpose shall have been served upon him (*a*), it shall be lawful for the Court of Chancery *to make an order* (*b*) vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose en action*, or any interest in respect thereof, in such person or persons as the said Court may appoint.

for *chose en action* or interest for 28 days vesting order may be made.

V. When any *stock* shall be standing in the *sole name* of a deceased person, and his *personal representative shall refuse or neglect* to transfer such stock or receive the dividends or income thereof for the space of *twenty-eight days* next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint (*c*).

On like neglect by executor to transfer stock, or receive dividends, similar order may be made.

VI. When any order being or purporting to be under this Act, or under the Trustee Act, 1850, shall be made (*by the Lord Chancellor intrusted as aforesaid, or*) (*d*) by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly (*e*): and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order, and the *Bank of England, and all companies and associations* whatever, and all persons,

Bank of England and companies to comply with such orders.

(*a*) In *Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338, it was held that the case of a person refusing to transfer stock in obedience to an *order* of the Court, was not provided for in the Trustee Act, 1850. Hence the present remedial enactment.

(*b*) The order under this section need not be made upon a petition, but may be made upon *motion*; *Re Holbrook's Will*, 5 Jur. N. S. 1333.

(*c*) It is the practice of the Bank of England not to allow the dividend to be split into fractional parts; *Skynner* v. *Pelichet*, 9 W. R. 191.

[(*d*) By the Lunacy Act, 1890, schedule 5, sections 6 and 7 are repealed so far as relates to "the Lord Chancellor entrusted as aforesaid," except so far as the sections relate to Ireland.]

(*e*) In *Re Smyth's Settlement*, 4 De G. & Sm. 499, it was held that, under the 35th section (which differed in this respect from the 26th section) of the Trustee Act, 1850, the Court had no power to vest "the right to the stock," but only "the right to call for a transfer of the stock," and that the Bank was justified in refusing to transfer stock to new trustees under an order vesting in them "the right to the stock." Hence this enactment, which directs the Bank to obey all orders vesting the right to stock *or* the right to call for a transfer of it. [Where the trustees appointed by a testator died and new trustees were appointed in their place, and all the trust property was vested in the new trustees, the Bank declined to act unless the order directed the new trustees to transfer the stock into their own names; *Re Glanville's Trusts*, W. N. 1877, p. 248; 1878, p. 21.]

shall be equally *bound and compellable to comply* with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of *England*, or such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

Indemnity to Bank and companies so obeying.

VII. That every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850, (*by the Lord Chancellor intrusted as aforesaid, or*) by the Court of Chancery, and duly passed and entered, shall be a complete *indemnity* to the Bank of *England*, and all companies and associations whatsoever, and all persons, for any act done pursuant thereto; and it shall not be necessary for the Bank of *England*, or such company or association or person, to inquire concerning the propriety of such order, or whether (*the Lord Chancellor intrusted as aforesaid, or*) the Court of Chancery had jurisdiction to make the same.

Power to appoint new trustees in lieu of persons convicted of felony, and to vest the trust estate accordingly.

VIII. That when any person is or shall be *jointly or solely* seised or possessed of any *lands* or entitled to any *stock*, upon any *trust*, and such person has been or shall be convicted of *felony*, it shall be lawful for the Court of Chancery, upon proof of such conviction, to *appoint any person to be a trustee* in the place of such convict, and to make an *order for vesting* such lands, or the right to transfer such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability and had duly executed a conveyance or assignment of his estate and interest in the same.

Power to the Court to appoint new trustees where there is no existing trustee.

IX. That in all cases where it shall be expedient to appoint a *new* trustee, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be *any existing trustee or not* at the time of making such order (*a*).

(*a*) See note, p. 1168, *supra*, as to the doubt which led to this enactment. See an order under this section, *Davis* v. *Chanter*, 4 Jur. N. S. 272. It has been doubted whether the Court has jurisdiction to appoint trustees of personalty where none were appointed by the testator, but the Court has authority to do it by its inherent jurisdiction independently of the Act; *Dodkin* v. *Brunt*, 6 L. R. Eq. 580. [And it has since been held that the executor or heir must be deemed a constructive trustee so as to give the Court jurisdiction to appoint trustees under the Act; *Re Davis' Trusts*, 12 L. R. Eq. 214; *Re Moore*, 21 Ch. D. 778, and see *Re Smirthwaite's Trusts*, 11 L. R. Eq. 251; *Re Gillett's Trusts*, 25 W. R. 23.

The Court sitting in Lunacy and in Chancery has power under this section to appoint new trustees of the will of a deceased lunatic, where the trustees appointed by the lunatic have died in his lifetime, for the purpose of getting rid of the funds standing in Court to the credit of the lunacy; *Re Orde*, 24 Ch. Div. 271.]

Chancellor may make order for appointment of trustees, without its being necessary that it should be made in Chancery, &c. [*Repealed.*]

X. (*This section, except so far as it relates to Ireland, is repealed by the Lunacy Act*, 1890, *but is replaced by sect.* 141 *of that Act*, see *post*, p. 1191.) In every case in which the Lord Chancellor intrusted as aforesaid (*a*) has jurisdiction under this Act, or the Trustee Act, 1850, to order a vesting order, it shall be lawful for him also to *make an order appointing a new trustee or new trustees*, in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in *Chancery* as well as in *Lunacy*, or be passed and entered by the Registrar of the Court of Chancery (*b*).

As to powers of persons intrusted with the care of lunatics. [*Repealed.*]

XI. (*This section, except so far as it relates to Ireland, is repealed by the Lunacy Act*, 1890.) That all the jurisdiction conferred by this Act (*c*) on the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of Lunatics, shall and may be had, exercised, and performed by the person or persons for the time being intrusted as aforesaid.

Act to be construed as part of Trustee Act, 1850.

XII. That this Act shall be read and construed according to the definitions and interpretations contained in the second section of the Trustee Act, 1850, and the provisions of the said last-mentioned Act (except so far as the same are altered by or inconsistent with this Act) shall extend and apply to the cases provided for by this Act, in the same way as if this Act had been incorporated with and had formed part of the said Trustee Act, 1850.

All orders made under Trustee Act, 1850, or this Act, to be chargeable with the same stamp duty as deeds of conveyance.

XIII. That every *order* to be made under the Trustee Act, 1850, or this Act, which shall have the effect of a *conveyance or assignment* of any lands, or a *transfer* of any such stock as can only be transferred by stamped deed, shall be chargeable with the *like amount of stamp duty* as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands, or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty.

County Courts.

By the County Courts Act, 1888 (51 & 52 Vict. c. 43) s. 67, it is enacted that the County Courts shall have and exercise all the powers and authority of the High Court in the actions or matters hereinafter mentioned (that is to say), Under the Trustees Relief

(*a*) See Trustee Act, 1850, s. 3, and *ante*, p. 1150.

(*b*) Where four trustees had been appointed, and three died and the fourth was a lunatic, a petition for the appointment of four new trustees was held to be properly intituled under this section in Lunacy only; *Re Owen*, 4 L. R. Ch. App. 782; *Re Mason*, 10 L. R. Ch. App. 273; [and see *Re Rolls Hoare*, W. N. 1888, p. 94]; See Trustee Act, 1850, s. 32, and *ante*, p. 1165, note (*e*).

(*c*) See *Re Waugh's Trust*, 2 De G. M. & G. 279; *Re Pattinson*, 21 L. J. N.S. Ch. 280. The doubts there raised as to the jurisdiction of the Lords Justices under the Trustee Act, 1850, were removed by 15 & 16 Vict. c. 87, s. 15 (date of Royal Assent, 1 July, 1852), and therefore after the Trustee Extension Act, to which the Royal Assent was given on 30 June, 1852. See *ante*, p. 1150, note (*a*).

Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the action or matter relates shall not exceed in amount or value the sum of £500.

By section 75, subs. (2), it is enacted that "Proceedings under the Trustee Acts, 1850 & 1852, shall be taken in the Court," *i.e.* the County Court, "within the district of which the persons making the application, or any of them, reside or resides."

By the Stamp Act, 1891 (54 & 55 Vict. c. 39) sect. 62, every instrument and every decree or order of any Court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property.

[No. 5.

THE LUNACY ACT, 1890.

53 Vict. cap. 5.

Such only of the provisions of this Act are here stated as affect the operation of the Trustee Acts.

1. This Act may be cited as the Lunacy Act, 1890.

2. Save as in this Act otherwise expressly provided, this Act shall not extend to Scotland or Ireland.

3. This Act shall come into operation, save as in this Act otherwise expressly provided, on the 1st day of May, 1890.

[The Judge in Lunacy.]

108. (1) The jurisdiction of the Judge in Lunacy under this Act shall be exercised by the Lord Chancellor for the time being entrusted by the sign manual of Her Majesty with the care and commitment of the custody of the persons and estates of lunatics, acting alone or jointly with any one or more of such Judges of the Supreme Court, as may for the time being be entrusted as aforesaid, or by any one or more of such judges as aforesaid.

PART IV.

Judicial Powers over Person and Estate of Lunatics.

[Management and administration.]

117. The powers and provisions of the part of this Act relating to management and administration apply:—(a) To lunatics so found by inquisition; (b) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of this Act; (c) To every person lawfully detained as a lunatic, though not so found by inquisition; (d) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the Judge in Lunacy, that such person is through mental infirmity arising from disease or age incapable of managing his affairs; (e) To every person with regard to whom it is proved to the satisfaction of the Judge in Lunacy by the certificate of a master, or by the report

of the Commissioners, or by affidavit or otherwise, that such person is incapable of managing his affairs, and that his property does not exceed £2000 in value, or that the income thereof does not exceed £100 per annum; (F) To every person with regard to whom the judge is satisfied by affidavit or otherwise that such person is or has been a criminal lunatic, and continues to be insane and in confinement. (2) In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exerciseable by the committee of the estate under order of the judge shall be exercised by such person in such manner and with or without security as the judge may direct, and any such order may confer upon the person therein named authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the judge. (3) Every person appointed to do any such act, or exercise any such power, shall be subject to the jurisdiction and authority of the judge as if such person were the committee of the estate of a lunatic so found by inquisition. (4) The powers of this Act relating to management and administration shall be exerciseable in the discretion of the judge for the maintenance or benefit of the lunatic or of him and his family, or where it appears to be expedient in due course of management of the property of the lunatic. (5) Nothing in this Act shall subject a lunatic's property to claims of his creditors further than the same is now subject thereto by due course of law.

[Committee may exercise power vested in lunatic in character of trustee or guardian.]

128. Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs (*a*).

[Appointment of new trustees under power to have effect of appointments by High Court, and like orders may be made as under Trustee Act, 1850.]

129. Where under this Act the committee of the estate, under order of the judge, exercises, in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the judge may in any such case, where it seems to him to be for the lunatic's benefit and also

(*a*) This section is in substitution for sect. 137 of the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70).

expedient, make any order respecting the property subject to the trust which might have been made in the same case under the Trustee Act, 1850, or any Act amending the same, on the appointment thereunder of a new trustee or new trustees (*a*).

Vesting Orders. (*b*)

[Power to transfer stock of lunatic.]

133. Where any stock is standing in the name of or is vested in a lunatic beneficially entitled thereto, or is standing in the name of or vested in a committee of the estate of a lunatic so found by inquisition, in trust for the lunatic, or as part of his property, and the committee dies intestate, or himself becomes lunatic, or is out of the jurisdiction of the High Court, or it is uncertain whether the committee is living or dead, or he neglects or refuses to transfer the stock, and to receive and pay over the dividends thereof as the Judge in Lunacy directs, then the judge may order some fit person to transfer the stock to or into the name of a new committee or into court or otherwise, and also to receive and pay over the dividends thereof in such manner as the judge directs.

[Stock in name of lunatic out of the jurisdiction.]

134. Where any stock is standing in the name of or vested in a person residing out of the jurisdiction of the High Court, the Judge in Lunacy, upon proof to his satisfaction that the person has been declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof, according to the law of the place where he is residing, may order some fit person to make such transfer of the stock or any part thereof to or into the name of the person so appointed or otherwise, and also to receive and pay over the dividends thereof, as the judge thinks fit.

Power to vest lands and release contingent right of lunatic trustee or mortgagee.]

135. (1) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage the Judge in Lunacy may by order vest such land in such person or persons for such estate, and in such manner, as he directs (*c*).

(2) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the judge directs (*d*).

(3) An order under sub-sections (1) and (2) shall have the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right.

(*a*) This section is in substitution for sect. 138 of the Lunacy Regulation Act, 1853.

(*b*) As to the parties to make application under these sections, the title of summons, and service, see the Rules in Lunacy, 1890, rr. 55—57.

(*c*) Compare sect. 3 of Trustee Act, 1850, *ante*, p. 1149.

(*d*) Compare sect. 4 of Trustee Act, 1850, *ante*, p. 1151.

(4) In all cases where an order can be made under this section the judge may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under sub-sections (1) and (2) (*a*).

(5) Where an order under this section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance (*b*).

(6) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord and lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done such assurances and things (*c*).

[Power to vest right to transfer stock and sue for *chose en action*.]

136. (1) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the Judge in Lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action.

(2) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons (*d*).

(3) When any stock is standing in the name of a deceased person, whose personal representative is a lunatic, or when a chose in action is vested in a lunatic, as the personal representative of a deceased person, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action in any person or persons he may appoint (*e*).

(4) In all cases where an order can be made under this section, the judge may, if it is more convenient, appoint some proper person to make or join in making the transfer (*f*).

(*a*) Compare sect. 20 of Trustee Act, 1850, *ante*, p. 1157.
(*b*) Compare sect. 28 of Trustee Act, 1850, *ante*, p. 1163.
(*c*) Compare sect. 28 of Trustee Act, 1850, *ante*, p. 1163.
(*d*) Compare sect. 5 of Trustee Act, 1850, *ante*, p. 1151.
(*e*) Compare sect. 6 of Trustee Act, 1850, *ante*, p. 1152.
(*f*) Compare sect. 20 of Trustee Act, 1850, *ante*, p. 1157.

(5) The person or persons in whom the right to transfer or call for a transfer of any stock is vested, may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves or any other person or persons according to the order, and the Bank and all other companies and their officers and all other persons shall be bound to obey every order under this section according to its tenor (*a*).

(6) After notice in writing of an order under this section, it shall not be lawful for the Bank or any other company to transfer any stock to which the order relates, or to pay any dividends thereon except in accordance with the order (*b*).

[Person to be appointed to transfer.]

137. Where a person is appointed to make or join in making a transfer of stock, such person shall be some proper officer of the Bank, or the company or society whose stock is to be transferred (*c*).

[Charity trustees.]

138. The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or chose in action in the trustee or trustees of any charity or society over which the High Court would have jurisdiction upon suit duly instituted, whether the appointment of such trustee or trustees was made by instrument under a power, or by the High Court under its general or statutory jurisdiction (*d*).

[Declarations and directions.]

139. The Judge in Lunacy may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised (*e*).

[Order to be conclusive evidence of allegation on which it is founded.]

140. The fact that an order for conveying any land or releasing any contingent right has been founded upon an allegation of the personal incapacity of a trustee or mortgagee shall be conclusive evidence of the fact alleged in any court upon any question as to the validity of the order, but this section shall not prevent a Judge of the High Court from directing a re-conveyance of any lands or contingent right dealt with by the order, or from directing any party to any proceeding concerning such land or right to pay any costs occasioned by the order when the same appears to have been improperly obtained (*f*).

[Power to appoint new trustees.]

141. In every case in which the Judge in Lunacy has jurisdiction to order a conveyance or transfer of land or stock or to make a vesting order, he may also make an order appointing a new trustee or new trustees (*g*).

(*a*) Compare sects. 26 of Trustee Act, 1850, and 6 of Trustee Extension Act, 1852, *ante*, pp. 1162, 1183.

(*b*) Compare sect. 26 of Trustee Act, 1850, *ante*, p. 1162.

(*c*) Compare sect. 20 of Trustee Act, 1850, *ante*, p. 1157.

(*d*) Compare sect. 45 of Trustee Act, 1850, *ante*, p. 1175.

(*e*) Compare sect. 31 of Trustee Act, 1850, *ante*, p. 1165.

(*f*) Compare sect. 46 of Trustee Act, 1850, *ante*, p. 1176.

(*g*) Compare sect. 10 of Trustee Extension Act, 1852, *ante*, p. 1185.

[Costs.] 142. The Judge in Lunacy may order the costs of and incident to obtaining an order under the provisions of this Act as to vesting orders and carrying the same into effect, to be paid out of the land or personal estate or the income thereof in respect of which the order is made, or in such manner as the judge may think fit (*a*).

[Saving of power of High Court.] 143. The provisions of this Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant.

[Power to make rules.] 338. *By this section, sub-section* 2, *the Lord Chancellor is empowered to make rules in lunacy* "for carrying this or any other Act, relating to lunacy into effect, and also for regulating costs in relation thereto" (*b*).

[Definitions.] 341. In this Act, if not inconsistent with the context—

"Contingent right" as applied to lands, includes a contingent and executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent (*c*).

"Convey" and "conveyance" include the performance of all formalities required to the validity of conveyances by married women and tenants in tail under the "Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," and also surrenders and other acts which a tenant of copyhold lands can perform preparatory to or in aid of a complete assurance of such copyhold lands.

"Land" includes an undivided share of land; "Lease" includes an underlease; "Lunatic" means an idiot or person of unsound mind.

"Property" includes real and personal property, whether in possession, reversion, remainder, contingency, or expectancy, and any estate or interest therein, and any undivided share therein.

"Stock" includes any fund, annuity or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer, accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854.

(*a*) Compare sect 51 of Trustee Act, 1850, *ante*, p. 1171.

(*b*) See the Rules in Lunacy, 1890, annulling the Lunacy Orders, 1883, and the Orders of May 4, 1827; Aug. 3rd, 1876; Feb. 6th, 1889; and May 6th, 1889.

(*c*) The definitions of "contingent right," "convey," "conveyance," "stock," "transfer," "trust," and "trustee" may be compared with those contained in the Trustee Act, 1880, *ante*, pp. 1146, 1147.

"Transfer" includes assignment, payment, and other dispositions, and the execution, and performance of every assurance and act to complete a transfer.

"Trust" and "trustee, include implied and constructive trusts, and cases where the trustee has some beneficial interest, and also the duties incident to the office of personal representative of a deceased person, but not the duties incident to an estate conveyed by way of mortgage.

342. The Acts mentioned in the fifth schedule are hereby repealed to the extent set forth in the third column of the same schedule (*a*).

Provided that this repeal shall not affect any jurisdiction or practice established, confirmed, or transferred, or any salary or compensation or superannuation secured, by or under any enactment repealed by this Act.]

(*a*) The repeals, contained in schedule 5, which are material for the present purpose have already been indicated; see *ante*, pp. 1149, 1157, 1183, 1185.

[No. 6.

THE LUNACY ACT, 1891.

54 & 55 Vict. cap. 65.

[Procedure as to Chancery Lunatics.]

27. (1) Subject to rules in lunacy the jurisdiction of the Judge in Lunacy as regards administration and management may be exercised by the masters, and every order of a master in that behalf shall take effect unless annulled and varied by the Judge in Lunacy.

(2) The power to make rules under section 338, sub-section (2), of the principal Act shall extend to all applications under the principal Act and this Act, and also to applications in the Chancery Division of the High Court in cases where such applications are also made under the principal Act.

[Definition of "seised" and "possessed."

28. In the principal Act, the word "seised" shall include any vested estate for life or of a greater description, and shall extend to estates at law and in equity in possession or in futurity in any lands; and the word "possessed" shall include any vested estate less than a life estate at law or in equity in possession or in expectancy in any lands.

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